Papers on Parliament No. 52

December 2009

Harry Evans: Selected Writings

Published and printed by the Department of the Senate,
Parliament House, Canberra
ISSN 1031-976X

Published by the Department of the Senate, 2009

Papers on Parliament is edited and managed by the Research Section, Department of the Senate.

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ISSN 1031–976X

Foreword

This special edition of *Papers on Parliament* commemorates the career of Harry Evans who recently retired after 21 years as Clerk of the Senate. It contains a selection of his writings from the 1980s to the present day along with two tributes by Senator the Hon John Hogg, President of the Senate, in a statement to the Senate on 19 November 2009, and Cleaver Elliott, Clerk Assistant (Committees), on behalf of all staff, at a farewell function on 4 December 2009. Both pieces give some details of Harry's career and therefore provide context for the papers collected in this volume.

From the forensic dissection and analysis of the flaws in certain judgements of the NSW Supreme Court in the case of *R v Murphy* in 1985 and 1986 to his assessment of the impact of the Government majority in the Senate from 2005 to 2007, these pieces show Harry Evans' clarity of thought and penetrating evaluation at work. He also writes with great style and wit and draws on a vast store of knowledge. Aficionados of parliamentary traditions may find Harry's paper on 'The Traditional, the Quaint and the Useful: Pitfalls of Reforming Parliamentary Procedures' to be an uncomfortable read but they would be hard nuts indeed not to smile at his demolition of mystique for its own sake or nod in sympathy with his defence of rationality in parliamentary procedures. It is one of my favourite pieces, along with his papers on statutory secrecy provisions (and the underlying advices) and the Magna Carta. His scholarship and his deep interest in the work of the American founders are evident in the various pieces on the ideas behind our Constitution, and his international reputation as an expert in parliamentary privilege is effortlessly demonstrated in the various papers on that subject. His championship of the institution of the Senate is a thread that connects all these works.

I welcome the opportunity to make these papers available to a wider audience so that others, too, may enjoy 'vintage Evans'.

Rosemary Laing
Clerk of the Senate

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Statement to the Senate on the Retirement of Harry Evans*

Senator the Hon John Hogg, President of the Senate

The longest serving Clerk of the Senate, Harry Evans, will soon retire. Born 7 February 1946 in Lithgow, New South Wales, Harry went on to study at Sydney University, where he graduated with a Bachelor of Arts with Honours. In 1967, Harry commenced as a librarian-in-training with the Parliamentary Library on a salary of $3239 per annum. By 1969, he had come to the attention of the legendary Jim Odgers, Clerk of the Senate, who wanted to bring out a new edition of his *Australian Senate Practice*. Odgers was looking for a good researcher to work with him on the project. Harry, with his strong interest in history, applied for and got the job. It was this promotion that set up his mastery of Senate Practice—40 years of it!

He became highly regarded as secretary to the Regulations and Ordinances Committee for many years and cut his teeth on executive accountability to the parliament. Upon leaving in 1981, the committee chair, Victorian Liberal Senator Austin Lewis said of him:

> … on behalf of the Committee, I wish to pay a special tribute to our former secretary, Mr Harry Evans, who has taken up other duties within the Senate. His vast knowledge, dedication and efficiency have been of inestimable value to the Committee … Members of the Committee congratulate Mr Evans on his advancement and look forward to his further progress as an officer of the Senate.

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* Statement to the Senate, 19 November 2009.

Progress indeed continued. In the early 1980s Harry set up what is now the Procedure Office, in response to the emergence of minor parties in the Senate and their needs for procedural advice and legislative drafting support, in addition to the requirements of the opposition and government.

In 1983, the Appropriations and Staffing Committee approved a new departmental structure as a result of the growth of Senate committee work and the emergence of new functions such as procedural support for minor parties. Several positions of Clerk Assistant were created. Harry was one of the first of these new clerks assistant and was responsible for the Committee Office until he returned to the Procedure Office in 1985, before being promoted to Deputy Clerk in 1987 and Clerk of the Senate the following year.

These were incredibly productive years during which Harry was Senate adviser to the Joint Select Committee on Parliamentary Privilege; was secretary to the two select committees on the conduct of a judge; was the principal critic of the New South Wales Supreme Court decisions in the case of *R v Murphy*, which provided the immediate catalyst for the *Parliamentary Privileges Act 1987*; was principal instructor in the drafting of the Parliamentary Privileges Bill; revised and redrafted the standing orders to bring them up to date and delete archaic, unused and contradictory provisions; was secretary to the Select Committee on Legislation Procedures, which provided the blueprint for the system of referral of bills to committees which commenced in 1990; and initiated the *Procedural Information Bulletin*, which continues to provide authoritative commentary on those interesting and unusual procedures with which the Senate abounds. He also found time to be an adviser to the Joint Committee on the New Parliament House.

As Clerk, a small sample of Harry's achievements include: rewriting *Australian Senate Practice* as *Odgers' Australian Senate Practice* in 1995 and publishing five further editions; devising innovative procedures for senators, including the bills cut-off order and devising many accountability measures such as the contracts order and the codification of procedures for making public interest immunity claims; championing the independence of the Senate and the Senate's rights under sections 53 and 57 of the Constitution; being a fearless critic of lack of accountability on the part of the executive; leading by example and fostering in the Department of the Senate a culture of excellence in supporting and promoting the work of the Senate; and, importantly, arguing successfully for the abandoning of the old-fashioned wigs and gowns for the clerks. Hear, hear!

Today, it is important, I think, to recall Senator Boswell's prophetic remarks in an end-of-year valedictory in 1990, when he said:

> I would like to say a special word about the Clerks. I believe Harry Evans will be one of the great clerks in the history of the Senate.

Few would argue with that. In addition to Harry's record tenure of 21 years as Clerk of the Senate—a record that will never be equalled under the current legislation—Australians have received great value from their tax dollar: Harry's last sick day, I am told, was in July 1988!

Harry, let me say to you that yours has been a unique career and your contribution to this institution unmatched. Today, at least in a small way, this is being acknowledged.

Finally, to me, in my current role as President and for over a decade before this, I have always been taken by your unqualified dedication to this place and the depth of knowledge that accompanies the advice you provide to me and indeed to us all and to those, of course, who have preceded me in my role as President of the Senate. On behalf of all of those, I thank you.

May your deserved retirement serve you and your wife, Rhonda—I am pleased to see that Rhonda has joined us—and your family well into the future. We wish you all the best.

Farewell to Harry Evans*

Cleaver Elliott, Clerk Assistant, Committees

Colleagues, former colleagues and distinguished guests from Canberra, around Australia and from overseas, while it is wonderful to see so many of you here, it is with great sadness that I welcome you to this farewell for Harry Evans, who is retiring from his position as distinguished Clerk of the Australian Senate. I say sadness for the single reason obvious to us all, that with his retirement, the Australian Senate will be losing a man who has dominated the parliamentary accountability stage for a quarter of a century and who is recognised nationally and internationally as an outstanding champion of an independent and effective legislature.

It is a great honour to introduce the Clerk to you this morning, but an honour laced with trepidation; how many of us ever get to farewell a boss whom not one of us in this room wants to lose?

The notability of Harry's career did not commence with his appointment as Clerk. His career path to becoming one of the greatest of parliamentary officers commenced much earlier with his appointment to the department in 1969 as a research officer to the then Clerk J.R. Odgers, author of *Australian Senate Practice.* There has followed a most distinguished career, during which everything he touched turned to procedural gold. The department has flourished and senators have consistently rated their support from him and the services which have developed under his leadership, as being of the highest level. During the 70s, his career saw several periods as acting Usher of the Black Rod or Deputy Black Rod.

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* Edited transcript of a speech presented at Parliament House, 4 December 2009.

There is nothing like the baubles of Westminster to bring out Harry's precision of thought. I refer to his well-known explosion of the myths of the Westminster system, so often used to veil our eyes while our constitutional clock is stealthily and consistently wound backwards by an overreaching executive—Harry, we thank you for that. He will not allow myths to conceal reality.

A further feature of his career was to serve as secretary of the Regulations and Ordinances Committee, a position where he fine-tuned his great insight into the Stalinist tendencies of modern executive governments. One of his duties as secretary of the committee was to organise the first Conference of Commonwealth Delegated Legislation Committees which was held in Canberra in 1980. His duties included organising a social program and there are stories that he convinced an eminent member of the House of Lords delegated legislation committee that in order to enjoy a barbecue in the Aussie bush, one first had to go out and shoot dinner before it hopped away!

What has been the driving force in Harry's career? Unswervingly, everything he did was for the advancement of the institution of the Senate, the legislative arm of the Commonwealth, and for senators.

His career has been marked by a most prolific record of writing. Many know of the greatest of his achievements, the production of six editions of *Odgers' Australian Senate Practice*, including a regularly updated electronic version, (and you know what is significant about Harry's *Odgers*—not that it is a repository of our collected procedural wisdom—but his emphasis that we must make our own decisions and our own way in the world) but I want to single out for special mention two more of his spectacular written achievements.

It is not an everyday event that the Senate decides to investigate the conduct of a High Court judge. Yet when the Senate decided to investigate the conduct of the then Mr Justice Murphy, it was to Harry they turned for faultless procedural guidance. He was not content with that achievement—and this is the essence of Harry's work—from the legal and parliamentary procedural issues which emerged, he distilled the principles and formulated them into a codification of parliamentary privilege. The *Parliamentary Privileges Act 1987* now endures as a testimony of his clarity of thought, precision of writing and fair preservation and safeguard of fundamental rights.

I come to the last written achievement which must be mentioned and perhaps the one which has been of the greatest benefit in maintaining and advancing the rights of senators—his rewriting of the standing orders of the Senate as a present for this new building.

In the old building, we had 451 standing orders, many of them repetitive, superseded and while useful, often muddled in their thinking and in need of an overhaul. The procedural experts amongst us know that to rewrite a set of standing orders is a most daunting task. It is a credit to Harry that he accomplished this task in a very short space of time and reduced a mudddlesome 451 orders, to some 210, which today, 20 years later, still sparkle with clarity and simplicity. It is a wonderful thing to see that movement in the chamber, as a senator pulls open their desk drawer, reaches for their standing orders, and then stands to assert their rights or the rights of another senator. While it is a great privilege for us to assist senators with their procedures, the procedures belong to them, not to us. It is their house not ours and Harry, you have given them the greatest gift, modern standing orders for a modern building, and the capacity to manage their own affairs with the

minimum of intervention by us support staff. While his writings will fortunately grace the record for many years to come, these three written works alone conclude a procedural trifecta without parallel.

That brings me to another side of Harry, and that is his loyalty to, and compassion for, his staff. Harry has maintained a deep concern and interest in all of his staff, congratulating all our personal and professional achievements in life, and condoling with our losses. His leadership has fostered an attitude of the pursuit of excellence, a willingness to contribute, and a fair workplace where our efforts are recognised.

Whenever we brought a new project, it was met with enthusiasm and support.

During his 40 years of parliamentary service, Harry has broken many records. We can count the number of sitting days, all 2764 of them, and not a day's sick leave since 1988—who said we did not have a sick leave policy! But the greatest record of all is having served a total of 304 senators, each of whom he remembers, and he could tell you of the policies they pursued, the contributions they made, and a story about each one of them.

He has a wicked sense of humour—as you know, he tells a great joke and a story. True to his interest in history, all things parliamentary and also of the natural world around us, the jokes and stories range from fascinating snippets from the tumults of the English revolution, the principles of which still play out all around us today, to the wondrous habits of the woodpecker finch of the Galapagos.

Just the other day he was reminding us of the thoughts and writings of a Puritan parliamentarian by the name of Edmund Ludlow, one of Cromwell's dour generals, who (how can I phrase this…?) took the English army to Ireland. It put me in mind of the way Harry surveys the front bench during question time (you know, the way a magpie looks down a sauce bottle…) and I often wonder if he thinks Ludlow's thoughts on Ireland as he looks at the ministry, which I adapt to the Senate: this chamber affordeth not a piece of timber sufficient to hang these men, nor enough water in any one place to drown them, nor earth enough in any one part to bury them.

I conclude with his interest in American history and the value of their constitutional arrangements and developments. If you ever give him a moment, he will share the wisdom but also the wry sayings of American presidents. Calvin Coolidge, the 30th, is one of his interests, not because of constitutional profundities, but as a man of legendary few words. He was seated at a dinner next to a young woman who had taken up a bet to get him to talk. 'I bet you I can get more than three words out of you', she said. 'You lose' was the Coolidge reply. Lessons there for some of our modern politicians. But his love of the bush and his stories of the excellence of the minds of ravens have always been captivating.

Harry, although we try, words are not enough to mark a contribution which has been as sustained and spectacular as yours. Yours has been a unique career, one which we are all privileged to have shared and one which we are unanimous in congratulating you for.

Parliamentary Privilege: The Reasons of Mr Justice Cantor—An Analysis*

Harry Evans

One of the immunities adhering to the houses of the Australian Parliament by virtue of section 49 of the Constitution is the immunity contained in article 9 of the Bill of Rights of 1688:

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

Hitherto it has been thought that this immunity not only prevents parliamentary proceedings or words spoken in the course thereof being the subject of civil or criminal action, but also prevents those proceedings being referred to before the courts in such a way that they are questioned in a wide sense. It has been thought that what has been said in the course of parliamentary proceedings may not be commented upon, used to draw inferences or conclusions, analysed or made the basis of cross-examination or submission. The authorities for these propositions consist of a number of cases in which the meaning of article 9 has been explored, principally *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522, *R v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc,* (1983) 2 All ER 233, and *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1.

It is true that these conclusions are drawn largely from submissions made by the British Attorney-General in the first case and from *obiter dicta,* but those submissions

* This article was first published in *Legislative Studies,* Autumn 1986.

and dicta were regarded as correct and authoritative. It was thought to be quite clear that the immunity contained in article 9 would prevent the cross-examination of witnesses in court proceedings on evidence given before parliamentary committees, and this conclusion was supported in debate in the Senate by the Minister Representing the Attorney-General and the Deputy Leader of the Opposition on 16 April 1985 (Hansard, pp. 1026–30).

In proceedings in the Supreme Court of New South Wales on 3 and 4 June 1985, counsel representing the President of the Senate submitted that the court should not allow cross-examination of witnesses on the basis of evidence given before Senate committees, and that, to avoid the necessity for counsel representing the President to appear to take objection to questions or submissions, the judge should, of his own motion, enforce the restriction imposed by article 9. Mr Justice Cantor declined to perform this task, and on Wednesday 5 June gave his reasons.

Mr Justice Cantor does not accept that article 9 has the effect expounded above. He holds that witnesses may be questioned as to what they said before a Senate committee, as this does not necessarily amount to a breach of article 9. In reaching this conclusion he has determined that for there to be a breach of article 9 there is 'a need for there to be some adverse effect flowing from the cross-examination', and that the adverse effect must be 'upon the freedom of speech or upon debates in Parliament or upon proceedings in Parliament'. The judge has therefore set up a new test of whether reference to parliamentary proceedings is in breach of article 9, the test being whether there is an adverse effect upon freedom of speech or debates or proceedings.

The judge added that 'I am of the view that the revelation in a Court of Law of what was said in a House of Parliament does not necessarily impeach or question what was said in Parliament'. This is not a new conclusion: it has never been the situation that the mere 'revelation' of proceedings in Parliament is in breach of article 9. The cases make clear that evidence of parliamentary proceedings may be admitted to establish facts material to a case, such as the fact that a certain statement was made at a certain time. This reference to 'revelation' of proceedings suggests that the judge thought the interpretation of article 9 advanced by counsel for the President to be far more restrictive then in truth it is, a suggestion supported by other matters discussed below.

In order to maintain his conclusion the judge has dismissed much of what was said in previous cases as *obiter*, and has gone back to the wording of article 9 to seek its true meaning. In support of his test of adverse consequences he refers to the synonyms and connotations of the word 'impeach'. Unfortunately he has not given the same attention to the verb 'question', the dictionary meanings of which include 'ask questions of, interrogate, subject to examination' (OED). In order to reconcile his test with the cases he indicates a belief that in the cases where evidence of proceedings in Parliament was held not to be admissible there was likely to be an adverse effect upon freedom of speech or debates or proceedings. It is unfortunate that he has not attempted this reconciliation in greater detail, since it is by no means clear that, in cases such as *Scientology* and *Anderson Strathclyde*, the element of adverse effect which he requires was in fact present. An exposition of the adverse effect likely in those cases would have clarified greatly his concept of adverse effect. He also refers to 'an adverse effect upon the institutions (sic) of Parliament' which, as a restatement of the tests, seems to widen it.

In establishing his new test, the judge obviously felt the need to overcome a number of difficulties. One is a difficulty which he detects in the 'widest possible construction' which he says was urged by counsel for the President, that is that it would embrace 'any critical comment of discussion outside Parliament of what took place in Parliament', such as occurs in the press. Since such critical comment and discussion constantly occurs, he regards this as a fatal weakness of the wide interpretation. This question of a possible application of article 9 to public comment was raised by the judge during submissions, and in response counsel for the President suggested that the proper view was that article 9 had no application to public discussion, that the expression 'place out of Parliament' probably referred to other tribunals or bodies of the state, and that in any case since the article referred explicitly to courts the possible wider application was not a matter which should trouble the judge. Thus it was not submitted that the wide interpretation of article 9 was a potential prohibition on public discussion; this is a conclusion which the judge has drawn in spite of submissions to the contrary.

Another major difficulty, which the judge refers to at some length, is the difficulty of the judge intervening in the proceedings to prevent questions or submissions contrary to article 9. This difficulty, however, is not removed or avoided because, as the final paragraph of the judge's reasons make clear, there is still under this test the possibility of questions or submissions in breach of article 9, and it would be necessary for the judge to intervene to prevent them. Indeed, as he seems to concede, his test is likely to make a task of a judge in determining when to prevent questions or submissions more difficult. In response to this residual difficulty, he seems to contemplate that it is necessary for him to undertake a balancing role, and to determine 'whether the harm likely to be done to the administration of criminal justice in this trial would far outweigh any harm which might be done to the institutions (sic) of the Senate'. This reference to a requirement to balance conflicting interests would seem to indicate that, according to the judge's new interpretation of article 9, examination of parliamentary proceedings might be admitted even if it is in clear breach of article 9 where the interests of the court proceedings so require. The article is thus reduced from an important constitutional prohibition to a subordinate principle which may be overridden.

This balancing seems to be the method by which the judge overcomes the other remaining difficulty, that of fairness to the accused in criminal proceedings. It is clear that if cross-examination of witnesses on their previous evidence and submissions relating thereto are to be restricted, there is always some possibility of unfairness to an accused. Since the test proposed by the judge might lessen but would not remove this possibility, in that some questioning or submissions could still be objectionable, the judge seems to imply that by the process of balancing article 9 may be put aside entirely in criminal proceedings.

In deciding to allow cross-examination of witnesses on their parliamentary evidence, of necessity the judge concludes that there is no inherent adverse effect in such a process. In submissions put by counsel representing the President such inherent adverse effects were postulated. The judge has referred to only one of these, namely the possible discouragement given to future witnesses in parliamentary proceedings. This he dismisses as 'somewhat strained and artificial'. He has not, however, referred

to the other inherent adverse effect *on the witness*, namely that an attack upon the credit or credibility of a witness by the use of his previous evidence and a comparison of past and present evidence to form a basis of a submission as to inconsistency or unreliability necessarily involves inflicting upon a witness a process which may well be damaging to the witness, and which would not have been inflicted had the witness not given evidence in the parliamentary proceedings. In other words, a witness may well be made to suffer, however slightly, for giving evidence to the Parliament, and this is precisely what article 9 is designed to prevent.

Apart from seemingly repudiating the very rationale of the immunity, the judge's new test is highly unsatisfactory. It is vague. What is meant by an adverse effect, and how is it to be recognised? It would seem to involve a court in some assessment of the impact of the giving of particular evidence upon parliamentary proceedings, an assessment which a court is ill-equipped to make. The references by the judge to the 'revelation' of matters occurring in parliamentary proceedings and to the balancing process merely add greater vagueness. It would have been safer for the judge to follow the conventional view of the effect of article 9, whatever decision he made as to the particular proceedings before him.

The course of the proceedings in the court subsequent to the judge's ruling give some indication of how the concepts contained in the ruling are to operate in practice. Witnesses were cross-examined not only on evidence which had been given before Senate committees in public session or had been published by the committees, but on evidence which had been given in camera, which had not been published by the committee concerned or by the Senate, and the publication of which without the authorisation of the Senate is forbidden by a standing order of the Senate. Normally such unauthorised publication of in camera evidence would be treated as a contempt of the Senate. Presumably, the judge regarded the use of this in camera evidence in the court proceedings as either not having an adverse effect on parliamentary proceedings or as having an adverse effect which was outweighed by the requirements of the court proceedings.

Similarly, evidence given by a witness before the committees was compared with his evidence before the court, he was questioned as to the truth of his evidence before the committees and as to whether he regarded his appearance before a committee as a serious occasion. The witness was also asked whether he was placed under pressure by a committee. Presumably the judge regarded none of these inquiries as amounting to impeaching or questioning parliamentary proceedings according to his test of adverse effect, or at least regarded any adverse effect as being outweighed by the interest in the court proceedings.

The judge also allowed the accused to be cross-examined on a statement which the accused made to one of the Senate committees. It would have been thought that the use of parliamentary evidence given by the accused against him at his trial would be the clearest possible breach of article 9, and the defence made a submission to that effect. Even this, however, does not offend according to the judge's test of adverse effect.

The judge's reasons refer only to the examination of evidence given in a parliamentary committee by a witness. There is nothing to indicate, however, that they

are intended to be confined to witnesses, and in terms they apply with equal force to members of Parliament. Thus if this reasoning is followed members may well find themselves being cross-examined in court proceedings on their speeches in Parliament, hitherto an unthinkable occurrence. In the process, proposed by the judge, of balancing the conflicting interests, members, and their houses, may be made to suffer 'adverse effects' because of their parliamentary speeches if the interests of court proceedings so require. Whether the Parliament will tolerate such a degree of judicial intrusion into its proceedings remain to be seen.

Parliamentary Privilege: Reasons of Mr Justice Hunt—An Analysis*

Harry Evans

On 17 March 1986 in proceedings in the Supreme Court of New South Wales before the commencement of the second trial of Mr Justice Murphy, counsel instructed by the President of the Senate submitted that in the course of the trial the court should not allow witnesses or the accused to be cross-examined on statements which they made to Senate committees. This submission was based upon an assertion that the judgement of Mr Justice Cantor on 5 June 1985 to the contrary was in error.[1]

After hearing this submission Mr Justice Hunt gave a judgement on 8 April 1986 rejecting the submission and the principal judgements on which it was based, and providing a new interpretation of article 9 of the Bill of Rights in its application to the houses of the Australian Parliament under s.49 of the Constitution. This judgement concludes that article 9, notwithstanding its broad language, 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament', has the limited effect of preventing what has been said and done in the course of parliamentary proceedings from being the actual subject of criminal or civil actions. It does not, in the judge's view, prevent proceedings in Parliament being used as evidence of an offence

* This article was first published in *Legislative Studies*, Autumn 1987.

1 *R v Murphy: Submissions of Amicus Curiae instructed by the President of the Senate*. See also H. Evans, 'Parliamentary privilege: reasons of Mr Justice Cantor—an analysis', *Legislative Studies*, Autumn 1986, pp. 24–6.

committed elsewhere, to support a cause of action or to establish motive or intention. It follows from this reading down of article 9 that witnesses and an accused in court proceedings may be cross-examined on statements which they made to parliamentary committees and those statements may be used to impeach their credit and to invite a court or jury to draw inferences or conclusions.

There are three notable features of this judgement: it does not follow the reasoning of Mr Justice Cantor, but provides an entirely different line of reasoning; unlike Mr Justice Cantor's judgement it expressly repudiates the judgements on which the Senate's submission relied; but it supports the use which was actually made of the Senate committee evidence before Mr Justice Cantor.

The reasons of Cantor J rested upon the proposition of a new test of breach of article 9: the test of adverse effect upon parliamentary proceedings. Cantor J's reasons also referred to the need to 'balance' the prohibition contained in article 9 against the requirements of court proceedings. These matters are nowhere to be found in the judgement of Hunt J. By implication that judgement repudiates them, and substitutes a different test of breach of article 9.

Cantor J's reasons made some attempt to reconcile the test which they proposed and the conclusion which they supported with the cases upon which the Senate submission mainly relied. Hunt J's judgement expressly repudiates the judgements in those cases (*Church of Scientology of California v Johnson-Smith* (1972) 1QB 522, *R v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc*, (1983) 2 All ER 233, *R v Wainscot* (1899) 1 WALR 77, *Comalco Ltd. v Australian Broadcasting Corporation* (1983) 50 ACTR 1). It was clear that what happened in the first trial could not be reconciled with those cases.

Apart from indicating that witnesses could be cross-examined on their parliamentary evidence, Cantor J's judgement gave little guide as to what it would allow or disallow. That became apparent only in the course of the first trial. Witnesses and the accused were extensively and intensively examined on their statements to the committees, the truth of those statements was questioned, and on the basis of that questioning the statements were used to attack them in addresses to the jury.[2] The judgement of Hunt J would allow this use of the committee evidence. The judgement therefore operates to validate, as it were, the use which was made of the Senate committee evidence in the first trial, without adopting the reasons underlying the judgement in the first trial.

Hunt J has not adverted to a distinction which was clearly drawn in the President's submissions (at p. 5) between evidence as to parliamentary proceedings being given for a legitimate purpose which does not violate article 9 as hitherto interpreted and such evidence being given for a purpose contrary to article 9. The President's submissions stressed that evidence of proceedings in Parliament may be used to prove material facts, such as the fact that a particular statement was made at a particular time. Such facts may be relevant in court proceedings in many ways; the example given in the submissions was the examination of parliamentary debates in order to establish whether a press report the subject of a defamation action was a fair and accurate report of the debates. In his reasons Hunt J implies that this use of evidence

[2] See references to the transcripts of the trial in the above submissions.

of parliamentary proceedings would not be permitted by the previously established interpretation of article 9. He states (judgement, p. 11) that it was submitted to him in the President's submissions that even to ask a witness whether he has made a particular statement to a parliamentary committee would be to impeach or to question that statement and would be in breach of article 9.

The President's submissions were quite to the contrary; the admission of evidence of parliamentary proceedings to establish a material fact might well involve just such a question as the judge postulates. Such a question in itself would not offend against article 9 in the interpretation put by the President. In order to determine whether the admission of particular evidence of parliamentary proceedings is in breach of article 9 it is necessary to have regard to the purpose for which the evidence is being given. Inherent in the President's submission is the presumption that the cross-examination of witnesses as to their parliamentary evidence would be for the purpose of attacking the credit of those witnesses, and this is obviously so in the context of the trial. If it were relevant for the purposes of the trial to establish simply the fact that witnesses or the accused had given evidence before a Senate committee and the witnesses and the accused were questioned to establish this fact, this would not be contrary to article 9.

The judge has therefore not accurately represented the interpretation of article 9 which was put to him. His first two rulings, to the effect that a witness in the trial may be asked whether he made a particular statement to a Senate committee and that the fact that a witness made such a statement may be proved, are not inconsistent with the hitherto established interpretation of article 9. By purporting to overthrow an interpretation which was not in fact put before him, Hunt J's judgement does a disservice to the proper understanding of the issues involved in the interpretation of article 9.

Another distinction which was carefully drawn in the President's submissions and which was not adverted to by Hunt J is the distinction between the principle regulating the use of evidence of parliamentary proceedings contained in article 9 on the one hand, and on the other the question of whether evidence of parliamentary proceedings may be admitted at all without the permission of the house concerned. At pages 11, 12 and 16 of his judgement, Hunt J refers at some length to the fact that it was previously thought to be a rule that no evidence as to parliamentary proceedings could be given without the consent of the house concerned, and this rule was repudiated by the courts and by him in one of his earlier judgements. That there is any such rule was not submitted in the President's submission, and it was pointed out that this question related to the production of evidence rather than the use to which it may be put.

The question of whether evidence of parliamentary proceedings may be admitted in court without the approval of the house concerned has nothing to do with the proper interpretation of the restriction contained in article 9. The President's submissions refer to the practice of the British and Australian houses of granting permission for evidence of their proceedings to be given in court, and in reality it was no more than that: a practice which was no doubt designed to support article 9 but which was not part of the principle contained in article 9. This was made clear in the report of the Select Committee of the British House of Commons which recommended that the

practice be abolished.[3] That recommendation was based on the care taken by the courts to see that evidence of parliamentary proceedings is not admitted contrary to article 9.

In his discussion of the matter, however, Hunt J implies a belief that the so-called rule that evidence of parliamentary proceedings could not be given without the consent of the house concerned is an inherent part of the previously established interpretation of article 9. If he did not have such a belief it is not clear why he should have spend so many words in his judgement discussing this matter when it was not submitted to him. The judge seems to think that, once the courts had determined that the permission of the house concerned was not necessary to admit evidence as to its proceedings, the previously established interpretation of article 9 was undermined. He appears to believe that his judgement is a continuation of that inroad upon the conventional interpretation of article 9. He goes so far as to suggest (p. 26 of his judgement) that the finding of the court in the *Scientology* case in part depended upon this so-called rule as to the requirement for the consent of the house. A careful reading of the judgement in that case and of the submissions made by the Attorney-General indicates that the judgement did not depend upon the so-called rule as to the consent of the house, and clearly recognised the distinction drawn here.[4] That is why the judgement was followed by the court in the *Anderson Strathclyde* case, which occurred after the House of Commons had abandoned the practice of giving permission for evidence of its proceedings to be admitted, a fact which is recorded by Hunt J at page 32 of his judgement but which is not given its proper significance.

In failing to distinguish between the practice of the houses and the principle contained in article 9, Hunt J's judgement has further clouded the issue involved in the interpretation of article 9.

At pages 17 to 19 of his judgement Hunt J gives great weight to a matter which also impressed Cantor J: the possibility that the interpretation of article 9 submitted by the President might have some application to criticism of parliamentary proceedings in the media and elsewhere other than in court. Both judges reasoned as follows: the conventional interpretation of article 9 would prevent critical comment on parliamentary proceedings in the media and in public discussion, since article 9 uses the expression 'any court or place out of Parliament'. The fact that such critical pubic discussion of parliamentary proceedings constantly occurs with impunity indicates a fatal flaw in the accepted interpretation of article 9, which, if applied to court proceedings, would have the effect of disallowing in court what constantly occurs in other places. This reasoning fundamentally confuses the nature of article 9, the nature of parliamentary privilege and the powers of Parliament.

The Bill of Rights was concerned to prevent abuses which had occurred in the organs of the State, abuses perpetrated by the Crown and in the royal courts. Article 9 is concerned with restraining the organs of the State, the bodies which exercise real power, and so it refers explicitly to the courts. The phrase 'or place out of Parliament' cannot be taken to refer to discussions in hotels as Hunt J suggests, but should be read

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3 First Report of the Committee of Privileges, Session 1978–79: Reference to Official Report of Debates in Court Proceedings, H.C. 102, 1978–79.

4 See the remarks of the Attorney-General at p. 525C and 527G, and of Browne J. at p. 531C and F.

as meaning 'other authorities of the State'. Because both judges attached such great significance to the expression, it was suggested in the President's submission that it may have been intended to refer to bodies of the type of the Court of Star Chamber. Hunt J dismisses this suggestion by pointing out that that body was abolished in 1641, but that is no reason to suppose that the Parliament of 1688 did not wish to guard against the activities of such royal extra-judicial bodies, and in fact the Bill of Rights refers to another such State organ, the Court of Commissioners for Ecclesiastical Causes, the use of which by James II was one of the grievances of the Parliament in 1688. The contention that the phrase 'or place out of Parliament' refers to the Crown and its agencies is supported by a modern historian who has published an exhaustive and scholarly study of the Bill of Rights.[5] It is to be noted in passing that, while the phrase 'or place out of Parliament' is important in Hunt J's attack on the conventional interpretation of article 9 in this thesis about criticism in the media, his interpretation of article 9 would render the phrase meaningless.

If the Parliament of 1688 had wished to prevent criticism of parliamentary proceedings in public discussion, it would have done so by means of a criminal statute attaching penalties to such criticism. This was not its purpose in the Bill of Rights, which was concerned with the conduct of government. In fact, subsequent to 1688 the British Parliament *did* attempt to stifle criticism of its proceedings in the press by use of its power to punish contempts or 'breaches of privilege'. That it did not do so by any attempted enforcement of article 9 through the courts illustrates the second confusion underlying Hunt J's thesis.

This confusion arises from the ambiguity of the term 'breach of privilege'. This term is used in two different senses: it refers to breaches of the privileges or immunities of Parliament established by law, such as the immunity contained in article 9, and it also refers to acts which are regarded by the houses as contempts and which may be visited with punishment, acts such as refusing to give evidence or tampering with witnesses.[6] A 'breach of privilege' in the first sense occurs when a body of the State, such as the courts, ignores or violates an established immunity of the houses. The remedy for such a breach of privilege lies in the proper application of the law. Parliament previously regarded public criticism of its proceedings as a 'breach of privilege' in the second sense, that is, as a contempt which would be visited with punishment. The history of the attempts by Parliament, principally in the 18th century, to publish its critics and the abandonment of those attempts is well known. Hunt J's thesis essentially rests on the proposition that what is not a breach of privilege in public discussion cannot be a breach of privilege in the courts. The fact that Parliament no longer treats public criticism of its proceedings as a contempt, however, has nothing to do with the immunity contained in article 9 and its proper interpretation. This confusion between the powers of the houses to punish contempts and their statutory immunities has bedevilled much of the discussion of parliamentary privilege,[7] and it is not surprising that it should occur here to obscure the interpretation of article 9.

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5 L.G. Schwoerer, *The Declaration of Rights 1689*. Baltimore, John Hopkins University Press, 1981, p. 84.

6 This historical confusion is discussed in the Report of the Select Committee on Parliamentary Privilege, H.C. 34, 1967, pp. 89–90.

7 ibid.

At pages 20 to 22 of his reasons Hunt J refers to some of the historical background of article 9 in order to establish that the mischief which it was intended to remedy was simply the prosecution of members of Parliament because of their parliamentary activities. The judge quotes the preamble to the Bill of Rights, which refers to 'prosecutions … for matters and causes cognizable only in Parliament', and he recites four notorious cases before 1688 of proceedings taken against members of Parliament for their conduct in Parliament. He thereby concludes that article 9 was intended only to prevent such prosecutions and proceedings.

The first point which must be made about this is that it remains to be explained why the Parliament of 1688 adopted the broad phrases 'freedom of speech and debates or proceedings' and 'impeached or questions' if all it intended was to prevent these sorts of prosecutions. As will be seen from the discussion below, that general language had precedents and a background to it.

The second point to be made is that the judge's account of the history of article 9 is a very incomplete account. A more comprehensive examination of the history of freedom of speech in the British Parliament and of the Bill of Rights explains the phraseology of article 9 and does not support the judge's narrow interpretation of it.

It is quite true that the British Parliament, and the House of Commons in particular, had to insist upon the immunity of its members from punishment because of their parliamentary activity, but this immunity was in issue as early as the 14th century and first appeared in the statutory law in 1512.[8] In that year the Act in Strode's case voided the penalties inflicted upon Strode and others, and went on to declare that members should not be 'vexed or troubled' for their parliamentary activities.[9] By the 17th century a much more militant House of Commons was going much further than claiming the mere immunity of its members from prosecution. It was asserting, as in the case of Sir John Eliot and others, the complete immunity of its own proceedings from any examination by any other body, including the House of Lords and the Crown, its own exclusive jurisdiction over its own proceedings and freedom from any form of interference in its members' parliamentary activities.[10] The protestation of the House of Commons of 1621 claimed 'that every member of the said House hath like freedom from all impeachment, imprisonment and molestation (other than by censure of the House itself)'.[11] The Treason and Treasonable Practices Act of 1661 referred to Parliament's 'just ancient freedom and privilege of debating any matters of business' and the right of the houses to 'the same freedom of speech' as they had long enjoyed.[12]

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8 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 20th edn, ed. C. Gordon, London, Butterworths, 1983, pp. 78–9.

9 G.B. Adams and H.M. Stephens (eds), *Select Documents of English Constitutional History*. New York, Macmillan, 1901, p. 224.

10 Erskine May, *op. cit.*, p. 80.

11 G.W. Prothero (ed.), *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*. 2nd edn, Oxford, Clarendon Press, 1898, p. 314.

12 D. Pickering (ed.), *The Statutes at Large From the 12th Year of King Charles II to the Last Year of King James II Inclusive*. 1763, vol. 8, pp. 4–5.

The part of the preamble to the Bill of Rights referring to prosecutions quoted by Hunt J itself contains an assertion that the courts should not have even examined the matters brought before them. Moreover, as has been pointed out by a modern scholar of the Bill of Rights,[13] James II, whose sins are recounted in the preamble, had not initiated any prosecutions against members. The reference to prosecutions was originally inserted in a draft document drawn up by the Commons to support an intended attack on the use of informations to initiate all kinds of prosecutions, an attack which was dropped in the amendment of the draft,[14] leaving the paragraph in the preamble as something of an anomaly in the context of the whole bill. The oft-quoted statement by Sir George Treby, a member of the Commons, that a provision was inserted 'for the sake of … Sir William Williams, who was punished out of Parliament for what he had done in Parliament' referred not to article 9, as is supposed, but to the paragraph in the Commons document before it was amended, referring to prosecutions by informations. When it was suggested that the clause should be amended to refer only to informations laid for 'what is done in Parliament', Treby protested: 'This will be declaring that Magna Charta is Magna Charta, redressing what was never violated'.[15] In other words, the immunity from prosecution for things said and done in the course of parliamentary proceedings was already beyond question and it was an absurdity to declare merely that again. Notwithstanding Treby's protest, the clause was amended to refer to prosecutions for causes cognisable only in Parliament. This history makes it clear that the paragraph in the preamble is not a good aid in interpreting article 9.

The conclusion that the framers of the bill were seeking merely to deal with the specific cases of prosecutions of members in the past, the most important of which, the judgement against Sir John Eliot and others, had already been reversed, is therefore not justified. They were asserting a principle of wider application.

The contemporary debates are replete with statements by members of Parliament and others which indicate that freedom of speech in 1688 was a part of the freedom of proceedings from all improper interferences. Thus Sir Edward Seymour, a former Speaker, warned the House of Commons against exposing itself to undue outside pressure on the issue of the disposal of the Crown: 'If your debates are not free, there is an end of all your proceedings … What comes from you is the result of reason, and no other cause. As your debates must be free, so must your resolutions upon them …'[16]

Contemporary and near-contemporary commentary supports the contention that article 9 was regarded as meaning much more than mere immunity from prosecution. Blackstone stated that 'whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere'.[17] The judge in the *Scientology* case quoted these words with approval,

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13 Schwoerer, *op. cit*., p. 81.

14 A. Grey, *Debates of the House of Commons from the Year 1667 to the Year 1694*, vol. 9, London, 1763, pp. 42–4, 81–2; Schwoerer, *op. cit*., pp. 84–6.

15 Grey, *op. cit*., pp. 81–2; Schwoerer, *op. cit*., p. 86.

16 Grey, *op. cit*., p. 45.

17 *Commentaries on the Laws of England*. 1st edn, Oxford, Clarendon Press, 1765, pp. 58–9.

attached due weight to the broad language of article 9, and made it clear that he was relying upon a long-established and traditional interpretation of article 9.[18]

The suggestion that the victorious revolutionary Parliament of 1688, having vanquished the Stuart monarchy and asserted its supremacy in the State, would have countenanced the use of its proceedings in any way against its members in the courts is therefore difficult to accept.

It should be noted in passing that in relation to the provision in the Constitution of the United States which is the equivalent of article 9, and which provides that 'The Senators and Representatives … for any Speech or Debate in either House … shall not be questioned in any other place' (article 1, section 6), it has been held that the provision prevents any inquiry into anything said or done in the course of Congressional proceedings and into the motivation for such acts, and prevents the admission in a prosecution of any evidence relating to any legislative act of a member of Congress.[19]

In order to support his conclusion that article 9 does not prevent proceedings in Parliament being 'used against' participants in those proceedings in the broadest sense, Hunt J resorts to the Aristotelian philosophy of causation (judgement, pages 30 to 31, 37 to 38). The essence of this argument is that the use of parliamentary proceedings as evidence of an offence or to establish a civil liability does not mean that the participant in those proceedings who is punished or held to be civilly liable is suffering because of the parliamentary proceedings; the latter are not the 'real cause' of that person's adversity. A member of Parliament or a parliamentary witness may not have been convicted or held civilly liable but for their participation in parliamentary proceedings, but this is of no consequence so long as the parliamentary proceedings are not the actual subject of the criminal charge or the civil suit.

Such a conclusion reduces article 9 almost to a merely procedural guarantee. A member or a witness may be attacked in a criminal or civil action which could not be maintained for a moment, far less succeed, in the absence of an attack upon their participation in parliamentary proceedings, so long as there is something outside those proceedings which can be made the formal cause of the action. Under Hunt J's judgement this could be so even where an essential element of the offence or the civil liability itself is established only through evidence of the parliamentary proceedings. The malice necessary for a successful suit for defamation may be established by reference to those proceedings (this is explicitly referred to at page 37 of the judgement), and presumably *mens rea* in respect of an act done outside the Parliament may be established by a reference to what has occurred within it.

Given the ingenuity of counsel in putting actions together this could easily lead to a great number of attacks in the courts upon members, attacks motivated by their activities in Parliament. The possibility of such actions against members is well illustrated by two recent cases in Britain in which actions against members were based on their extra-parliamentary activities but appeared to have regard to their

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18 At p. 530 B.

19 *U.S. v Johnson* (1966) 383 US 169; *U.S. v Brewster* (1972) 408 US 501; *U.S. v Helstoski* (1979) 442 US 477.

participation in parliamentary proceedings.[20] In the second of these cases the Privileges Committee observed that a threat by solicitors to use a member's speech in the House against him in an action for words spoken outside Parliament could not be carried out. Under Hunt J's judgement the threat would be a real one. The distinction which the judgement would draw between participation in parliamentary proceedings being the actual cause of an action and being the foundation, perhaps the essential foundation, of the action, is a distinction without substance.

Witnesses before parliamentary committees, according to Hunt J, are more likely to tell the truth if they know that they may be questioned in court and their credibility and reputation attacked on the basis of their evidence (p. 33 of the judgement). Presumably he considers that members of Parliament are likely to speak more carefully if they know that they may be assailed in the courts for their speeches. Such a conclusion flies in the face of experience. A person who has the choice between telling a lie or remaining silent on the one hand, and on the other telling a truth which may show him in an unfavourable light or subsequently be used to his detriment, will almost always choose the first course. Some encouragement is necessary to make a person tell the awkward or dangerous truth. In parliamentary and other forms of inquiry this encouragement takes the form of an indemnity against future punishment or liability in consequence of evidence given; hitherto the indemnity offered to parliamentary witnesses has been thought to be absolute. It is a common experience in the conduct of parliamentary inquiries, and a matter of importance to those who have had much to do with them,[21] that a reluctance on the part of witnesses to give evidence and to tell all they know is frequently overcome by an assurance of the absolute protection contained in the Bill of Rights, and the assurance of the protection contained in the standing orders and the resolutions of the houses (an assurance which the judges in the *Wainscot* case felt bound to uphold). The judgement of Hunt J does not address the question of witnesses giving evidence in camera with the expectation that it will not be produced elsewhere.

The effect of Hunt J's interpretation of article 9 would be to encourage witnesses to take the easy course of not giving evidence or telling only the convenient parts of the truth, and also to cause members of Parliament to hesitate before they speak out against abuses in public and private affairs.

At page 31 of his judgement Hunt J suggests that his conclusion might be otherwise where a witness is under compulsion and without the usual privilege against self-incrimination. This does not accord with the way in which parliamentary committees work and the basis on which they conduct their inquiries. Most witnesses who give evidence before parliamentary committees do so on invitation.[22] Very few are summoned, but very many witnesses give evidence on invitation knowing that they may be compelled if they hesitate. It is somewhat unrealistic to say that a witness who gives evidence before a parliamentary committee without being summoned has done so voluntarily. This was very forcefully put by one of the judges in the *Wainscot*

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20 Reports of the Committee of Privileges, H.C. 246, 1974, H.C. 233, 1981–82.

21 See, e.g. Senator P.E. Rae, *The Rights of the Individual Appearing Before Senate Select Committees*. Law Society of W.A. Summer School, 1972, pp. 35–7.

22 J.R. Odgers, *Australian Senate Practice*. 5th edn, Canberra, AGPS, 1976, pp. 499–500.

case.[23] As for the privilege against self-incrimination, it is not and never has been acknowledged by parliamentary inquiries: a witness before a parliamentary committee may be excused from answering a question in a self-incriminating way, but it is not a right of the witness.[24] Moreover, a parliamentary witness is liable to punishment under the powers to deal with contempts of the House concerned for giving any false evidence or for refusing to answer a question.[25] Every witness before a parliamentary committee must therefore be regarded as under compulsion.

Hunt J refers to the 'primary function' of the courts of ascertaining the truth, and implies that nothing must be allowed to impede this function (p. 28 of the judgement). In fact, the law erects a number of barriers to the ability of the courts to pursue the truth without impediment: the law of legal professional privilege, the law of what used to be called crown privilege, now called public interest immunity, and the very laws of evidence themselves, which impose rules, such as the hearsay rule, which are often ignored in royal commissions and other forms of inquiry because they impede the diligent pursuit of the truth. These barriers are erected because it is considered there are considerations of public policy behind them which must lead to the modification of the otherwise wide power of the courts to obtain evidence.

Behind the prohibition contained in article 9 of the Bill of Rights, as it has hitherto been interpreted, is also a great consideration of policy: the necessity for the Parliament as the legislature and 'grand inquest of the nation' to be able to discuss and to conduct inquiries utterly without fear of the consequences for members of Parliament or for witnesses.[26] Hunt J's judgement would so restrict that essential parliamentary freedom to debate and to inquire as to virtually destroy it. If the judgement were allowed to stand Parliament would be in danger of becoming a cowed institution.

23 At p. 83.

24 Odgers, *op. cit*., p. 540.

25 ibid., pp. 537, 540.

26 cf. the statement of Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 35, a statement which Hunt J. reads narrowly (judgement, p. 34).

Parliamentary Privilege and Statutory Secrecy Provisions*

Harry Evans

A question which arose in proceedings in the Senate during 1991, perhaps the most important question from the parliamentary perspective, was that relating to the effect on parliamentary privilege of general statutory secrecy provisions.

This question arises from provisions in statutes which prohibit in general terms the disclosure of various categories of information. At the federal level in Australia, and no doubt in most other jurisdictions, there are many statutory provisions, here generically designated as secrecy provisions, which prevent the disclosure of information thought to require special protection from disclosure. Usually these provisions create criminal offences for the disclosure of information obtained under the statute by officers who have access to that information in the course of duties performed in accordance with the statute.

The question which arose is whether statutory provisions of this type prevent the disclosure of information covered by the provisions to a house of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry.

The position which has always been adhered to by the Senate's advisers, and, it can be said, by the Senate itself in practice, is that such provisions have no effect on the powers of the houses and their committees to conduct inquiries, and that general

* This paper was presented at the 23rd Conference of Presiding Officers and Clerks, Adelaide, June 1992 and first published in *The Table*, 1992.

secrecy provisions do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees. The basis of this view is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a house or a committee. That law was made crystal clear at the federal level by the *Parliamentary Privileges Act 1987*, which declares that the submission of a document or the giving of evidence to a house or a committee is part of proceedings in Parliament and attracts the wide immunity from all impeachment and question which is also clarified by the Act. It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. This principle is very clearly applicable to the federal houses, because section 49 of the Constitution establishes the law of parliamentary privilege and makes it clear that that law can be altered only by a statutory declaration by the Parliament. These principles were set out in 1985 in a joint opinion of the then Attorney-General and the then Solicitor-General:

> Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away … In the case of the Parliament of the Commonwealth, s. 49 of the Constitution requires an express declaration.[1]

These principles were called into question by advice given to the executive government by its legal advisers late in 1990. The context of the advice was the operations of the Parliamentary Joint Committee on the National Crime Authority. The *National Crime Authority Act 1984* establishes a National Crime Authority with power to inquire into matters relating to organised crime. The Act also establishes a Joint Parliamentary Committee to oversee the authority on behalf of the Parliament. The provisions establishing the committee were not initiated by the government, but were inserted into the Act by an amendment made in the Senate. In the part of the Act establishing the committee there is a provision which limits the powers of inquiry of the committee, by providing that the committee is not to investigate a particular criminal activity or to reconsider the findings of the authority in relation to a particular investigation. In another part of the Act there is a general secrecy provision, making it an offence for officers of the authority to disclose information obtained in the course of their duties except in accordance with those duties. During a phase in which the authority was apparently not disposed to cooperate with the joint committee, members of the authority were claiming that the general secrecy provision prevented them providing information to the committee. They claimed that they could be prosecuted for providing information to the committee contrary to that provision, and at one stage they were even seeking from the executive government immunities from prosecution under the section.

The committee sought advice from the Senate Department, which staffs the committee, on this question. The advice was that the secrecy provision has nothing to do with the provision of information to the committee. Apart from the principles

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[1] Quoted in the report by the Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, 30 May 1985, Parliamentary Paper no. 235/1985, p. 2.

already enunciated, there are additional reasons for that advice. The general secrecy provision contains nothing to indicate that it has any application to the committee, and is not placed in the part of the Act dealing with the committee. Moreover, the provision allows the disclosure of information in accordance with the duty of officers, and it could readily be concluded that officers have a duty to cooperate with the committee which is statutorily charged with the task of overseeing the activities of the authority.[2]

Notwithstanding the cogency of these arguments, the government and its legal advisers came to the support of the authority. An opinion of the Solicitor-General was obtained. This opinion asserted that the secrecy provision does indeed prevent the provision of information to the committee. The opinion did not make it clear exactly how the secrecy provision operates in relation to the committee's inquiries. It appeared to contemplate that the secrecy provision has no application while the committee is operating within its statutory charter, but that should the committee stray outside its statutory bounds the secrecy provision operates in some way to stop the committee's inquiries.[3]

The great weakness of this argument is revealed by the question: If an officer of the authority gives information to the committee, can the officer then be prosecuted under the secrecy provision? In the opinion, and in the subsequent government opinions to which reference will be made, this question was carefully avoided. The government's advisers stopped short of claiming that a person could be prosecuted for presenting information to a parliamentary committee. Such a claim could not be maintained in the face of the law of parliamentary privilege, but if a prosecution could not be undertaken, how could the secrecy provision operate? As has been indicated, the secrecy provision, like most of the provisions so classified, works by creating a criminal offence for the disclosure of information. If there is no offence for disclosing information to a parliamentary committee, the provision does not operate in relation to such a committee. In all the subsequent arguments, this difficulty was not tackled by the government's advisers. It was also pointed out that if the joint committee strayed outside its statutory terms of reference, the legal remedy would be to restrain it directly, not to invoke the secrecy provision in some unspecified way. The Solicitor-General's advice appeared to contemplate that the remedy for a committee going beyond its terms of reference was that its proceedings would be deprived of the protection of parliamentary privilege. This is analogous to saying if the Parliament passes a bill which is later found to be beyond its constitutional powers, its proceedings on the bill would be retrospectively stripped of their privileged status. Alternatively, if the presentation of evidence to the committee contrary to the secrecy provision remains privileged, does this mean that the provision cannot be enforced against an officer who gives such evidence voluntarily, but operates only to restrain the committee where an officer objects to giving such evidence?

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2 Advice to the Joint Committee on the National Crime Authority by the Clerk of the Senate, 13 May 1990. This and the other advices referred to were tabled in the Senate on 9 September 1991. The various advices are available in a volume attached to the explanatory memorandum to the bill referred to in note 12. The opinion referred to in this note is at p. 1.

3 Opinion of the Solicitor-General, 20 August 1990, p. 28.

These difficulties with the Solicitor-General's opinion were pointed out in a further advice to the joint committee. It was also pointed out, perhaps somewhat unkindly, that the Solicitor-General had been shown to be wrong in an earlier opinion. In 1986 the Senate had disallowed certain export control orders, but the government had continued to enforce the orders, supported by an opinion of the Solicitor-General to the effect that the disallowance had not been valid. The basis of this claim was a very restrictive reading of the statutory disallowance powers. When the matter was brought before the Federal Court, however, the court upheld the parliamentary view and found that the disallowance had been effective.[4]

In spite of all these considerations, the government expressed an intention of adhering to the advice of the Solicitor-General.[5] The reaction in the Senate to this was that one of the Senate members of the joint committee introduced a bill to amend the National Crime Authority Act to make it clear that the secrecy provision has no application to inquiries by the committee.[6]

In the advice to the committee it was pointed out that there are many general secrecy provisions in federal statutes, and the apprehension was expressed that if the Solicitor-General's opinion were to go unchallenged all of these provisions could be invoked to prevent inquiries by the houses and their committees into a wide range of information collected by government and its agencies. It was also pointed out that not only secrecy provisions could be so invoked: once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the houses and their committees.

This apprehension soon proved to be only too well founded. Early in 1991 another government opinion, composed in the Attorney-General's Department, was presented to the Senate.[7] This opinion contended that another general statutory secrecy provision inhibited the provision of information to a parliamentary committee. This opinion had the value of demonstrating the danger to the houses inherent in the line being taken by the government, and in exposing the weaknesses of that line. The opinion conceded that a person 'probably' could not be prosecuted for giving information to a parliamentary committee contrary to the secrecy provision, without explaining how, if there could be no prosecution, the provision could operate. The opinion made plain a view that secrecy provisions are simply an excuse for officers who do not wish to answer questions before committees, but cannot be enforced if information is voluntarily provided. The opinion also contained an amusing statement to the effect that if the parliamentary argument were correct the houses and their committees would have greater powers than even ministers to gain access to information. A commentary on the opinion[8] pointed out that the line taken by the government's

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4 Comments on the Solicitor-General's opinion by the Clerk of the Senate, 28 August 1990, p. 35. *Thomas Borthwick & Sons (Pacific) Ltd. v Kerin and Others* (1989) 87 ALR 527; the opinion of the Solicitor-General was tabled in the Senate on 16 December 1988.

5 Letter from the Acting Attorney-General to the Chairman of the Committee [undated], p. 40.

6 National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990, Senator Crichton-Browne, introduced 8 November 1990.

7 Attorney-General's Department Opinion, 15 April 1991, p. 41.

8 Comments on that opinion by the Clerk of the Senate, 28 May 1991, p. 45.

advisers appeared to be based on a reluctance to concede that mere houses of the Parliament and parliamentary committees are constitutionally more powerful than ministers and public servants.

Before there was time for the dispute to progress much further, yet another opinion of the Attorney-General's Department was produced in the Senate.[9] This opinion related to yet another statutory secrecy provision, but, to the amazement of those who had been following the argument, came to the opposite conclusion. Contrary to the other government opinions, it asserted that the Senate could require the disclosure of information to one of its committees notwithstanding that that information was covered by a secrecy provision. This opinion was produced by the responsible minister as if it represented the government's view, apparently without any realisation that the government's advisers had contradicted themselves.

All of the opinions and advices were then drawn to the attention of the Senate, and the government was called upon to determine exactly where it stood on the question. In due course a second opinion of the Solicitor-General was produced.[10] This opinion conceded that a general statutory secrecy provision does not apply to inquiries by the houses or their committees unless the provision in question is so framed as to have such an application. The opinion contended that a secrecy provision could apply to parliamentary inquiries by force not only of express words in the provision but by a 'necessary implication' drawn from the statute. It was just such a 'necessary implication' which was found by the Solicitor-General in the National Crime Authority Act to give the secrecy provision in that Act an application to inquiries by the joint committee.

In a final clerkly commentary on this opinion,[11] it was pointed out that the doctrine of 'necessary implication' still posed a residual threat to the powers and immunities of the houses and their committees, because the government's legal advisers could always find 'necessary implications', invisible to mere mortals, when there was a desire to invoke a particular secrecy provision to inhibit a parliamentary inquiry. This is well illustrated by the 'necessary implication' drawn from the National Crime Authority Act, which would certainly not be drawn by any conscientious reader of the statute not blessed with the saving grace of being a government law officer. The opinion also posed another danger: it contained a suggestion to the effect that perhaps the statutory secrecy provisions should be fixed up so that their application to parliamentary inquiries is clear; as the Solicitor-General delicately put it, the provisions should be 'clarified'. The final commentary drew attention to the danger in that suggestion in the following terms:

> I need not say that this appears to be an attempt to achieve by alteration of the law that which cannot be achieved by tortured interpretation of it, and that any attempt to enact such 'clarifying' legislation should be closely scrutinised. The assumption underlying the Solicitor-General's

9 Attorney-General's Department Opinion, 14 May 1990, p. 50. This opinion was thus given much earlier than the other government opinions, but was tabled later. Comments on that opinion by the Clerk of the Senate, 3 June 1991, p. 53.

10 Opinion of the Solicitor-General, 12 August 1991, p. 65.

11 Comments on that opinion by the Clerk of the Senate, 19 August 1991, p. 69.

> recommendation is that because some information has been thought in the past to require general statutory protection from disclosure (often, it should be said, without any justification other than a general desire for secrecy which is not in keeping with the spirit of more recent times), such information should also be protected from disclosure to parliamentary committees.

As an indication of lack of acceptance of the final government opinion, a private senator's bill was introduced into the Senate to declare, for the avoidance of doubt, that statutory provisions do not affect the law of parliamentary privilege except by express words.[12]

These residual questions have not been resolved. In the general pressure of legislative business the bill has not been brought on for debate, but all the relevant documents have been tabled in the Senate. There has been some discussion about clarifying the National Crime Authority Act and of a new spirit of cooperation between the National Crime Authority, now with a new head and a substantial change of staff, and its watchdog committee. Government departments and agencies appear to have accepted that general statutory secrecy provisions do not apply to the giving of evidence to parliamentary committees, and so far have not done looking for 'necessary implications'.

This episode and the conflict of advice demonstrates that the executive government instinctively seeks to curb the powers of Parliament, particularly the parliamentary power to inquire into executive government activities, and that parliamentary vigilance against such attempts is required. In this struggle between the wielders of power and the constitutionally established institutions of safeguard and oversight of that power, legal opinions are weapons. It cannot be assumed that the advice of government law officers provides impartial arbitration of the disputes which arise. Experience indicates that such advice, no doubt by coincidence, always turns out to support whatever view is taken by the government of the day. The houses must have access to their own advice, advice which is informed by the contrary spirit of upholding the parliamentary safeguard.

[12] Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, Senator Crichton-Browne, introduced 9 September 1991.

1975 Revisited: Lost Causes and Lost Remedies*

Harry Evans

Being a mere callow youth and a relatively junior officer during the great 1975 crisis, my part was essentially that of an observer. The only occasion on which I rose to the more exalted status of a participant was when I served subpoenas on Maurice Byers and Clarrie Harders, two of the public officers who were summoned by the Senate in the middle of 1975 to give evidence about the government's overseas loan-raising activities. These two gentlemen, who were certainly not callow youths at that time and are now even further removed from that condition, are also participants in this conference. As is well known, they appeared in answer to the subpoenas but declined to give evidence in accordance with the government's claim of crown privilege (as it was then called). Perhaps they will mark the occasion of this conference by telling us the evidence that they could have given. Having been an observer, I offer the following observations on the basis of a large amount of hindsight, but hindsight, of course, is unavoidable.

The events of 1975 attract a great deal of anecdotage. I would like to recount an anecdote with a serious point to it. One of the major problems with the events of 1975 is that they diverted attention from the parliamentary work of the Senate and the importance of that work as a safeguard in the system of government. When the Senate resumed after the luncheon suspension on 11 November 1975, the first business dealt with was not the appropriation bills, the delay of which by the Senate had precipitated the deadlock between the Senate and the government, and the passage of which then so surprised the

* This paper was presented at the ANU Conference on the Constitution and Australian Democracy, Canberra, on 11 November 1995. It has been published in *Quadrant*, December 1995 and in M. Coper and G. Williams (eds), *Power, Parliament and the People*. Leichhardt, NSW, Federation Press, 1997.

Leader of the Government in the Senate and his colleagues, who had not been told of the lunchtime dismissal of the government. Several other things occurred, the most important of which was a statement by the chairman of the Senate Standing Committee on Regulations and Ordinances, Senator Devitt (Labor, Tasmania). Senator Devitt, on behalf of the committee, had given a notice of motion to disallow certain Postal Services Regulations and Postal By-laws. He informed the Senate that the committee had objected to provisions in these instruments of delegated legislation which would have conferred on postal officers a very wide discretion to open and dispose of mail. The committee regarded the legislation as unduly infringing the rights and liberties of citizens, in particular, the right to privacy of mail. Senator Devitt reported that the responsible minister had agreed to amend the regulations and by-laws so that mail could be opened only on reasonable suspicion of contravention of law or other specified grounds, and so that mail would be disposed of only in accordance with a court order. Senator Durack (Liberal, WA), a member of the committee, drew attention to the importance of the undertaking given by the minister, and the manner in which the committee had protected the rights of the citizen. Senator Devitt's notice of motion was withdrawn on the basis of the undertakings given by the minister. Only then did the Senate, after receiving another bill from the House of Representatives, proceed to consider and speedily pass the appropriation bills.

This episode provided, on a day on which other events monopolised attention, an illustration of the importance of the power of the Senate to disallow delegated legislation and the scrutiny of that legislation by the committee on behalf of the Senate. Were it not for that power and that scrutiny, delegated legislation would escape parliamentary control, and the ability of ministers to make laws without parliamentary sanction would be virtually unlimited. Such checks and controls which the system of government places on executive power must not be forgotten when the events of 1975 are reconsidered.

Turning to those events themselves, three aspects of them impress me most. Two of these aspects were obvious to me at the time, and one is apparent only by comparison with more recent developments.

The first feature of the affair which impressed me at the time was that the opposition parties in the Senate had not worked out the possible consequences of their blocking the appropriation bills should the prime minister refuse to go to an election. He had given plenty of indication that he would not follow the precedent he set in 1974 and call an election in response to the opposition's demands. Consideration should therefore have been given to the possible consequences of such a situation. Among those consequences was that, if the Governor-General dismissed the government and commissioned the Leader of the Opposition to form a government on the basis that an election would be advised, the outgoing government could take a number of procedural steps to frustrate that course of action. In particular, they could prevent the passage of the appropriation bills, or at least make their passage legally very dubious. The opposition do not appear to have thought through what their position would then be. I happen to know that they were forewarned, privately and orally, of this potential situation on at least one occasion, but did not allow the warning to influence their course of action.

Because of the possible consequences of the prime minister refusing to go to an election, I did not think, before October 1975, that the opposition would seek to block the appropriation bills. When this occurred, I did not think that the Governor-General,

whatever else he might do, would dismiss the government and commission the Leader of the Opposition on the basis of an undertaking to pass the bills. In fact, I had a wager with one of my colleagues that neither of these things would happen (I no longer make wagers; remember that I was only a callow youth). It may seem that these beliefs indicate extreme naivety, but they were based not on ignorance but on a consideration of matters which the principal players in the drama appeared not to have considered.

The second remarkable feature of the events is that, the Governor-General having taken the step which I believed he would not take, the outgoing government appeared also not to have worked out the possible consequences or the further course of their strategy. They may have regarded their dismissal as unthinkable, but it is amazing that, as experienced politicians, they had not formulated a parliamentary strategy to follow if the unthinkable happened. It is well known that the Leader of the Government in the Senate and his Senate colleagues were not told of the dismissal of the government during the lunchtime suspension, and were therefore taken by surprise by the speedy passage of the appropriation bills. It is amazing that they did not find out about the dismissal during the 20-odd minutes that Senator Devitt and Senator Durack took to make their statements of such great parliamentary importance. It is therefore obvious that allowing the passage of the appropriation bills was not a preconsidered strategy, it was an accident. The outgoing government might have decided, as a matter of political strategy, not to use the Parliament to trip up the incoming prime minister and the Governor-General, but it is clear that they had not considered the matter.

These two aspects of the affair demonstrate that the parliamentary procedural elements of political events can be of crucial importance, but are often forgotten by the political participants.

The third notable feature of the events, which appears only by comparison with recent times, is that nobody sought formal written advice of the possible parliamentary and procedural consequences of the prime minister refusing to go to an election, although they had almost a month between the blocking of the bills and 11 November to do so. If the same situation were to occur now, senators of all parties and none would certainly seek a written memorandum on the possible parliamentary and procedural consequences. Someone amongst them would almost certainly make the advice public, and it would then become known and would probably influence the actions of the participants and therefore influence the course of events. A culture of openness, if it has not come to executive government to the extent some would have us believe, has certainly affected the Senate.

The possible consequences to which I have referred were publicly canvassed by my predecessor immediately after 1975, so that it would be difficult to ignore them now. Apart from any other considerations, a repeat of the events of 1975 could not occur because the same circumstances could not be duplicated, particularly the circumstance of the two antagonists embarking on their respective courses apparently blind to a large part of the possible outcomes of their actions.

Turning to the constitutional significance of the events of 1975, they undoubtedly reveal a gap in Australia's constitutional order, in that there is no constitutionally regular method of dealing with the situation which then arose, that is, the majority of the Senate refusing to pass the appropriation bills until the government submitted itself to an

election (this is not a new-found view on my part, but was expressed in print in 1982). The situation brought two constitutional principles into conflict, the principle that a government cannot carry on if the Parliament refuses it the necessary funds, and the principle that a government with the support (i.e., control) of the House of Representatives is entitled to continue to advise the Governor-General and to remain in office without re-election. The Governor-General elected to give the first principle precedence over the second, but another Governor-General, on advice at least as persuasive as that received by Sir John Kerr, could have decided that the second principle is the more important. (It must not be forgotten that in 1970 Mr Whitlam also thought that the first principle should prevail over the second; he called on the then government to go to the polls following the defeat in the Senate of its states receipts duties legislation.) Neither the written constitution nor the wider constitutional order determines this question, which famously arises from the combination by the framers of the Constitution of federalism (encompassing true bicameralism) and cabinet or responsible government.

In spite of all the outpouring of words and print on 1975, proposed solutions to this gap in the constitutional order have not been as thoroughly analysed as they should.

The favoured solution of some, of course, is that the Senate should be deprived of its power to reject annual appropriation bills (or 'supply', as it is loosely called). That so-called solution has not been thought through by its proponents, either at a purely technical level or at a wider constitutional level. On the technical level, no one has yet explained how, if an appropriation bill could be passed without the consent of the Senate, the government could be prevented from including an appropriation in every bill and thereby passing all its legislation without that consent (there are ways of attempting to solve this problem, and ways in which a government could get around the solutions, and so on ad infinitum). On the higher constitutional level, the advocates of this 'reform' never consider that it would simply make absolute the power of the already overpowerful executive government, which has a stranglehold on the House of Representatives and which, without the Senate, would not be subject to any parliamentary restraint whatsoever. Such a situation would allow ministers to legislate virtually by decree. The parliamentary control over delegated legislation, to which Senator Devitt's and Senator Durack's statements on 11 November 1975 are enduring monuments, would be a thing of the past, as a Senate without power over primary legislation would hardly be conceded control over delegated legislation. The 'elective dictatorship' would be complete.

Perhaps the most remarkable things about the events of 1975 are the facts which are now conveniently forgotten or ignored. One such set of facts relates to the solution to the constitutional problem. Not only is there a solution which closes the gap in the constitutional order, without ceding total legislative power to the ministry, but such a solution was actually formulated as a bill and passed by the Senate in 1982. In that year, Senator Gareth Evans introduced the Constitution Alteration (Fixed Term Parliaments) Bill. The bill would have provided that the House of Representatives could not be dissolved, other than in a double dissolution under section 57 of the Constitution, unless it expressed lack of confidence in the ministry and was unable, within a specified time, to express confidence in an alternative ministry. In the event of an early election, either by early dissolution of the House of Representatives or by double dissolution under section 57, the House then elected would continue only until the end of the fixed

parliamentary term. Although these provisions would not have absolutely prevented the Senate seeking to force a government to an election where the grounds for a double dissolution were in place, there would be such an enormous disincentive to doing so that such a course would not be a feasible proposition. A government elected in such circumstances would have to face the electorate again within a short time at the end of the fixed term. (It is to be noted that the Fraser Government unsuccessfully put forward in 1977 a constitutional amendment, a version of the so-called simultaneous elections proposal, which his party had previously opposed, in an attempt to avoid another election in late 1977 or early 1978, when the next half-Senate election was due.) As well as solving the problem of 1975, the 1982 bill would have redressed the constitutional balance somewhat by taking away the power of the prime minister to go to an early election at a politically convenient time, again not by direct prohibition but by a prohibitive disincentive to such a course.

The bill as introduced by Senator Evans contained provisions removing the Senate's power to reject appropriation bills, but it was accepted that the presence of those provisions was merely a gesture. The bill was amended to remove those provisions, and was not only passed by the Senate but passed with the support of all the non-government senators and of several government senators who dissented from their government's resistance to the bill. It was not surprising that the then government allowed the bill to die in the House of Representatives, but it was speedily reintroduced in the Senate after the new Labor government took office in 1983. Had the bill been passed by the then Parliament and put to a referendum, its chances of passage would have been very high, as it would have been supported by all parties other than the opposition and by a considerable number of dissident opposition senators. The latter circumstance would probably have prevented the opposition campaigning vigorously against it at the referendum, and public opinion polls showed 75 per cent support for the proposal. In what was described as an act of breathtaking cynicism, the government dropped the bill. The prime minister, it was said, preferred to keep his power of deciding when elections would be held, and to do so sacrificed the best opportunity of solving the problem of 1975.

In view of these events, no further complaints about what happened in 1975 should be entertained, as those most likely to do the complaining had it within their grasp to prevent a repeat of 1975 and at the same time to bring about a highly desirable constitutional reform.

The 1982 bill having been abandoned in these disreputable circumstances, it is probably just as well that no other solutions to the 1975 problem have been pursued. Any such solutions, in the unlikely event that the electorate were gullible enough to accept them, probably would have entrenched executive control of Parliament and saddled Australia with a Queensland or New Zealand system of government, and we would now, like the New Zealanders, be desperately seeking solutions to executive dictatorship.

After all this time, it is to be hoped that we are wiser in constitutional matters. Certainly there appears to be a greater appreciation of the need for constitutional balance. The proposal for Australia to become a republic has supplanted the search for a solution to 1975 as the great constitutional issue. The task of genuine constitutionalists is to ensure that proposed constitutional changes do not dismantle constitutional safeguards but enhance them.

Protection of Persons Who Provide Information to Members*

Harry Evans

The questions

In recent times senators have been concerned about action taken against persons who have supplied them with information and documents. The action taken has included legal proceedings and extra-legal punitive action. In the case of legal proceedings, the reference by the senators to the information in parliamentary proceedings cannot be used against the persons who supplied it, but can otherwise facilitate legal action. Also, subpoenas, search warrants and orders for the discovery of documents have been issued and served on senators, to gain access to documents supplied to senators and to facilitate action against the persons who supplied them. This kind of activity has great potential to discourage people from approaching the parliamentary forum with their grievances or with allegations of malfeasance.

A significant question arises in relation to these matters: does the protection afforded by parliamentary privilege extend to the provision of information by other persons to members of parliament?

This question encompasses two distinct issues:

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* This paper was presented at the 27th Conference of Presiding Officers and Clerks, Hobart, July 1996 and published in a revised form in *The Table*, 1997.

(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to members by other persons; and

(b) whether a house may treat as a contempt any interference with such communication of information to members by other persons.

The answer to question (a) does not necessarily determine the answer to question (b). If the communication of information to members does not attract the immunity of parliamentary privilege it may still be lawful for a house to treat as a contempt any interference with such communication. If, however, the communication of information to members *is* protected by parliamentary privilege, this probably determines the answer to question (b), in that there can then be little room for doubt that it is open to a house to use its contempt jurisdiction to protect such communication.

The two questions may be considered in turn.

(a) Parliamentary privilege and communications with members

It has always been generally accepted that the immunity of parliamentary proceedings from any impeachment or question before any court or tribunal extends to matters which, while not part of the actual proceedings of a house or its committees, are closely connected with those proceedings. The kinds of examples usually cited include the 'publication' by a member of information to a parliamentary officer or to a stenographer in the course of seeking advice on, or composing, a notice of motion or question to be used in a house or a committee; it is fairly certain that a member would be protected by parliamentary privilege in making such 'publications'. It is possible to postulate many other circumstances in which the immunity applies or should apply.

This extended operation of the immunity is provided for at the Commonwealth level in Australia in the *Parliamentary Privileges Act 1987* in the following terms:

> 'proceedings in Parliament' means all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee [emphasis added].

This provision is regarded as a codification of the pre-existing law, not as an extension of the law, and the relevant section of the Act has been accepted in general as such by the Federal Court in *Amann Aviation v Commonwealth* (1988) 19 FCR 223.

In relation to the Commonwealth houses, therefore, the extended operation of the immunity is a matter of statutory interpretation. There has yet been no occasion for judicial construction of the relevant words of this provision.

The issue which arises is whether this extended operation of the immunity applies to communications of information to members by other persons.

The answer to this question is likely to be determined by the closeness of the connection between the communication of the information to the member and

potential or actual proceedings in a house or a committee. For example, if a person provides information to a senator with an explicit request that the senator initiate some action in the Senate in relation to that information, such as an inquiry by the Senate, there is a much stronger basis for concluding that the communication of that information is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence or gossip. Similarly, if a senator has requested the information for the purpose of using it in the Senate or a committee, there is a stronger basis for applying the immunity than if there is no evidence of any potential relationship between the information and parliamentary proceedings. If a senator has actually used the information in the course of parliamentary proceedings, that also provides a firmer basis for applying the immunity to the provision of the information than if no parliamentary use is made of the information. The courts would be likely to determine the question in particular cases by considering these kinds of factors.

In an old British case, *Rivlin v Bilainkin* (1953) 1 QBD 534, it was held that the publication of information by a person to a member of Parliament did not give rise to an issue of parliamentary privilege because 'the publication was not connected in any way with any proceedings of the House of Commons'. Presumably if the publication *had* been connected with such proceedings a live issue of parliamentary privilege would have been present, and may have been determined by the nature of the connection.

In *Grassby* (1991) 55 A Crim R 419, which involved a prosecution for criminal libel in respect of the provision of a document to a member, Allen J of the Supreme Court of New South Wales found that parliamentary privilege did not protect the provision of the document to the member.

There are difficulties with this judgement which prevent it being regarded as an authority on either of the two issues.

The New South Wales Parliament is unique in that it has no constitutional or statutory provision conferring upon its houses the powers and immunities known as parliamentary privilege and applying to all other Anglo-American legislatures. The powers and immunities of the New South Wales houses depend on a common law doctrine that they are only such as are strictly necessary for the houses to discharge their legislative functions. This doctrine has been expounded in a line of cases and recently confirmed. It is found that the houses do not possess the power to deal with contempts, and therefore the judgement of Allen J cannot have any relevance to issue (b). The houses possess an immunity of freedom of speech, but it is by no means clear that the scope of this immunity is the same as that of other legislatures, because it is not clear whether the Bill of Rights of 1689 applies in relation to proceedings of the New South Wales houses or merely applies in New South Wales in relation to proceedings of the British houses.

The judgement of Allen J does not clarify these matters. In referring to the immunity of freedom of speech of the New South Wales houses, it is not clear whether he thought he was applying the common law doctrine of necessary immunities or expounding article 9 of the Bill of Rights. The references to effects on members and the discharge of their functions (at 429–30) suggest the former. The references to

article 9 of the Bill of Rights do not explain whether it is taken to apply to the houses or whether it is merely indicative of the content of the inherent immunity of freedom of speech generally. In referring to article 9 (at 432) Allen J cites a collection of judgements some of which are mutually contradictory and one of which was expressly repudiated by the *Parliamentary Privileges Act 1987* of the Commonwealth.

The judgement also mixes up issues (a) and (b) as if they were the same question, and this, as has been indicated, is particularly inappropriate in relation to the New South Wales Parliament. In this aspect the judgement relies heavily on a sweeping statement in Erskine May's *Parliamentary Practice* to which further reference will be made and which, as will be suggested, is not justified by the cases on which it is purportedly based.

As has been indicated, the vital question is the connection between information supplied to a member of parliament and any parliamentary proceedings. In that respect the *Grassby* case was very easy to decide. Not only did Mr Maher, the state member to whom Mr Grassby supplied the offending document, not make use of it in any proceedings, but according to the evidence referred to in the judgement it was highly unlikely he would have done so. The judgement indicates that the case against Mr Grassby attached considerable significance to the lack of interest by Mr Maher in the document. In other words, there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential.

In different circumstances the matter may not be so easily decided, and a court may well come to a different conclusion. If a member were to make a speech in a house or ask questions in a committee about an issue, and a person were to supply the member with information relevant to that issue, and the member were subsequently to use that information in proceedings in the house or the committee, there would be a much stronger case for concluding that the provision of the information to the member would be protected in both senses (a) and (b), that is, as a question of legal immunity and as a question of protection by exercise of the contempt jurisdiction.

The judgement in *Grassby* is therefore of little value. At most, it merely reinforces the basis of the judgement in *Rivlin v Bilainkin*: where there is no connection with proceedings in parliament, the issue of parliamentary privilege does not arise.

In the case of the Easton petition in Western Australia, a ruling was made by the President of the Western Australian Legislative Council and is relevant to this question. In the course of the ruling, the President stated:

> Whatever was done by members, ministers and others before the presentation of the Easton petition is not a proceeding in Parliament and is therefore open to non-parliamentary inquiry.

This sentence, however, elaborated on, and followed on from, the substance of the ruling, which was:

> Although the presentation of a petition is as much a proceeding in Parliament as a conference of managers, the preparation, including circulation, of a petition is not.[1]

This ruling is stated to be supported by the conclusions of the Senate Privileges Committee in its 11th Report in 1988. In that report the committee concluded that the circulation of a petition prior to its presentation probably would not be covered by parliamentary privilege. That conclusion, however, was largely based on the fact that the circulation of a petition is not essential to its presentation, as it is not necessary for a petition to bear more than one signature. It cannot be concluded that all dealings with a petition, before or after its presentation, would not be 'for purposes of or incidental to' its presentation and therefore covered by the immunity attaching to the presentation itself. In particular, it cannot be concluded that no anterior dealing with a petition would attract the immunity. It is fairly clear that, for example, the 'publication' of a petition to a parliamentary officer prior to its presentation would attract parliamentary privilege, and a strong case can be made out that the immunity would also attach to other anterior dealings, such as seeking the advice of another member.

The provision of information to a member of parliament may attract qualified privilege under the common law interest or duty doctrine, whereby the publication without improper motive of matter to a person is privileged if the provider and the recipient of the information have an interest or a duty in providing and receiving it (either one may have either an interest or a duty). Whether the qualified privilege applies would presumably depend on circumstances. The only significant judicial authority appears to be an old British case (*R v Rule* (1937) 2 KB 375). Whether qualified privilege is attracted is not a determinant of the issues here considered.

In the course of his judgement Allen J observed that the protection of qualified privilege is a very strong protection, and may be defeated only by proof of malice or other improper motive on the part of a defendant. He appeared to argue that therefore there is enough protection without parliamentary privilege. The problem with this is that the kinds of persons who supply information about corruption or malfeasance to members of parliament, the kinds of persons commonly known as whistleblowers, are often persons who can be represented as having an improper motive. For example, an employee dismissed by an employer can be represented as activated by a desire for revenge. In the tobacco corporation case, which will be mentioned later, the persons who supplied the documents could well be said to have an improper motive, but there was a legitimate legislative interest in investigating the material they supplied. Qualified privilege is not a satisfactory substitute for parliamentary privilege in such cases.

It may therefore be concluded that, given the right circumstances, the provision of information by a person to a member of parliament may attract the immunity of parliamentary privilege.

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1 Western Australia. Legislative Council, *Minutes of Proceedings*, 16 May 1995, p. 116.

(b) Interference with communications to a member as a contempt

The issue here is whether it would be lawful for a house to treat as a contempt interference with communication of information to members by other persons.

The most likely form of interference is the taking of legal action in respect of the publication of matter to a member. It is therefore appropriate to reiterate that it is well established that the taking or threatening of legal action can constitute a contempt of parliament (or a contempt of court) if the effect or tendency is to interfere with the conduct of proceedings in parliament (or court proceedings). This question has been dealt with in some detail in reports and associated material of the Senate Committee of Privileges.

For the Commonwealth houses this is a question of statutory interpretation, turning on the application of section 4 of the *Parliamentary Privileges Act 1987*:

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

Unlike the statutory definition of 'proceedings in Parliament', this provision does not merely give expression to the pre-existing law, but is thought to embody the rationale of the law which empowers the houses to punish contempts. The provision limits the power to punish contempts which existed before the Act was passed.

There has been no judicial construction of the provision, so one can only reason from its terms and first principle.

It is clear that the provision of information to senators is often a vital part of their participation in Senate and committee proceedings, and that the suppression of such provision of information could severely hinder those proceedings. It is also clear, however, that information is often provided to senators without any connection, actual or potential, to parliamentary proceedings. The lawfulness of treating as a contempt any interference with the provision of information to a senator is therefore likely to depend on the closeness of any connection between the provision of information and actual or potential parliamentary proceedings. In a case where interference with the provision of information to a senator clearly had the effect or tendency of hindering the senator in the free performance of the senator's duties, it would be lawful to treat such interference as a contempt.

The word 'improper' in section 4 of the Parliamentary Privileges Act, it should be reiterated, does not mean unlawful or improper in some other context. It gives statutory expression to a principle expounded by the courts in relation to contempt of court: acts may constitute interference but may be proper because of their tendency or effect, provided that the means employed are legitimate; for example, urging (but not threatening) a witness to correct evidence which is false (*R v Kellett* (1976) 1 QB 372 at 386–8).

As with other aspects of contempt of parliament, it is instructive to make comparison with the equivalents in relation to legal proceedings, contempt of court and its criminal law counterpart, attempting to pervert the course of justice. If it can be a contempt of court or a perversion of the course of justice for a person to interfere with the provision of information to an actual or potential participant in actual or potential legal proceedings, this is strong ground for concluding that it is lawful for a house to treat interference with the provision of information to a member as a contempt.

A judgement of the High Court throws considerable light on this matter. In *R v Rogerson* (1992) 174 CLR 268 the High Court held that interference with the gathering of evidence by police can constitute a perversion of the course of justice even though such gathering of evidence is not part of the course of justice as such and even though no actual proceedings are contemplated by the police:

> The fact that police investigation stands outside the concept of the course of justice does not mean that, in appropriate circumstances, interference with a police investigation does not constitute an attempt or a conspiracy to pervert the course of justice … it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency.[2]
>
> The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, *hindering of access to it, deflecting applications that would be made to it*, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions.[3]

To apply these principles to contempt of parliament, interference with the provision of information to a member 'in appropriate circumstances' may constitute a contempt even though such provision of information is not part of proceedings in parliament as such, and even though the member does not contemplate use of the information in proceedings in a house or a committee.

It cannot be suggested that potential legal proceedings are entitled to a greater degree of protection than parliamentary proceedings: the provision of information to a member may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in parliament are protected by parliamentary privilege and why houses have the power to deal with interference with their proceedings.

The High Court appeared to consider that a culpable intention on the part of offenders towards potential legal proceedings is an essential element of the offence, at least where there are no proceedings actually on foot or necessarily contemplated. Other

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2 *R v Rogerson* (1992) 174 CLR 268 at 277.

3 ibid. at 280 [emphasis added].

authorities make it clear that, in the actual presence or contemplation of proceedings, a culpable intention may not be necessary for an offence to be constituted. These principles are equally applicable to contempt of parliament. (In its report on contempt in 1987, the Australian Law Reform Commission suggested that the offence of attempting to pervert the course of justice may not be constituted by any act in the absence of a culpable intention, and that an act may not be in contempt of court, as distinct from constituting the offence of attempting to pervert the course of justice, unless proceedings have actually commenced[4]. This may or may not be correct, but it does not affect the foregoing analysis. If there are such distinctions between contempt of court and perversion of the course of justice, however, they may be of persuasive influence in consideration of contempts of parliament.)

In two cases in the 1950s the British House of Commons potentially had occasions to consider alleged interference with the provision of information to a member in the context of contempt of parliament. The circumstances of these cases, however, make them not particularly helpful.

The first case involved a letter from an eccentric vicar to a member, who referred the letter to the bishop, who reproached the vicar. Initially this was received and regarded as a complaint against the member. Eventually the Speaker ruled that a motion concerning the matter could not have precedence because it was not raised at the earliest opportunity. A motion to refer the matter to the Privileges Committee was narrowly negatived, and at least some members in the majority seemed to have regarded themselves as bound to uphold the Speaker's 'determination'. Some members, however, may have been influenced by Mr Winston Churchill's assertion that the House should not 'use its Privilege to protect a correspondent … from some real or supposed injury … Privilege was never instituted or intended for such a purpose. It is to protect us and those who have to deal with us, and not to protect the vast mass of the nation outside'. (He also made much of the fact that a bishop has no power over a clergyman in a living in the Church of England.)[5]

In the second case, also involving ecclesiastics of a sort, a Deputy Assistant Chaplain General of the army was alleged to have threatened a subordinate army chaplain in consequence of the chaplain's provision of information to a member. The Committee of Privileges was able to point to the lack of precedents for treating as a contempt an attempt by one person to influence another in relation to communications with a member, but was also able to say that this was a matter for the responsible minister, because, as a matter of government regulation, members of the armed forces had a right to communicate with members and should not be subjected to any pressure or punishment on that account.[6]

Erskine May's *Parliamentary Practice* makes too much out of these cases in claiming that 'Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such

4 Australian Law Reform Commission, *Report*, no. 35, 1987, p. 103.

5 H.C. Debates, 1950–51, cc 675–88, 1297–316, 1773–9, 2491–544.

6 H.C. 112, 1954–55.

information is subsequently used in proceedings in Parliament being immaterial.'[7]. The cases do not provide authority for this sweeping statement. They are of little persuasive value for any general conclusion. The expressions 'those who have to deal with us' (Churchill) and 'others who solicit business in Parliament' (May) indicate that the boundaries are not as clear cut as May makes out. May is confused on the significance of *Rivlin v Bilainkin*, citing it as if it had to do with qualified privilege[8] when in fact the question of parliamentary privilege was at issue, and also mixes up the questions of the scope of the legal immunity and the extent of the contempt jurisdiction[9].

A precedent in the Australian House of Representatives is similarly unhelpful. This involved legal proceedings against a person in respect of the provision by the person to a member of a statutory declaration which the member used in debate. The report of the House Privileges Committee, having quoted May and observed the lack of precedent, made a finding that the legal proceedings did not amount to, and were not intended or likely to amount to, improper interference with the free performance by the member of his duties, without providing any analysis of the facts or reasons for the finding. It is not clear from the report whether the committee thought that interference with the provision of information to a member is ever capable of constituting a contempt.[10]

It may therefore also be concluded that, given the right circumstances, it may be lawful for a house to treat as a contempt an interference with the provision of information by a person to a member.

Subpoenas, search warrants and discovery of documents

If the provision of information to a member may in appropriate circumstances be protected, is there any protection against legal processes which may be used to obtain that information and proof of its provision to a member, such as subpoenas, search warrants and orders for the discovery of documents? Such processes may be used to facilitate the taking of action against a person in respect of the provision of information to a member.

The immunity of parliamentary proceedings, and matters 'for purposes of or incidental to' those proceedings, which is codified in section 16 of the *Parliamentary Privileges Act 1987*, is an immunity against the use which may be made of material in legal proceedings, not an immunity against processes for the production of such material. There is no immunity against those processes as such (except in relation to in camera evidence: s.16(4)). A member in possession of relevant material must produce it in response to such processes but may subsequently contest the use which may be made of it in the proceedings.

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7 *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 21st edn, ed. C.J. Boulton, London, Butterworths, 1989, p. 133.

8 ibid., p. 133.

9 ibid., p. 125.

10 Parliamentary Paper no. 407/94.

It is possible, however, that subpoenas, search warrants and discovery of documents may be resisted on the basis that the only purpose of the discovery or the subsequent production of the documents would be a purpose contrary to the parliamentary immunity. In other words, a court may hold that a person is not required to comply with a subpoena, search warrant or order for discovery because it is directed to impermissible use of protected material.

In a recent case in the United States the US Court of Appeals quashed subpoenas on the ground that they constituted an interference with legislative processes protected by the parliamentary immunity (*Brown & Williamson Tobacco Corp v Williams*, 1995, not yet reported). A tobacco company, in pursuit of former employees who had allegedly taken company documents, sought to subpoena the documents from two members of Congress to whom the employees had provided the documents, and who were members of a committee investigating the activities of tobacco companies. The Court of Appeals observed:

> the nature of the use to which documents will be put—testimonial or evidentiary—is immaterial if the touchstone is interference with legislative activities … A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen.

This judgement was based on a line of Supreme Court judgements indicating that the legislative activity protected by the immunity extends beyond proceedings in the houses or their committees.

This case suggests that, given appropriate circumstances, the immunity protects the provision of information to members and also provides a basis for resisting legal processes which aim to facilitate a legal attack on such provision of information.

Solutions

Clearly an absolute immunity for the publication of matter to members of parliament in all circumstances would not be warranted. It would be difficult to frame legislation to specify the circumstances in which the immunity applies. The *Parliamentary Privileges Act 1987* probably goes as close as can be to covering the question. It can only be hoped that courts will have regard to its terms and make appropriate decisions in any future cases, along the lines of the decision of the US Court of Appeals in the tobacco corporation case and, indeed, of the earlier judgements on which that decision was based. It would also be helpful if houses of parliaments, in appropriate cases, would assert the right to extend their protection to those who seek to assist the pursuit of the public interest by providing information to the tribunes of the nation.

Bad King John and the Australian Constitution*

Harry Evans

A suggestion was made by a number of organisations that something should be done to mark the 700th anniversary of the 1297 inspeximus issue of Magna Carta which is on display here in Parliament House. The Senate Department decided to oblige by devoting one of its occasional lectures to the subject before it was known that other and grander events were planned. Considering other anniversaries which are commemorated from time to time, however, perhaps this is one which should be marked by more than one event.

In 1952 the Australian government purchased a copy of the 1297 inspeximus issue of Magna Carta of Edward I for the sum of £12 500, a lot of money in those days. The copy had long been in the possession of a British school which needed to sell it to raise money for school improvements.

An inspeximus issue of a charter is one in which the granter states that an older charter has been examined (Latin: inspeximus, we have examined), and then recites and confirms the provisions of that original.

The 1297 statute of Edward I confirms and enacts the principal provisions of the original Magna Carta which King John was forced by his rebellious barons to sign in 1215. The 1297 statute was enacted by Parliament (which did not exist in 1215)

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 17 October 1997 and first published in *Papers on Parliament*, no. 31, June 1998.

and is still in force in part in the United Kingdom and, indeed, in the Australian states and territories.

The purchase of the copy by the Australian government indicated a belief that the document is an important part of Australia's constitutional and legal heritage and that we ought to have a copy upon which we can gaze with awe and reverence.

Is Magna Carta significant, and should we gaze upon it with awe and reverence?

There is certainly a long history of reverence for Magna Carta. It was constantly cited during the struggle between Parliament and King Charles I in the 17th century. Parliament's Petition of Right of 1628 referred to the Great Charter and alleged that King Charles had violated its terms. Its virtually sacred status came to be encapsulated in a phrase which was repeated throughout the 18th and 19th centuries. Magna Carta was called 'the palladium of English/British liberty'. A palladium is something without which the city falls, and this phrase implied that the Great Charter was the essential basis of the whole structure of the British constitution. The phrase was also employed by some of the American colonists during their revolution.[1]

On the other hand, there has been an equally long history of debunking of Magna Carta. Oliver Cromwell was very rude about it when the judges cited it against him, and incidentally provided a chilling foreglimpse of modern times when he scorned the old English republicans who regarded it as holy writ.[2] Some of the rebellious American colonists referred to it as a symbol of the genetic defects of the British system of monarchical government and of the radical difference in the republican foundation of their constitution.[3] As will be seen, this disagreement amongst the Americans about Magna Carta was very significant.

The document has therefore long had a mixed reputation.

The actual content of Magna Carta is now not conducive to awe and reverence. Most of it consists of a lengthy and very tedious recital of feudal relationships which not only have no relevance to modern government but which would be of interest only to the most pedantic antiquarian. Here are two samples of what most of it is like:

> No scutage or aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our body, for the making of our oldest son a knight, and for once marrying our oldest daughter, and for these purposes it shall be only a reasonable aid;

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1 See two 1787 articles by Noah Webster in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, vol. 1, New York, Literary Classics of the United States, 1993, pp. 158, 669.

2 E. Hyde, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England …* , ed. W. Dunn Macray, vol. vi, Oxford, Oxford University Press, 1969, p. 93.

3 A. Hamilton, *The Federalist*, no. 84, 1788, Everyman edn, p. 438.

> in the same way it shall be done concerning the aids of the city of London.
>
> If any one holds from us by fee farm or by socage or by burgage, and from another he holds land by military service, we will not have the guardianship of the heir or of his land which is of the fief of another, on account of that fee farm, or socage, or burgage; nor will we have the custody of that fee farm, or socage, or burgage, unless that fee farm itself owes military service. We will not have the guardianship of the heir or of the land of any one, which he holds from another by military service on account of any petty serjeanty which he holds from us by the service of paying to us knives or arrows, or things of that kind.

Whether King John was entitled to the money to marry off his eldest daughter for the first time and whether somebody was obliged to supply him with knives and arrows do not now appear to be matters of great constitutional importance.

There are two provisions only in the document which strike the reader as being of some significance, and these are the provisions which are always quoted as evidence of Magna Carta's continuing importance and contribution to constitutional development. The provisions are as follows:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgement of his peers or by the law of the land.
>
> To no one will we sell, to no one will we deny, or delay right or justice.

These provisions certainly have a more modern ring and appeal to them. This is partly because they appear to anticipate subsequent declarations of the rights of the citizen.

Rudyard Kipling wrote a charming story to account for the language of one of these two provisions amongst the feudal minutiae. His story tells of a Jewish money lender, a member of a despised and persecuted race, who uses the influence he has gained as a result of lending some money to the barons to have inserted in the document the reference to 'no one' being denied justice, in the hope that some day these words will be taken literally and extended even to members of his race.[4]

The occurrence of the words certainly has the appearance of an historical breakthrough requiring more than the usual explanation. As one authority puts it, 'Magna Carta … assumed legal parity among all free men to an exceptional degree' (but 'free men' was a restricted category).[5]

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4 'The treasure and the law', in *Puck of Pook's Hill*, 1910, various editions.

5 J.C. Holt, *Magna Carta*. 2nd edn, Cambridge, Cambridge University Press, 1992, p. 278.

There is a conventional view that these two provisions are the foundation of English law about the liberty of the citizen. While this may be true, it can lead to exaggeration. It is often said, for example, that the provisions are the origins of the entitlement of the citizen to due process of law. This phrase has assumed enormous importance in the jurisprudence of all common law countries, and particularly in the constitutional jurisprudence of the United States because the phrase appears in the Bill of Rights in the first ten amendments of the United States constitution.

Magna Carta, however, does not refer to due process of law; it provides that free men are not to be dealt with except in accordance with law. What this meant was unclear in 1215 and in 1297.

The phrase 'due process of law' first appears in a statute of Edward III of the year 1354. This statute, which is referred to by the title Liberty of the Subject, contains the following provision:

> … no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.

The first chapter of this statute provided 'That the Great Charter … be kept and maintained in all points', so it is clear that the provision about due process was thought to add something new and different. (The documents were in Latin and French respectively, but the English translations are literal.) The Petition of Right also separately cited the 1354 statute.

The direct influence of the 1354 statute can be seen by comparing its provision relating to due process with the corresponding provision from the 5th amendment of the United States constitution:

> No person shall … be deprived of life, liberty, or property, without due process of law.

The provision thus reached out over four centuries into the modern world in a more striking survival than any influence of Magna Carta.

There is a very great qualitative difference between a right to be dealt with according to law and a right to due process of law. According to law simply means in accordance with whatever the law provides; due process of law implies what the law should provide. This is certainly how the United States Supreme Court has interpreted the expression: as an entitlement to standard processes conducive to just results.

The statute of 1354 is therefore the real historical breakthrough. It is of greater significance to the constitutional heritage than Magna Carta. Perhaps the Australian government should have spent its money on a copy of the later statute so that we could gaze with awe and reverence upon the original use of this highly significant phrase.

It is true that Magna Carta may also be of some residual legal significance. In 1973 the Australian Capital Territory Law Reform Commission prepared a report on imperial statutes still in force in the territory, recommending which statutes should be repealed and which should be retained in force. The report recommended that the 1297 version of Magna Carta, which is still in force in the ACT, should be retained. The commission mildly dissented from the conclusion of its New South Wales counterpart that the value of the statute is chiefly sentimental. The ACT Commission thought that the phrase relating to the deferral of justice may make it unlawful for the executive government to delay unreasonably the rights of the citizen.[6] Similarly, in June of this year the ACT Supreme Court referred to Magna Carta as creating an overriding right to be dealt with by a court in relation to the traffic laws of the ACT.[7] So Magna Carta may be regarded as a living statute.

Even so, the conclusion may be drawn that the two provisions in question are a mere legal fragment, hardly worth the purchase of 1952 and the regard for the document before and since.

I want to suggest that Magna Carta has a significance which is not dependent on its content. This is its contribution to the history of constitutionalism, and, in particular, to the development of the concept of a constitution.

In order to appreciate this significance, it is necessary to realise that many concepts and institutions of government which we now take for granted and which we regard as obvious developed extremely slowly over a long period and in very small accretions. Even the most simple ideas and institutions have been a long time in developing. It is also necessary to appreciate that there are very few really new ideas or institutions. The modern epoch has made very few original contributions to government. A history teacher of mine used to ask his pupils to imagine that a Roman citizen of the 2nd century BC was brought back to life early in the 18th century, 2000 years later, to find that there were very few things in the world with which he was not familiar. If he were revived merely 200 years later, he would be amazed by the things he saw around him. Suppose, however, he were brought to this building and taken into the Senate chamber. He would immediately recognise the physical layout, the institution and its function. He would know that he was in a senate, a body for debating and resolving public affairs on behalf of the community. He would no doubt be delighted to learn that its very name is taken from his language and his institution. And however amazed he might be by the technology of the modern world, he would not be unfamiliar with most of the institutions and methods of government of the modern state. No doubt the vast scale of modern societies would surprise him, but there would be few political institutions not essentially similar to their ancient counterparts. (It is not true that representative government is an innovation of medieval times; it too was known to the ancients.[8])

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6 Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory.* Canberra, AGPS, 1973, p. 7.

7 'Speed fine makes slow trip through court', *Canberra Times*, 23 June 1997, p. 1.

8 As James Madison pointed out in *The Federalist*, no. 63, 1788, p. 324.

There have been two inventions in government in modern times. One of them is federalism as we now understand that term, the constitution by a people of two different levels of government each having a direct relationship with the people through election and the application of laws. Another modern invention is the written constitution. Both of these institutions were invented by the founders of the United States, justifying the boast of one of their mottos that they created *novus ordo seclorum*, a new order of the ages.

The idea of a written constitution, a supreme law of the country to which all other laws are subordinate and which can be changed only by some special process different from that applying to ordinary laws, now appears to us to be too obvious even to think about. Most countries now have constitutions. Historical references to the British constitution remind us that constitutions were not always the modern type of written constitutions; the expression was used to refer simply to the system of government of a country, which until modern times was prescribed simply by ordinary laws and practices.

The written constitution, although it first appeared at a particular point in history, was also the product of a very slow process of evolution. It was not discovered overnight by the gentlemen of Philadelphia in 1787.

There were two essential stages in the evolution of the written constitution. The first stage was the medieval charter. We would regard it as a massively simple and obvious concept that some of the principal rules of government should be codified and set down in writing. This also, however, had to be developed in stages. Ancient states largely depended on practice and custom, and when Aristotle set about collecting the 'constitutions' of states what he collected were descriptions of the governmental practices of the ancient cities. There were certainly some ancient antecedents of law codes, such as the Twelve Tables in which the principal laws of the early Roman Republic were codified. Medieval charters, however, added a significant new element. They were granted by kings to their subjects. The kings were placed in their positions by God, but they granted boons to their subjects. Medieval government was highly monarchical and personal: the king *was* the government. On the other hand, feudalism and the church created a sort of primitively pluralistic society. Those grants therefore often were concerned with agreed limitations on the otherwise unrestrained personal powers of kings and agreed rights of the subject (if only *great* subjects) which kings ought not to take away. Thus came about the notions of limitations on the power of governments and of subjecting governments themselves to law, as well as the notion of rights of citizens which could not be taken away by governments. These were great discoveries, however simple they may appear to us now, and they represent the contribution to constitutional history made by the medieval charters. The ancient republics had contributed checks and balances, the division of powers between different institutions of government and different office-holders, whose individual powers were limited, but the power of government itself was thought to be by definition limitless. The concept of personal rights was embryonic in ancient times. The notions of limiting the powers of government itself and recognising rights of the citizen against government were essentially medieval contributions.

Of course, kings were sometimes forced 'at the point of the sword' to agree to limitations on their powers and to recognise rights of their subjects. This was famously the case with Magna Carta. King John was not only tyrannical but exceptionally devious, and so when his grand subjects rebelled they determined not only to make him change his ways but to force him to sign an agreement which would be difficult for him to slide out of in the future. It could be said that in this process bad kings make good laws: the more oppressions your king engaged in, the more prescriptions against them you would seek. As we know from A.A. Milne's poem and *1066 And All That*, King John was a very bad king, and when he was brought to book, without intending any pun, he made an exceptionally good law by the standards of the time. Thus occurred Magna Carta, the Great Charter. The statutes of 1297 and 1354, usually depicted as the work of wise and benevolent monarchs co-operating with good parliaments, had a great deal to do with those monarchs' need of money.

It is significant that the barons of 1215 had the advice and assistance of a clerk, in the original meaning of that title, the Archbishop of Canterbury, Stephen Langton. Clerks have a proclivity for writing things down. In its uneasy relationship with the secular powers, the church had a great interest in protecting its rights and in getting things in writing, and this also contributed to the development of charters.

Magna Carta was repudiated by King John virtually immediately after its signature, and, although confirmed by needy sovereigns on subsequent occasions, was also ignored by other monarchs. This only served to ensure its survival, because every subsequent resistance to royal power, especially those of the 17th century, was able to have history on its side by appealing to the Great Charter. What is often called the myth of Magna Carta reflected the relative successes of the English revolutions.

The other stream contributing to the development of the written constitution was the covenant, an agreement between a people and their God, and later between people to constitute a church, a society and ultimately a form of government. The biblical idea of a covenant was revived during the Protestant Reformation and played a large part in the revolution and civil war in England in the 17th century. It was taken by the refugees from those events to the New World. Covenants were a feature of the American colonies from the earliest settlement. The Mayflower pilgrims agreed to 'covenant and combine together in a civil body politic'.[9] The history of colonial America thereafter is littered with covenants, which became more and more secularised and more sophisticated as they developed one from another. They were the forerunners of the various state constitutions which were the forerunners of the federal constitution of 1787.

Of course, America also had royal charters, and these also influenced the development of the various constitutions, in a significant way, as will be seen.

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[9] W. Berns, *Taking the Constitution Seriously*. New York, Simon and Schuster, 1987, p. 25.

Establishing a system of government by a covenant meant that the covenant could be changed only by agreement of the whole people, which necessarily involved a procedure different from that applying to ordinary laws. The institution of federalism also reinforced the special status and different method of changing the constitution: because it was an agreement between the people of the states it could be changed only by the people of the states speaking through their representatives at state level, and necessarily it had to be supreme over state laws. Thus arrived the modern written constitution.

The founders of the United States were insistent that their constitution was a covenant not a charter, in other words, an agreement between a people not a grant from a king. They retained, however, the charter tradition of limiting government power and recognising rights. This was so even before they amended the constitution to include a bill of rights: the unamended constitution of 1787 contained a number of prohibitions on the national government and protections of the rights of the citizen.

The subsequent debate over whether the constitution should include a bill of rights illuminates the vital contribution of the medieval charter to constitutionalism. Reference has been made to the ambivalent attitude of the Americans to Magna Carta. Those who favoured a bill of rights, that is, provisions explicitly limiting the power of government in respect of the expressly recognised rights of the citizen, tended to look favourably upon the great precedent of the Magna Carta. Those who opposed a bill of rights did so partly on the basis that the concept of a bill of rights was derived from medieval charters such as Magna Carta which were handed down by kings, and was therefore inappropriate to a constitution established by the contrary process of an agreement between people. James Wilson, the greatest constitutional theorist among the founders, explained that a grant of rights like Magna Carta could be made only by a king with sovereign powers, not by a government with a limited delegation of power by a sovereign people who retain their *natural* rights.[10] Contrary assessments of Magna Carta were thus central to the debate over a bill of rights.

As the debate progressed it became clear that agreement to a bill of rights was essential to achieve the adoption of the constitution. Opponents of central government regarded it as worthy of the same suspicion as kings. The operations of the new state constitutions had also taught a valuable lesson: even popularly elected governments should be explicitly limited; rights had to be safeguarded against popular majorities as against kings. The leading opponents of a bill of rights therefore undertook to support amendments to insert one. So a bill of rights was included by the first ten amendments in 1791. The charter and the covenant were combined and the medieval discoveries represented by Magna Carta thereby entered into the modern world.

The Australian Constitution exhibits an explicit combination of the charter tradition and the covenant tradition. It is a charter in the sense that it was handed

[10] Debate in the Pennsylvania Convention, 1787, in *The Debate on the Constitution*. vol. 1, p. 808; see also items in notes 1 and 3, and G.S. Wood, *The Creation of the American Republic, 1776–1787*. New York, Norton & Co., 1972.

down by the British sovereign through her Parliament and bestowed on the people of the country. It is a covenant in that it was drawn up by the representatives of those people and approved by them in a referendum, and it can be changed only by the same means. It neglects the charter tradition, however, by not having a statement of rights. In that respect the American constitution emphasises the charter tradition to a greater extent than its Australian counterpart. It is ironic that by the 19th century the British had repudiated the charter tradition by their hostility to declarations of rights.

If Australia becomes a republic one of the changes required will be to turn the Constitution into a completely autochthonous product instead of a document bestowed by the monarch. This requirement particularly affects the so-called covering clauses of the Constitution, the provisions which are part of the British statute containing the Constitution but not part of the Constitution itself. There are differences of opinion about whether the covering clauses can be amended by the people in a referendum under section 128 of the Constitution, or whether they would need to be amended at all if the change were to take place. This problem is really a problem of turning a charter bestowed by a monarch into a covenant agreed to by a people. On the other hand, if a bill of rights were to be included in the Constitution this would introduce and emphasise the more significant element of the charter tradition.

In one respect Australia could benefit by a large injection of the charter tradition. Perhaps because of our convict origins, when we started with governors possessing absolute powers, we do not have a great understanding of the virtues of limiting governments and putting safeguards between the state and the citizen. We tend to think that, provided that governments are democratically elected, they should be able to do anything. In short, we do not have a strong tradition of constitutionalism properly so called. Our version of the so-called Westminster system encourages our leaders to think that, once they have foxed 40 per cent of the electorate at an election, they have the country by the throat. Our prime ministers and premiers are averse to being told that anything is beyond their lawful powers, and are angered by restraints applied by upper houses or judges. They frequently behave in ways which make King John and Charles I seem moderate by comparison. When they have majorities in both houses of Parliament they become more like those monarchs' eastern contemporaries. We have not had a Magna Carta, or a Petition of Right, or a Bill of Rights as part of our own history, and we have not sufficiently valued what we have inherited from those great events. We should, particularly at this time, tap into that inheritance.

So perhaps after all we may gaze upon our copy of the Magna Carta with some awe and reverence, not because of its content or for its legal significance but for the contribution it made to the development of the written constitution and the concept of rights of the citizen. In a sense, all written constitutions, including our own, and all declarations of rights, are its descendants. Remembering that, and other aspects of history to which I have referred, may help us a little on our way into another century.

Franca Arena and Parliamentary Privilege*

Harry Evans

Although the federal and state parliaments of Australia have the power to alter the law of parliamentary privilege by legislation, some core element of parliamentary privilege may be constitutionally entrenched because it is essential for the ability of the parliaments to function, and to that extent parliamentary privilege may therefore not be amenable to alteration by statute.

This was perhaps the most interesting constitutional implication of the Franca Arena saga, which was played out in the New South Wales Parliament and the New South Wales courts and the High Court late in 1997.

Parliamentary privilege is a generic term which refers to legal immunities and powers of the houses of the various parliaments. Those immunities and powers are a notable feature of Anglo-American legislative institutions inherited from the British Parliament.

The Commonwealth Constitution provides in section 49 that the powers, privileges and immunities of each house of the federal Parliament may be declared by the Parliament, and, until so declared, are those of the House of Commons as at 1901. The constitution Acts of the various states, with the notable exception of New South Wales, contain similar provisions prescribing their immunities and powers by reference to those of the House of Commons at a particular date or for the time being. The New South Wales houses rely for their immunities and powers solely on common

* This article was first published in *Constitutional Law and Policy Review*, May 1998.

law, which determines the immunities and powers reasonably necessary for a legislature to function. All of the parliaments seemingly can alter their immunities and powers by legislation. Only at the Commonwealth level has this legislative power been utilised to any significant extent, and the Commonwealth *Parliamentary Privileges Act 1987* is only a partial codification of the existing law.

The identification of the immunities and powers of the houses is therefore largely a matter of consulting British common and statutory law on the subject. The content of that law is fairly well established. There is only one immunity of any substance possessed by the houses and their members: the immunity of parliamentary proceedings from any question or impeachment in any court or tribunal. This immunity is statutorily enshrined in article 9 of the Bill of Rights 1689 in the following terms:

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

The immunity is usually referred to as freedom of speech in parliament, because it means that a member of parliament cannot be called to account before any court or tribunal for speeches in parliament. This famously has the effect that a member cannot be sued for defamation contained in a parliamentary speech. This characterisation of the immunity is somewhat misleading, because it has a much wider application. The houses and their members cannot be called to account in any way in legal proceedings for any of their parliamentary actions, and no body can inquire into proceedings in parliament except the houses themselves. This means, for example, that a royal commission or other commission of inquiry appointed by the executive government cannot inquire into proceedings in parliament.

The scope of the activities included in proceedings in parliament and therefore protected by the immunity is not entirely settled. Such proceedings are statutorily defined to include at the federal level, and are generally taken to include at the state level, all words spoken and actions done in the course of the transacting of parliamentary business and in the course of transactions closely associated with that business. There is room for dispute, however. In 1995 a Western Australian royal commission (the Royal Commission into Use of Executive Power) inquired into the circumstances surrounding the presentation of a petition to the Legislative Council. It was clear that the actual presentation of the petition was a proceeding in parliament and therefore not amenable to the inquiry. Some of the matters examined by the commission, for example, advice given by the Clerk of the Council to members, were arguably also protected by the immunity. A legal challenge to the commission by Dr Carmen Lawrence, who was involved in the matter, was not pursued to a conclusion.

The immunity known as freedom of speech in parliament has long been regarded as essential to allow a parliament to debate and inquire freely on behalf of the public without fear of retribution of any kind. Without it, members who would otherwise expose abuses through parliamentary forums could be harassed into silence by the executive government and other powerful interests using legal proceedings and executive-appointed inquiries.

The immunity adheres in the terms of article 9 of the Bill of Rights to the federal houses and those of the states with House of Commons immunities conferred by their constitutions. The New South Wales houses have a common law immunity which appears for practical purposes to be identical in content.

The only power of substance possessed by the houses is the power to punish contempts. This power principally supports the power to conduct parliamentary inquiries, and, for that purpose, to compel the attendance of witnesses, the giving of evidence and the production of documents, and to punish defaults as contempts. Because the New South Wales houses do not statutorily possess House of Commons powers, their power to punish contempts appears to be more circumscribed than that of their counterparts in other jurisdictions.

In recent years there has been concern about the ability of members of parliament to abuse their freedom of speech by recklessly defaming in their speeches persons who then have no redress. This has led to the adoption by various houses, starting with the Australian Senate in 1988, of procedures whereby such persons may make a privileged response to allegations made about them in the houses. An incidental effect of the Franca Arena affair, as it may now be known, was the adoption of those procedures by the New South Wales Legislative Council. It is conceded by their proponents that the procedures provide only limited and often delayed redress, and are inadequate when very serious and damaging allegations of official corruption are made under parliamentary privilege.

Such was the case with speeches made in the Legislative Council by the Honourable Franca Arena. Mrs Arena's contributions culminated in a speech in the council on 17 September 1997 in which she alleged, in effect, that there was a conspiracy between the Premier, the Leader of the Opposition and the royal commissioner inquiring into alleged police protection of paedophilia, Justice Wood, to suppress findings against 'people in high places'.

This allegation was so politically damaging that political leaders considered that it was essential to conduct some inquiry into it.

The most readily available and, because of parliamentary privilege, the only lawful avenue of inquiry would have been an inquiry by the council itself through one of its committees. This was apparently the only form of inquiry acceptable to Mrs Arena. While the council, as has been indicated, possesses powers of inquiry theoretically adequate to the task, such a treatment of the matter would have had a great political drawback: it could be seen as politicians inquiring into themselves. There is also a parliamentary rule of comity between houses that one house does not inquire into the conduct of members of the other house, except ministers acting in that capacity. An inquiry by the council into Mrs Arena's allegations would involve inquiry into the conduct of members of the assembly.

For these reasons some independent commission of inquiry was called for. To any such body, however, the law of parliamentary privilege opposed a barrier. Mrs Arena's speech was undoubtedly a proceeding in Parliament and therefore could not be the subject of inquiry by any body other than the council itself. Attention was

therefore directed to the possibility of the Parliament using its legislative powers to alter its immunities so as to permit an inquiry into Mrs Arena's allegations.

This was the course adopted, but it was approached with great caution. The importance of freedom of speech in parliament to the operation of a parliamentary system, and the danger of legislative dilution of that immunity, obviously weighed heavily on the minds of the legislators. The statute which was eventually passed[1] provided that a house of the Parliament could by resolution authorise a special commission to inquire into and report to the house on a specified matter relating to its proceedings. Such a provision would seem to be sufficient in itself to overcome the problem of parliamentary privilege, because any inquiry under the provision would clearly be an inquiry by the council itself into its own proceedings, through an agent authorised by the council. The clarity of the provision was diminished by an involvement of the state Governor in setting the commission in motion and receiving its report; no doubt this was done to retain some control by the government over inquiries initiated by the council. Further precautions, however, were taken. In order for the special commission to proceed with an inquiry, a house would have to declare by resolution that parliamentary privilege would be set aside to the extent required for the inquiry. Such a waiving of parliamentary privilege would not operate to set aside the privilege attaching to the contributions to parliamentary proceedings of an individual member, but would authorise the member to give evidence voluntarily before the special commission. Resolutions under the provisions would require a two-thirds majority of the members present and voting.

Mrs Arena challenged the validity of this legislation in the courts. Given that parliamentary privilege at state level is a matter on which the state parliament may legislate, there was obviously considerable difficulty in advancing coherent and persuasive grounds of challenge. Several grounds were raised, the principal ground being that parliamentary privilege is essential for the operation of a legislature and therefore cannot be legislatively waived. The Supreme Court of New South Wales rejected the challenge to the statute without giving any credence to this argument. Leave to appeal to the High Court was sought, but was refused. In the course of refusing leave, Chief Justice Brennan made the following significant observations:

> The critical question on the present application is whether the Act so affects the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament itself. If an affirmative answer could be given to that question, the applicant would have made a case for the grant of special leave. But whatever limits there might be upon the powers of Parliament legislatively to affect its privileges, it is not possible to regard this Act as exceeding those limits. … Nothing that we have said should be thought to diminish the importance which the Courts have traditionally accorded to the privileges of the Parliament … [2]

This raises the possibility that a different statute, less carefully crafted, might have been held to be invalid on the stated ground. To some extent the law of parliamentary privilege may be constitutionally entrenched notwithstanding the power of

1 *Special Commissions of Inquiry Amendment Act 1997*.

2 *Arena v Nader and Others* [1997] 42 NSWLR 427 at 1605.

parliaments to alter it by legislation, a power which, it might have been thought hitherto, is unlimited. If a malign majority in a parliament were to legislate, say, to take away the immunity of individual members and allow them to be prosecuted for their parliamentary actions, the courts might well strike down such legislation as taking away something essential to the very institution of parliament.

There have been other judicial hints that there may be some basic constitutional and common law principles beyond repudiation by statute although they are not explicitly constitutionally entrenched or even constitutionally implied. This notion has been suggested even in relation to the states, notwithstanding that their parliaments were long thought to have inherited untrammelled legislative sovereignty from the British legislature. Parliamentary privilege, or at least freedom of speech in parliament, may be added to the list of matters thought by some to have this sacred status.[3]

A special commission, duly authorised by the Legislative Council, and consisting of Mr J.A. Nader, QC, a retired judge of the Supreme Court of the Northern Territory, inquired into Mrs Arena's allegations. Mrs Arena declined to give evidence before the commission. The commission found that there was no evidence to support her allegations and dismissed them accordingly.

The question of the propriety of her conduct was then referred to the Legislative Council Privileges and Ethics Committee, which is to consider a suggestion that she be expelled from the council. The power to expel a member is undoubtedly possessed by the New South Wales houses and by houses with House of Commons powers, but was denied to themselves by the federal houses in their 1987 legislation.

The council also referred to the Police Commissioner documents provided by Mrs Arena in support of her allegations. A report by the commissioner is to be considered by the Privileges and Ethics Committee.

The special legislation passed by the New South Wales Parliament is to expire in accordance with a sunset clause contained in it.

The lesson will no doubt be drawn from this case by parliaments that they must be very careful in legislating in the area of parliamentary privilege; they cannot assume that their legislative power is at large. Any adventurous tampering with the basics may invite equally adventurous judicial review.

In recent times, indeed, there has been something of a spate of court cases on parliamentary privilege. This is largely due, no doubt, to the increasing number and importance of parliamentary committee inquiries and upper houses kicking over the traces of government control. In another New South Wales case, *Egan v Willis and Cahill*,[4] the Supreme Court was called upon to determine the extent of the Legislative Council's power to compel the production of documents by a minister. The Court found that the council possesses the power to order the production of documents, and

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3 This matter is analysed by G. Winterton, 'Constitutionally entrenched common law rights: sacrificing means to ends?', in C. Sampford and K. Preston, *Interpreting Constitutions*. Leichhardt, NSW, Federation Press, 1996, pp. 121–45.

4 [1996] 40 NSWLR 650.

acted within its powers in suspending a minister from the council as a penalty for failure to produce documents in accordance with an order. The case has gone to the High Court. Also before the High Court are two cases concerning federal parliamentary privilege, *Katter v Laurance* and *Rowley v O'Chee*, both originating in Queensland. The first involves the use of statements in parliament to elucidate statements outside parliament which are the subject of defamation action; the second involves a claim by a senator to immunity from orders for discovery of documents provided to the senator for the purpose of proceedings in the Senate. The scope of freedom of speech in parliament is therefore in issue in both cases. It seems that the courts will become more involved in determining questions of parliamentary privilege. The very extensive American case law on the subject, which was referred to in the Egan case, may be influential in this process. It will not be a matter of judicial activism, but of parliamentary activism drawing in the courts.

Constitution, Section 57: Comments on Article by George Williams*

Harry Evans

The article by George Williams[1] is not an adequate presentation of the point in issue about s.57.

The article begins with the claim that s.57 'is designed to enable a government in control of the House of Representatives to enact legislation in the face of a hostile Senate'. This interpretation of s.57 was submitted by the then government but explicitly rejected in the only substantive High Court judgement on the matter[2]. The claim that 'the intention of s.57 was to secure the effectiveness of the will of the House of Representatives in any event' was rejected as 'an unnatural reading of the section' in favour of an interpretation of the section as 'a means by which the electorate can express itself and perhaps thus resolve the "deadlock" which has been demonstrated to exist between the House and the Senate'. It is misleading to return to the erroneous notion that the purpose of a double dissolution is to 'ensure that the will of the House prevails'.[3]

Similarly, the article claims that the High Court will 'favour a course which will avoid it having to delve too deeply into the internal affairs of Parliament'. But delving into

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* This paper was first published in *Constitutional Law and Policy Review*, August 1998.

1 G. Williams, 'The Native Title Amendment Bill 1997 (Cth): a double dissolution trigger?', *Constitutional Law and Policy Review*, August 1998, p. 35.

2 *Victoria v Commonwealth* (the PMA case) (1975) 134 CLR 81.

3 ibid. at 125–6 per Barwick CJ. See also Stephen J at 168–9.

the internal affairs of Parliament is precisely what the court did in its judgement on s.57. The argument that the processes set out in s.57 should be regarded as the internal affairs of Parliament was explicitly rejected. Having determined whether the Senate had failed to pass a bill, there is no reason why the High Court should refrain from determining whether there was a disagreement between the houses over amendments within the terms of the section.

The article glosses over the statement by Barwick CJ, the only justice to refer explicitly to the point in issue. It is worthwhile quoting the passage in full.

> The expression in s 57 is 'passes it with amendments to which the House of Representatives will not agree'. Those words would not, in my opinion and with due respect to a contrary opinion attributed to Sir Kenneth Bailey,[4] necessarily be satisfied by the amendments made in the first place by the Senate. At the least, the attitude of the House of Representatives to the amendments must be decided and, I would think, must be made known before the interval of three months could begin. But the House of Representatives, having indicated in messages to the Senate why it will not agree, may of course find that the Senate concurs in its view so expressed, or there may be some modification thereafter of the amendments made by the Senate which in due course may be acceptable to the House of Representatives. It cannot be said, in my opinion, that there are amendments to which the House of Representatives *will* not agree until the processes which parliamentary procedure provides have been explored.[5]

The fact that a Chief Justice said this is less important than its conformity with appropriate parliamentary processes and the purpose of a s.57 of resolving genuine disagreements between the houses. George Williams' article in that respect neglects the following points:

- The process of returning a bill to the Senate with the Senate's amendments disagreed to is not merely a course which *may* be followed; it is the course which is regularly followed, hitherto, so far as I can tell, invariably, including in the case of the bill which provided the basis for the double dissolution in 1951. The treatment of the Native Title Bill is conspicuous in its departure from the normal process.
- Treating a bill in this way blurs the distinction between rejecting a bill and amending it. Amending a bill then becomes the virtual equivalent of rejecting it if the government chooses so to treat it. If the framers of s.57 had wanted to treat the amendments of a bill as the equivalent of rejecting it they could have spared themselves the trouble of expanding the section with the various phrases intended to accommodate disagreements over amendments.[6]
- If the government in the House of Representatives accepts some Senate amendments, as in the case of the Native Title Bill, how can it be said that there is a disagreement between the houses if the Senate has not been given

4 The opinion of the Solicitor-General now relied upon by the government and referred to by George Williams.

5 PMA case, 134 CLR at 125. Emphasis in original.

6 cf. Stephen J. ibid. at 168–9.

> the opportunity to decide whether it is satisfied with the amendments accepted? It is fallacious to argue that the existence of a disagreement is revealed when the bill returns after a three month interval. In its second consideration of the Native Title Bill, which then included some of its earlier amendments, the Senate made different amendments in an attempt to reach agreement, and again the government accepted some of those amendments but did not provide the opportunity for the Senate to consider whether it was satisfied with those amendments.

These matters remind us that the purpose of traditional parliamentary procedures is to seek agreement. Section 57, in its references to amendments, contemplates that those procedures will be used in an attempt to reach agreement before the section is resorted to as a means of resolving a remaining disagreement. It must be remembered that what the framers had in mind was a system of legislation by representative assemblies, not a system of executive domination.

Even if all this is regarded as arguable, why would a government run the risk of going through the whole process of a double dissolution and a joint sitting only to have the legislation passed by that process found to be invalid? Why would a government not emulate the wise caution of its predecessor in 1951? The explanation for this risk being run has been suggested in the Senate: the Native Title Bill was treated in this way because the government was anxious to have the first stage of a double dissolution 'trigger' before the House rose for the Christmas break in 1997. It is the only plausible explanation so far advanced, and it means that the political timetable determined the course of action rather than sound legal advice.

Postscript

The Native Title Amendment Bill 1997 will now not provide a ground for a double dissolution.

Following negotiations between the government and Senator Harradine, the bill was again presented to the Senate and finally passed on 8 July 1998.

The way in which this was done is of some interest. The bill had been laid aside in the House of Representatives after some of the Senate's amendments were rejected by the government in the House on the second consideration of the bill. Laying a bill aside is usually regarded as terminating the proceedings on the bill. In recent times, however, the Senate has revived and passed bills which have been rejected at the third reading, which normally is regarded as a complete rejection of a bill. Taking a leaf from the Senate's book, the government revived the Native Title Bill in the House of Representatives, adjusted its response to some of the Senate's amendments, made some further amendments reflecting the agreement with Senator Harradine, and returned the bill to the Senate for reconsideration. After two days of debate and reconsideration of the various amendments, the Senate agreed to the action taken in the House of Representatives and, both houses having agreed to the same sets of amendments, the bill was thereby finally passed.

In adopting this course, the government temporarily forfeited its claim that the bill had met the conditions of s.57 for a double dissolution, because returning the bill to

the Senate suspended, as it were, the second stage of the 'trigger'. If the Senate had not agreed to the action taken in the House there would clearly have been a disagreement between the houses over amendments within the terms of s.57. Similarly, if the Senate had unreasonably delayed consideration of the revived bill, there would have been a failure to pass it. The government's claim that the bill had met the conditions for a 'trigger' would thereby have been considerably strengthened.

The Other Metropolis: The Australian Founders' Knowledge of America*

Harry Evans

It is well known that the framers of the Australian Constitution drew extensively upon the United States constitution for many aspects of their creation. This is best demonstrated by the impressive list of the characteristics of the Australian Constitution drawn directly from the American model: the employment of special procedures, different from those applying to normal legislation, for consulting the people in establishing the Constitution and for amending it; the special legal status thereby given to the written constitution; the division of powers between the central and state governments; the prescription of the powers of the national government in the written constitution; the establishment of a constitutional court to interpret and enforce the constitution; the delegation of national legislative power to two elected houses of parliament of virtually equal competence, each representing the electors voting in different electorates and reflecting the geographically pluralistic character of the country. It is equally well known that the founders incorporated a very significant feature alien to the American model and drawn from the British system: responsible or cabinet government, whereby the executive government consists of ministers having the support of a party majority in the lower house of the parliament. If the Constitution is considered as a paper model, however, one would have to say that the institutions drawn from the United States dominate those drawn from the United Kingdom.

* This article was first published in *The New Federalist*, no. 2, December 1998. The research assistance of Kay Walsh is gratefully acknowledged.

That is not how it has worked out in practice. Cabinet government has come to dominate the other elements. This is primarily a matter of the prevailing concept of the Constitution, how the Constitution is regarded by those who work within it, influencing its practical operations, rather than the other way around. From about 1910 until recently there was a remarkable forgetfulness about the origins of the elements of the Constitution. There was an overwhelming concentration on its British antecedents. This eventually led to the automatic and unthinking use of the term 'Westminster system' to describe Australian government. To determine how it should work, Westminster norms were consulted and cited as authoritative. Westminster precedents were binding in the conventions of government.[1] Explicit statements by leading founders, that the elements of the Constitution drawn from the United States, generically called its federalist elements, made our system, as designed, very unBritish,[2] were ignored. The federalist elements came to be regarded much as a family regards some large and weighty pieces of furniture acquired by the will of a respected ancestor: it would not do to get rid of them, but they had to be kept out of the living areas. The concept of the Constitution largely explained the way in which the system actually worked. For example, the relative quiescence between about 1920 and the 1950s of the Senate arose from the prevailing view, shared by the senators who determined its activities, that it was a kind of colonial shadow of the House of Lords, notwithstanding the explicit statements of leading founders that it was intended to be nothing of the sort.[3]

This development of constitutional theory and political practice reflected the political and cultural history of the country. The emergence of the Labor Party, which largely had not participated in the federation movement and had little sympathy for constitutional checks and balances and things American, compelled the non-Labor parties to merge and then to line up behind the banner of the Empire and all things British. Both sides of politics thus came to view the apparatus they aspired to control as a 'Westminster system'. Changes in the world outside reinforced this development. The world view of the statesmen of the 1890s was confident, optimistic and outward looking: in the inevitable triumph of liberalism, democracy and parliamentary government the two great constitutional models provided by the English-speaking peoples were seen as making an equal contribution. The darker horizons of the 20th century discouraged such an outgoing view of the world. The isolation of Britain in the South African war, and the international crises and threats of war leading up to the disaster of 1914–18, encouraged Australians to see themselves as members of a great world Empire which offered some protection to them in their insecurity. There was, to paraphrase Hilaire Belloc, a clinging to nurse in fear of meeting something worse. We are still emerging from that period, and this is reflected in thinking about the Constitution and its history as in other areas of our culture.

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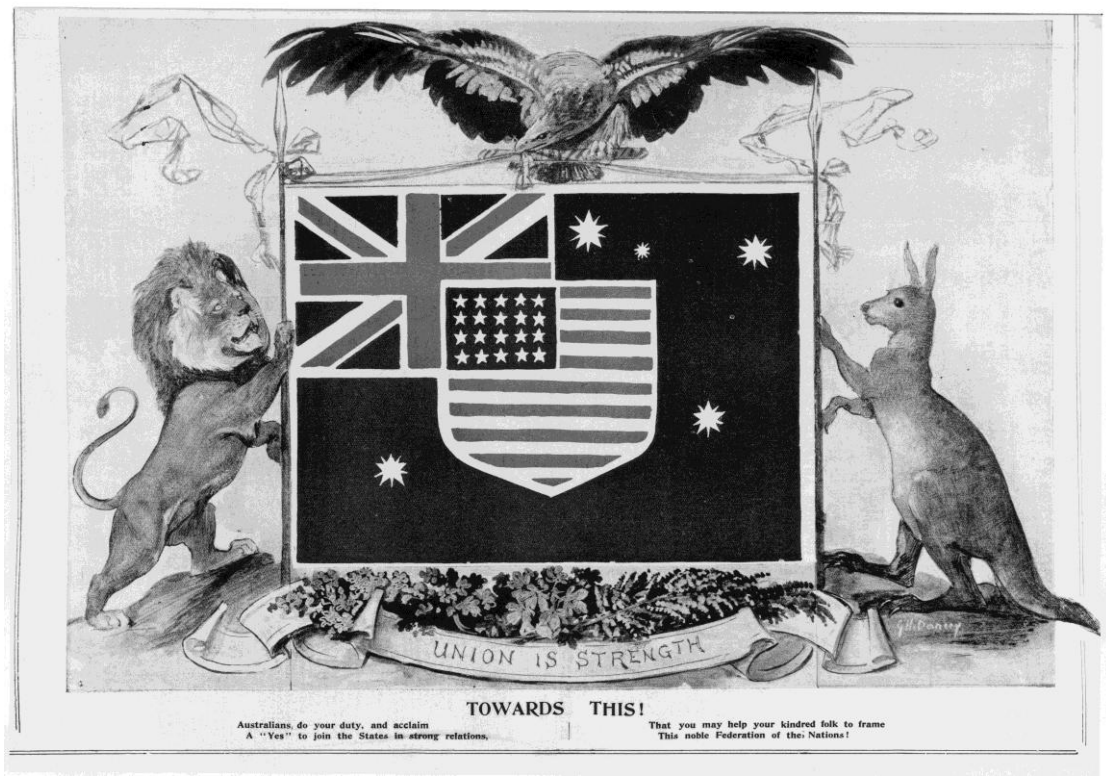
1 For the Westminster hegemony and the rediscovery of the federalist heritage, see C. Sharman, 'Australia as a compound republic', *Politics*, May 1990, pp. 1–5; B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*. Cambridge, Cambridge University Press, 1995. The latter points out that the High Court, in the *Engineers* case, joined the retreat from federalism.

2 *Official Record of the Debates of the Australasian Federal Convention* (hereafter *Debates*), Richard Baker, 17 September 1897, p. 789. The convention debates are online at www.aph.gov.au/senate/pubs/index.htm.

3 *Debates*, Richard Baker, 17 September 1897, p. 784.

Federation celebrations, Pitt Street, Sydney, 1901
nla.pic-vn3789521, National Library of Australia



Melbourne Punch, 2 June 1898

This change in perception did not affect only the political elite. The photographs and drawings accompanying this article, illustrating the federation movement and the federation celebrations in 1901, are remarkable for the display of American flags and the adoption of American republican symbolism in connection with federation. This indicates a popular perception that federation owed much to the example of the United States, a perception which also changed as the country entered this century.

It is perhaps a result of historiographical anachronism, reading back into a past epoch the characteristics of an intervening period, that something of a minor myth has grown up about the knowledge the Australian founders had of the United States model on which they so readily drew. It is generally thought that they had only a fairly superficial acquaintance with the constitution and government of the republic for which many of them expressed their admiration.

This view is reflected in the authoritative account of the composition of the Constitution, Professor J.A. La Nauze's 1972 work, *The Making of the Australian Constitution*. This study conveys an impression that, in talking about the United States constitution, most of the founders did not know as much as they should have known. It is conceded that Andrew Inglis Clark had a fairly detailed knowledge of American constitutional law and governmental practice, but he was an exception, and, of course, he was not at the convention of 1897–98. La Nauze recounts an embarrassing incident which suggests that, when it came to United States precedents, only Inglis Clark really knew what he was talking about.[4] The great Edmund Barton, no less, acquiesced at the Melbourne session in 1897 in the striking out from the draft of the provision about the original jurisdiction of the High Court in cases in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Barton and his fellow delegates apparently did not appreciate the reason for this provision. Inglis Clark had to point out to the great man by telegram from Hobart that the provision was designed to avoid the application of an early decision of the United States Supreme Court, in *Marbury v Madison*, which could otherwise be followed in Australia and cause difficulty for Australian law. The judgement is now regarded as a foundation of American constitutional law and is well known to all students of that law. Recent controversy about judicial review has added to its importance, and it is not clear that it had the same status one hundred years ago. In any event, Barton, and those delegates he said he consulted, appear to have been ignorant of the case and the point in issue.

In the absence of Inglis Clark, delegates to the 1897–98 convention, according to La Nauze's account, relied very heavily on a book by an Englishman, James Bryce's *The American Commonwealth*, which was the 'bible' of the convention.[5] In 1891 their knowledge was fairly superficial, but there was 'evidence of much more serious

4 J.A. La Nauze, *The Making of the Australian Constitution*. Carlton South, Vic., Melbourne University Press, 1972, pp. 233–4. Another account of the incident, with a similar interpretation, is in A.C. Castles, 'Andrew Inglis Clark and the American constitutional system' in M. Haward and J. Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Hobart, Centre for Tasmanian Historical Studies, 1995, pp. 15–18.

5 La Nauze, op. cit., pp. 18, 273.

homework in 1897–8'. Even so, apart from Bryce, they relied on 'standard studies and commentaries'.[6]

A more detailed examination of the founders' references to the United States indicates that, while they did not recall *Marbury v Madison*, they were more knowledgeable than La Nauze's account, and the general impression largely flowing from it, would suggest. There is not space here to recount such a detailed examination. This thesis may be illustrated, however, by a consideration of the debate in the conventions about the Senate, perhaps the most conspicuous borrowing from the United States. The exchanges about the Senate, which pitted the federalists, the devotees of the example of the Great Republic, against the responsible government men, followers of the British-is-best school, suggests that the state of their knowledge was fairly good.

In the first place, they appear to have been better read than La Nauze suggests. Even in 1891 they were not confined to Bryce, and references were made to the writings of J.R. Lowell, former United States ambassador to Britain, and Woodrow Wilson, then a law professor.[7] Several delegates appear to have closely read the accounts of the debates at the 1787 Philadelphia convention at which the United States constitution was drafted. These accounts are now seldom referred to except by close students of American constitutional history. Thus, at the 1891 convention, when the more serious homework had not been done according to La Nauze, Richard Baker interposed when an impasse appeared to have been reached about the Senate, to suggest that perhaps a Philadelphia precedent should be followed by the establishment of a 'committee of compromise' to consider the views and the options.[8] In 1897 at Adelaide, Bernhard Wise pointed out that the somewhat acrimonious debate on equal representation in the Senate had all been played out before at Philadelphia, and had included a contribution, quoted by Wise, by a delegate from Delaware named George Read.[9] At Adelaide Patrick Glynn referred to *The Federalist* no. 72, noting that it was not certain whether it was written by Hamilton or Madison.[10] At Sydney in 1897 Josiah Symon quoted the correspondence of Samuel Adams.[11]

Perhaps delegates were led to this sort of knowledge by the 'standard commentaries'. They appear to have used the latter, however, more as sources of institutional theories and arguments than of facts or law. In 1897 at Sydney, Wise, referring to the wisdom of the scheme of representation in the Senate, quoted Story's *Commentaries*, a work which is included in La Nauze's list of the literature to which delegates referred, not as a legal text but as an exposition of the theory of representation.[12] It is true that, in 1891, when discussing a proposal to have the Senate directly elected rather than appointed by the state legislatures as in the United States, Charles Kingston quoted a passage from Bryce,[13] but this, as will be suggested, rather denotes an alertness to developments in the United States than an over-reliance on that source.

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6 ibid., pp. 274–5.

7 *Debates*, Richard Baker, 17 March 1891, p. 439, 1 April 1891, pp. 543, 545.

8 *Debates*, 16 March 1891, p. 393.

9 *Debates*, 25 March 1897, pp. 105–6.

10 *Debates*, 15 April 1897, p. 664.

11 *Debates*, 10 September 1897, p. 296.

12 ibid., pp. 325–6.

13 *Debates*, 2 April 1891, pp. 596–7.

Apart from their book-learning, some of the delegates displayed an acquaintance with American government and politics and an up to date knowledge of how they worked in the 1890s. An example is provided by an exchange between Alfred Deakin and John Cockburn at the 1891 convention, in which the latter referred to the way in which positions in the US Senate had come to be contested in state legislative elections and were the subject of much political manipulation. Deakin was alert to a significant difference between the Australian colonial legislatures and those of the states in the United States: in all states both branches of the latter were elected and had no equivalent of the nominated upper houses of Australia.[14]

Kingston improved on quoting Bryce: he had conferred with the author and invited comments on the draft Australian Constitution, which resulted in Bryce's endorsement of the proposal for senators to be directly elected as a cure for the problems of the US Senate.[15]

The delegates were also not lacking in practical experience. Inglis Clark was not the only founder to visit America. Old Henry Parkes regaled the 1891 convention with an account of his visit to Washington in 1882 on a trade mission, during which he conversed with the President, the Secretary of State and congressional leaders, and was disgusted to discover the Senate meeting in closed session (a practice which it continued in relation to some business until 1929).[16] At Sydney in 1897, Josiah Symon referred to his travels around the United States and his talks with American political figures.[17] Kingston also referred to discussions he had while in America.[18] Those who argued against equal representation of the states in the Senate constantly referred to the anomaly of Nevada, which was entitled to elect two senators in spite of its tiny population and its domination by a single mining industry. Deakin, in supporting equal representation in the Senate, was able to trump this argument: he had visited Nevada, but a first hand examination of it had not altered his view.[19]

A seemingly advanced knowledge of developments in the United States also explains the significant change which was made between the 1891 constitutional convention and that of 1897 from a Senate appointed by the state parliaments to one directly elected by the people of the states. The 1891 draft constitution bill provided for the Senate to be appointed by the state legislatures; in this it followed the constitution of the United States, under which the US Senate was so appointed until an amendment in 1913. The 1897 bill provided for the proposed Australian Senate to be directly elected.

This change is conventionally attributed to the 'advance of democracy' in the Australian colonies in the period between the two conventions. Quick and Garran's *Annotated Constitution of the Australian Commonwealth* offers this explanation, while also referring to evidence placed before the 1897 convention of the

14 ibid., p. 592.

15 *Debates*, 10 September 1897, pp. 287–8.

16 *Debates*, 13 March 1891, p. 318.

17 *Debates*, 10 September 1897, pp. 297–8.

18 ibid., p. 287.

19 ibid., p. 336.

unsatisfactory nature of the US system.[20] La Nauze in effect adopts the advance of democracy thesis. He also conveys the impression that the change in the draft bill emerged from a 'secret' drafting committee and simply reflected the prevailing view amongst the delegates.[21]

Events usually have many causes, and the 'advance of democracy' was undoubtedly one of the causes of the change of approach to the composition of the Senate. There *was* an upsurge of democratic sentiment in the 1890s, of which much evidence may be cited. Further evidence from drafts of the Constitution is provided by proposals for amending the Constitution: the 1891 bill, again following the United States model, provided for amendments to be approved by elected conventions in each of the states; the 1897 bill adopted the more democratic process of approval of amendments by the electors voting in referendums.

Apart from the advance of democracy in Australia, however, a corresponding advance of democracy in the United States had resulted in events which made it fairly clear that the US Senate was in the process of being converted to a directly elected body. The model on which the 1891 bill was based was about to disappear. It took another 16 years for the US constitution to be changed, but by 1897 the change was in process and it looked as if its completion was not far off. It was the Australian founders' knowledge of this which was decisive in making the change in Australia.

The contention that the Senate should be elected was not new to the United States in the 1890s. It was advanced at the Philadelphia convention in 1787, and a change to direct election was suggested throughout the nineteenth century, for example in the 1860s by Andrew Johnson. In the 1890s, however, it was taken up by the reform movement, which flourished at that time, and which made great gains between 1891 and 1897.

The aim of the reform movement was to break the control of party machines and party bosses over nominations and elections. The main weapon of the movement was state legislation requiring primary elections. In the 1890s primary elections were adopted in many states. They allowed voters to select candidates directly. Primaries were held for candidates for the Senate, with the expectation, not always fulfilled, that the candidates who won the primaries would be appointed by the state legislatures. A growing number of senators were therefore in fact elected by the people and owed their places to the electors rather than the state houses. There were moves to regularise this change by an amendment of the constitution. From 1894 onwards various state legislatures petitioned the Congress to initiate such an amendment. The proposed amendment was first passed by the House of Representatives in 1893 and repeated in following years.

These developments, which fell largely between the two Australian conventions, were well known to the delegates to the 1897 convention. In debate in the convention before the 'secret' committee was appointed, several delegates expressed the view that the Senate should be directly elected, with reference to the situation in the United

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20 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*. Sydney, Angus & Robertson, 1901, p. 418.

21 Quick and Garran, op. cit., pp. 124–5.

States. The recent developments there were set out in an article by Senator John Hipple Mitchell of Oregon, published in the journal *The Forum* in June 1896. Mitchell was a promoter in the Senate of the proposed constitutional amendment. His article was quoted at length to the convention by Isaac Isaacs, who favoured direct election of senators.[22] The article did not simply refer to the unsatisfactory features of the appointment of senators in the United States, but provided a fairly detailed account of the progress of the reform movement in relation to direct election of senators, including action recently taken in the Congress.

If anything was decisive in steering delegates towards popular election of senators, it was this intelligence of American events. It was not merely a matter of pointing out the failings of US Senate appointments, as Quick and Garran implied, but of foreseeing the success of the US reform movement and anticipating a similar success in Australia. It has already been noted that the 1891 convention had been directed to a passage in Bryce's book referring to a proposal to change the US Senate to a directly elected body. This did not influence that convention to change to direct election. By 1897 it appeared from the Mitchell article that the proposal was well on the way to achievement. At the 1891 convention those favouring direct election of senators were in a minority; at the 1897 convention they were an overwhelming majority. Bryce's 'bible' was not decisive; knowledge of recent events and a more direct source appear to have had greater influence.

It was ironic that Isaac Isaacs was in the majority. His political radicalism overcame his constitutional theories on this occasion. He was one of those who wanted a purely British system of government: legislative power vested in an Australian version of the House of Commons, and a cabinet formed in that chamber. He had little time for the checks and balances of a federal system, particularly an upper house representing the states equally and with equal legislative powers. His fellow anglophiles, while forced to adopt such institutions of federalism, never really accepted them as legitimate. They preferred to pretend, before and after 1901, that they had bestowed upon the country a British system of cabinet government, albeit with a few superfluous federalists excrescences which could be ignored most of the time. The change to a directly elected Senate, however, made it more difficult to maintain this pretence.

The federalists, those who favoured the institutions of federalism such as the Senate, quickly realised that a conceptual as well as an institutional shift was involved in the change to direct election. If the Senate was to represent the states as bodies politic in the federation, how much more effectively could it do so if it represented the people of the states rather than the state parliaments. The leading federalists, such as Richard Baker, were usually careful to refer to the Senate representing the *people* of the states rather than simply representing the states. This was music to the ears of the radical democrats who were also federalists, such as John Cockburn, who were federalists largely because they associated democratic reform with state-level politics.[23]

The responsiveness of the convention not only to democratic sentiment in Australia but to the reform movement in the United States has been somewhat obscured. This may be because the anglophiles, and subsequently conservative and Labor politicians

22 *Debates*, 26 March 1897, pp. 176–7.

23 *Debates*, Richard Baker, 23 March 1897, p. 28, John Cockburn, 30 March 1897, p. 340.

and academics, were not anxious to emphasise the federalist character of the Constitution or its borrowings from what some convention delegates called the Great Western Republic. The notion that the founders did not have an extensive knowledge of the United States may be a subsidiary aspect of this view.

Whatever the validity of this analysis, it is clear the founders' knowledge of America should not be underestimated.

Reasonably Necessary Powers: Parliamentary Inquiries and *Egan v Willis and Cahill*∗

Harry Evans

In all but one of the jurisdictions of Australia, the houses of the various parliaments, by constitutional or statutory prescription, subject to statutory alteration, possess the powers, privileges and immunities of the British House of Commons, either as at a particular date or for the time being.

The effect of these provisions is to confer upon the houses a set of immunities and powers which were acknowledged by the common law, and which in some instances were embodied in statute, before the maturity of the Australian parliaments. The principal immunity is the freedom of parliamentary proceedings from impeachment or question before any court or other tribunal (enacted in article 9 of the Bill of Rights, 1689), and the principal power is the power to conduct inquiries and, for that purpose, to compel the attendance of witnesses, the giving of evidence and the production of documents and to punish contempts.

The exception is New South Wales, which has no such constitutional or statutory provision. In that state the immunities and powers of the houses depend on a common law doctrine that they possess such immunities and powers as are reasonably necessary for the discharge of their legislative functions. This law, expounded in the context of subordinate colonial assemblies, has been developed with the change in the

∗ This article was first published in *Constitutional Law and Policy Review*, February 1999.

houses' status to that of legislatures of a state of an independent federation.[1] The effect of this doctrine is that the houses possess an immunity of their proceedings from impeachment or question seemingly virtually identical to the article 9, Bill of Rights immunity, but no general power to punish contempts, upon which the power to conduct inquiries may be regarded as ultimately dependent. The extent of their other powers is something of a grey area.

Ironically, it is one of the New South Wales houses, seemingly in the weakest position amongst Australian parliaments in relation to powers, which has taken the strongest action in the exercise of its powers, and thereby found itself in court for judicial determination of the lawfulness of its actions. The underlying problem is one common to all legislatures in the Anglo-American stream: in the exercise of their function of conducting inquiries, houses frequently need information from executive governments. What is the solution if governments refuse to hand over information required by a house? In legislatures following the so-called Westminster pattern, where the executive usually controls the lower house through a disciplined party majority, the question usually arises only in relation to upper houses, like the federal Senate or the New South Wales Legislative Council, which have non-government majorities and seek to exercise their powers independently (although, as will be seen, New South Wales once provided an exception also to this rule). In most jurisdictions, upper houses seeking information and governments reluctant to produce it have not pushed their respective claims to the boundaries; governments have usually produced the required information or some compromise has been reached. Where a significant disagreement has arisen, it has usually been regarded as a matter to be settled politically, which means in practice that the majority of the house concerned seeks to inflict maximum political damage on a recalcitrant government. Indeed, a few years ago when a senator suggested that the political issue should be turned into a legal issue by statutory reference to the courts, the Senate Committee of Privileges unanimously rejected such a measure and insisted that such contests should continue to be pursued politically.[2] In New South Wales, however, the parties to a dispute *did* push their claims to the boundaries, and headed for the courts.

The majority of the Legislative Council would no doubt say that this was due to the stubbornness of the Treasurer, Mr Egan, a member of the council, in flatly refusing to produce documents demanded by the council. In relation to a number of matters of great political controversy, including some involving allegations of government malfeasance, the council passed orders for the production of documents and Mr Egan refused to produce them on the basis that such orders were not within the powers of the council. Finally, exasperated by his obduracy, the council in 1996 suspended him from its sittings, and he was escorted from the parliamentary precincts by the Usher of the Black Rod. He then went to the New South Wales Supreme Court seeking a declaration that the council had acted beyond its powers.

A significant feature of the case was that Mr Egan made no claim of privilege or public interest immunity, that is, no claim that he should be immune as a matter of

1 The cases go back to *Kielley v Carson* (1842) 4 Moo PC 63; the principal modern case is *Armstrong v Budd* (1969) 71 SR (NSW) 386.

2 49th Report of the Committee of Privileges, Parliamentary Paper no. 171/1994, in relation to the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.

law from producing the documents because of the nature of the documents or the effect of their disclosure. He did not claim, for example, that production of the documents would be contrary to the public interest because they were the subject of legal professional privilege or cabinet deliberations. Instead, the case focussed on the lawfulness of the council's action in demanding the documents and in dealing with him for default.

In denying the power of the council, Mr Egan relied on a gloss on the principles of responsible government, which, according to his interpretation, requires that the executive government be accountable to the lower house alone and have no responsibility to the upper house. This argument had the virtue of overcoming one of those political inconsistencies which haunt politicians from time to time. Mr Egan's party, when in opposition, and when the then government did not have a majority in the Legislative Assembly, made great use of orders for production of documents, and forced that government to disgorge mountains of documents about various embarrassing matters. That was different, said Mr Egan, because that was in the assembly, to which the government is alone responsible.

This Egan doctrine of responsible government was given short shrift in the courts, and was not the determinant of the case. The courts focussed on the question of whether the council has the power to act as it did.

The Court of Appeal, to which the case was removed by consent from the Supreme Court, delivered an answer most favourable to the council and unfavourable to Mr Egan.[3] Applying the doctrine that the council possesses the powers reasonably necessary for the exercise of its functions, the court held that the council has the power to order the production of 'State papers', and, by appropriate means, to enforce such an order. It was held that, while there is no general power to punish for contempt, the suspension of the Treasurer from the council was an appropriate means of seeking to ensure compliance with the order. In ejecting Mr Egan right out of the building, however, the council acted beyond its powers (this became known as the 'footpath point'). Chief Justice Gleeson, in applying the doctrine of reasonable necessity, referred to the effect of the *Australia Acts 1986* in raising the status of the New South Wales houses above that of a colonial legislature, and adopted the reasoning of the American law that the power to compel evidence is necessary to a legislature.[4] While that law extended the power to the punishment of contempts, he limited it to self-protection and coercion. The other two justices, Mahoney and Priestley JJ, while agreeing with this reasoning, noted that no question of privilege or public interest immunity was raised, and that such a question could arise for future determination.

Not satisfied with this judgement, Mr Egan appealed to the High Court. (It is remarkable that there has not been more political comment on the propriety of a minister spending so much of the taxpayers' money on seeking to establish that the government does not have to provide information to Parliament.)

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3 *Egan v Willis and Cahill* [1996] 40 NSWLR 650.

4 *McGrain v Daugherty* (1927) 273 US 135; *Quinn v US* (1955) 349 US 155.

While the High Court dismissed the appeal, its answers to the questions raised were less clear-cut and provided more hints of future trouble from the parliamentary perspective.[5]

The new Chief Justice of the High Court did not sit on the case, having participated in the judgement of the Court of Appeal. Justices Gaudron, Gummow and Hayne, while sounding a cautionary note about limits to the court's jurisdiction in areas of executive/legislative conflict, were content to apply the reasonable necessity test and to find that the council had not crossed the boundary between self-protection and coercion on the one hand and punishment on the other. They pointed out, however, that questions of privilege or public interest immunity were not raised by the case, and nor was the question of the power of the council to coerce private citizens. These matters were explicitly not examined. This was in response to submissions by Mr Egan's counsel, who painted disturbing pictures of the council ransacking cabinet documents and seizing the private correspondence of hapless citizens.

Justice McHugh agreed that the appeal should fail on the basis on which it was pursued, but considered that technically it should have been allowed, so as to require the Court of Appeal to make a narrower order. He considered that the power to suspend a member inheres in the council and that Mr Egan's case should be dismissed on that ground alone. The court should not determine the power of the council to require the production of documents by ministers, but if the reasonable necessity test is applied, he would find that the council does not have that power. Such a power would extend to private citizens, and the council does not have any power to compel private citizens. The council can *ask* for information and can suspend a member for obstructing it in that regard.

Mr Justice Kirby noted that the case did not provide an opportunity to determine whether the powers of the federal houses under section 49 of the Constitution, long held to include the power to punish contempts,[6] should be reinterpreted and read down to exclude that power. One senses that he would like an opportunity to engage in this exercise. He accepted the established test of reasonable necessity, but not necessarily the old cases relating to it. He agreed that the reasoning of the United States cases in relation to the power of investigation is applicable to the council, but that the council has no implied power to punish contempts. He found no error in the Court of Appeal's judgement.

Justice Callinan also accepted the reasonable necessity test and found that the council's action was reasonably necessary and not punitive, but also noted that there was no question of public interest immunity.

This judgement is not the end of the matter. In November 1998 Mr Egan again refused to produce documents to the council, and was again suspended from its sittings. He is again going to the Supreme Court to seek a ruling on the council's powers, but on this occasion his claim is that the documents in question are protected by legal professional privilege, and the council does not have the power to compel the production of such documents. It will be interesting to see how the courts deal with this question.

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5 *Egan v Willis and Cahill* (1998) HC 71.

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

So far, the judgements are relevant only to the New South Wales houses because of the different foundation on which their immunities and powers rest. There is plenty of material in the judgements, however, to concern the houses in the other jurisdictions. It may be that the courts will be able to determine questions of public interest immunity only in relation to the New South Wales houses, but it is difficult to see how any pronouncements on that subject could be prevented from flowing over into the other jurisdictions in one form or another. There is also the hint from Mr Justice Kirby that section 49 of the Commonwealth Constitution should be reinterpreted to exclude the contempt power, notwithstanding the long-established and recently reiterated American law that such a power is inherent in a legislature. Then there is the horror which seems to be aroused in judicial breasts at the idea of houses compelling evidence from private citizens, although that has also long been recognised as essential to the power to conduct inquiries.

That power is seldom exercised, in that witnesses, official or non-official, are seldom coerced, and most evidence is taken voluntarily. All houses will have to be cautious in any exercise of the power in the future. As parliamentary matters, like all matters in modern society, are drawn more frequently into litigation, it can safely be predicted that this case, and Mr Egan's next case, will not be the last. The possibility of a clash between legislatures and courts cannot be ruled out.

Enough of Executive Arrogance?: *Egan v Chadwick and Others*∗

Harry Evans

A previous article referred to the judgements of the New South Wales Court of Appeal and the High Court in the case of *Egan v Willis and Cahill* relating to the power of the Legislative Council of New South Wales to require the production of government documents.[1] Both courts, the High Court on somewhat narrower grounds, found that the Legislative Council had the ability to demand the production of documents and to impose a penalty of suspension on a council minister for refusal to respond.[2] There was every indication, however, that the minister concerned, the Treasurer, Mr Egan, was not content to let the matter rest there.

Mr Egan again refused to produce documents in response to an order of the council, and again went to court, this time in an attempt to establish that the powers of the council do not allow it to require the production of documents claimed to be protected by legal professional privilege or documents the subject of a public interest immunity claim. The Court of Appeal has now delivered its judgement in that case, *Egan v Chadwick and others*.[3] The court unanimously rejected Mr Egan's argument, and found that the council has the power to require the production of such documents.

∗ This article was first published in *Constitutional Law and Policy Review*, May 1999.

1 H. Evans, 'Reasonably necessary powers: parliamentary inquiries and *Egan v Willis and Cahill*', *Constitutional Law and Policy Review*, February 1999.

2 (1996) 40 NSWLR 650; (1998) 158 ALR 527.

3 (1999) NSWCA 176 (10 June 1999).

The court, restrained by the judgement of the High Court in the earlier case, confined itself to the doctrine that the powers of the Legislative Council are such as are reasonably necessary for the performance of its functions. Spigelman CJ stated the question before the court:

> Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents to extend to documents which, at common law, would be protected from disclosure on the grounds of legal professional privilege or public interest immunity?

The Chief Justice, with whom Meagher JA agreed, answered this question in the affirmative. To restrict the powers of the council in the manner suggested by Mr Egan would be an intrusion of the court into matters which should be determined by the legislature itself. Having regard to the principle that ministers are responsible to the council, access to legal advice provided to government is reasonably necessary for the council to perform its functions, and it is for the council to weigh any claim of public interest immunity.

The majority also found, however, that the principle of responsible government, which the law recognises but does not seek to enforce, a recognition which was illustrated by a comprehensive examination of earlier judgements, imposes one restriction upon the council's powers. Because responsible government requires the collective responsibility of cabinet and the confidentiality of cabinet deliberations, the council may not require the production of documents which record the deliberations of cabinet.

It appears that this category of documents is much narrower than the category of 'cabinet documents' which is often cited by governments as a protected class. The judgement therefore does not provide ministers with a very useful escape clause; they cannot simply turn all documents into cabinet documents by wheeling them through a cabinet meeting, as allegedly happened in Queensland on one occasion.

The other Justice, Priestley JA, did not find even that restriction on the council's powers. He made the telling point that government documents are generated at public expense for public benefit:

> Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.

Just as the courts examine documents for which protection is claimed to determine where the balance of public interest lies, so must the Legislative Council have this capacity. Cabinet documents yield to the principle of government accountability, of which he made a ringing declaration:

> … notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men

> and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.

As indicated in the previous note, all of this has limited direct relevance to other Australian houses of parliaments, because of the different law under which they operate. They rely on constitutional or statutory prescription of their powers, albeit by reference to those of the British House of Commons, rather than common law. It would be difficult, however, in the light of this judgement, for any court to find that those houses, with the positive prescriptions they possess, have any lesser power.

The judgement did not compel Mr Egan to hand over the documents in dispute. As the court found, it is for the council to determine the remedy for any continuing refusal to produce the documents, and such a remedy must be political rather than legal. The judgement simply established that Mr Egan had no *legal* grounds for his refusal in respect of most of the documents, and it was on legal grounds that he chose to argue by going to the court.

This is the wider significance of the judgement: it undercuts ministers who seek to turn political questions about whether information should be disclosed to the legislature into legal questions. Governments of all persuasions, in resisting legislative demands for documents, have claimed legal barriers to doing so, and produced opinions of solicitors-general in support of such claims. The Court of Appeal has reinforced the point that the question of where the greater public interest lies is not a legal question.

It appears that on this occasion Mr Egan is not appealing to the High Court to attempt to obtain a reversal or modification of this judgement. The Legislative Council passed another resolution requiring the production of documents which were the subject of claims of legal professional privilege and public interest immunity and which related to the Sydney water contamination affair. Mr Egan produced several boxes of documents which the council did not publish but reserved for examination by its members.

This apparent change of attitude may have had something to do with the reaction of the media. As the previous article observed, Mr Egan and his government had been let off rather lightly by the commentators in his previous conflicts with the council. On this occasion the fourth estate was more critical. An editorial in *The Australian* referred to Mr Egan's 'sheer unmitigated gall' and his expenditure of an estimated $2 million in legal fees, and concluded: 'Enough is enough, Mr Egan. Your arrogance has gone too far'.[4]

It may be too much to ask that no minister will henceforth be arrogant, but the judgement of the court struck a significant blow for accountability of the executive to parliament.

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4 'Government must be accountable', *Australian*, 11 June 1999, p. 10.

The Australian Constitution and the 1911 Myth*

Harry Evans

Much of what passes for debate on constitutional matters in Australia is based on myths. Certain beliefs which are actually quite false are constantly repeated and accepted as true by the learned and unlearned alike. Most of them have been comprehensively refuted at one time or another, but this does not prevent their repetition or acceptance.

One such may be called the 1911 myth, which is along the following lines. The framers of the Australian Constitution followed the British pattern in deciding upon the powers of the two houses of the Parliament, and therefore gave the Senate the powers of the House of Lords as they were in 1900. If only the Constitution had been drawn up after 1911, the framers would have followed the British Parliament in stripping the second chamber of its powers, as was done with the House of Lords by the *Parliament Act 1911* after it rejected the Liberal government's budget of 1909. We should now make up for our time lag by following the British Parliament down that path, which is self-evidently conducive to good government.

This story is a favourite of Gough Whitlam, who repeats it on every plausible occasion. A recent disappointing recurrence of it appeared in a Parliamentary Library paper on section 57 of the Constitution (Research Paper no. 2/2000–01). The paper regards the tale as so well known that it does not bother with more than a casual line that 'A constitution framed after this might have been a less conservative document'.

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* This article was published in *The House Magazine*, 6 September 2000 and H.D. Irving et al, *Trusting the People: An Elected President for an Australian Republic*. Cottesloe, WA, Design by Design Practitioners, 2001.

The use of the word ‘conservative’ incorporates at a stroke a whole body of mythology about the Constitution.

This oft-repeated ‘fact’ is wrong, on two counts.

In the first place, under the ‘unwritten’, that is, uncodified, British constitution as it was before 1900, the House of Lords was thought not to possess the power which it attempted to exercise in 1909, and it was believed that that power had been effectively removed over 200 years earlier. According to the first edition of Erskine May’s *Parliamentary Practice*, published in 1844, the powers of the two houses in relation to financial legislation were governed by the resolution of 3 July 1678, which declared that all financial grants were the ‘sole gift’ of the House of Commons, and that house had the sole right to determine all financial legislation. The Lords were usually described as powerless in matters of finance and ultimately powerless in other matters; they were so described by Walter Bagehot in his classic exposition *The English Constitution* (1st edn, 1867). The whole point about the 1909 budget crisis was that the House of Lords attempted to exercise powers which it was long thought not to have; the 1911 Parliament Act simply regularised the ‘unwritten’ constitution as it was thought to be for the previous 200 years. The Act closely reflected Bagehot’s description. If the Australian framers had actually attempted to copy the British Parliament, they could easily have ordained a powerless second chamber by incorporating a version of the resolution of 1678.

Secondly, the Australian framers explicitly chose *not* to follow the British pattern of bicameral relations. The debates in the constitutional conventions are replete with statements to the effect that they were constructing a different kind of parliament, a point conceded by those who would have preferred to follow the British model more closely.

An example is provided by a speech made to the 1897–98 convention on 17 September 1897 by Richard Baker. Describing the House of Lords as approximating ‘a mere gilded ceremony’, he pointed out that, from their earliest decisions, the conventions had decided on a completely different kind of second chamber which would deliver a different system of government. He also made a very telling attack on the British constitution, an attack which could be repeated verbatim with the same accuracy now. What he called ‘the British sham’ of a titular head of state and a supposedly responsible cabinet actually produced rule by autocratic prime ministers only occasionally restrained by feeble parliaments, and two parties agreed on nothing except a desire to turn their rivals out, get themselves in and get their hands on the autocrat’s power. This critique of a degenerate constitution was intended to persuade the convention to abandon every feature of the British model and to adapt better systems exhibited by modern republics. In this he was not successful, but there was no denying his point that the Constitution was not British in its basic structure. The 1911 Act simply confirmed the degeneration Baker identified and emphasised the different character of the Australian design. And Baker, be it noted, was a ‘conservative’ in the conventional political sense. It is even more instructive to read the speeches of the political radicals, like Dr John Cockburn.

So much for the 1911 myth. It will go on being repeated because it is part of a larger mythology, to which the use of the word ‘conservative’ in the library paper alludes.

This is to the effect that the old fogies of the constitutional conventions stupidly and slavishly followed the British model, with some American elements they didn't understand (another myth[1]), without anticipating changes which were on the horizon. This picture is painted for the purpose of convincing us that we should now *more* slavishly follow the British model by having a powerless second chamber, an all-powerful prime minister and an artificially adversarial two-party system. Only such a system, it is implied, is truly democratic. By this sleight-of-mind the supposed radicals and anti-monarchists are able to wrap themselves in the Union Jack without most people appreciating the ludicrous spectacle they make. It is never explained why we should now adopt the most outmoded and dysfunctional system of government in the democratic world, which the British themselves are struggling to reform. And it is never revealed that we were warned off doing just that by the framers of our own Constitution.

1 See 'The other metropolis: the Australian founders' knowledge of America', in *The New Federalist*, no. 2, December 1998.

The 1911 Myth Embellished, by Gough*

Harry Evans

In an item in *The House Magazine* of 6 September 2000 ('The Australian Constitution and the 1911 myth'), a prevailing myth about the Australian Constitution was refuted. This oft-repeated story is to the effect that, if only the Australian Constitution had been drawn up after the British Parliament Act of 1911 was passed, the Australian founders would have seen the wisdom of making the upper house largely powerless, at least in relation to financial legislation, and would have amended their work accordingly. The article pointed out that this tale ignores two facts: when the Australian Constitution was drawn up the House of Lords was already believed to be a powerless body; and the founders made it perfectly clear that they deliberately chose not to follow that model of a mere delaying second chamber. They consciously departed from the British pattern in that and several other respects. It was noted in passing that the 1911 myth is propounded by Gough Whitlam on every plausible occasion.

No sooner had those words appeared than proof of their accuracy was provided by another address by Mr Whitlam, restating a version of the 1911 story. This latest retelling contains some interesting embellishments[1].

According to this version, not only did the founders not foresee the *Parliament Act 1911*, not only did they foolishly copy the powers of the House of Lords pre-1911, but when it came to disagreements between the two houses, they did not discuss the

* This article was first published in *The House Magazine*, 3–5 December 2000.

1 'Whitlam tells how founding fathers "squibbed" ', *Canberra Times*, 13 October 2000, p. 5.

matter at all! According to Mr Whitlam, 'our founders squibbed the issue of what happens when there is a different political composition of the upper House'.

Those of us who have read the debates of the Australian constitutional conventions, and recall seeing days and days, pages and pages, of debate about the powers of the two houses and the possibility of conflict between them, must have been imagining things. The long speeches about the deliberate departures from the British model must also be figments of our imagination. Clearly we only saw what we thought was there. We must also look again at our copies of the Constitution; we must have imagined that there was a section 57, in which the founders provided a mechanism for resolving disagreements between the houses, simultaneous dissolutions followed by joint sittings in the event of continuing disagreement. We must have imagined the founders' speeches in which they said that possible disagreements over financial legislation were the main reason for having those provisions. How could we have thought that we read all that when it is not there? We must have dreamt that Gough Whitlam himself participated in the employment of this mechanism in 1974. We must also have dreamt that in 1970 Mr Whitlam announced that his party in the Senate would vote against the budget legislation of the then government, for clearly he would not have attempted to bring about a situation of deadlock between the houses for which, he now tells us, the founders neglected to provide.

Apart from having these delusions about the Australian Constitution, we must also have been mistaken about the constitution of the United States and the entire legislative history of that country, for Mr Whitlam now informs us:

> In the United States, the problem had *never* [emphasis added] arisen because of dispute settlement rules between the President and the legislature.

The history books must have misinformed us about all those supposed occasions of disagreements between the two houses of Congress and between the Congress and the President. The newspapers must similarly have been making it up when they told us, as recently as 1995, about the executive government starting to shut down because of a disagreement between the President and the houses over annual appropriations. We must look at the US constitution again and find those 'dispute settlement rules' which we have obviously missed in previous readings. President Clinton would have been glad to know of them.

'It is only in Australia, in the Federal Parliament and in some of the states, that you can have the upper House rejecting or deferring supply', Mr Whitlam goes on. Clearly whole generations of American senators have been deluded as to their powers, not to mention those across the border in Canada, where there are moves afoot to *increase* the role of the second chamber.

If the celebrations of the centenary of federation achieve anything, it is to be hoped that they encourage some people to check whether some hoary old tales about the Australian Constitution actually have any foundation in either its text or the explanations of those who wrote it. Perhaps it will facilitate this process if we are presented with those old tales in their most outlandish form.

The Role of the Senate*

Harry Evans

The first step towards an assessment of the role of the Senate in Australia's Constitution and system of government is an appreciation of the intention of the framers of the Constitution who ordained it.

The intention of the framers

The purpose of the Senate was to ensure, by securing equal representation of the states, regardless of their population, in one house of the Commonwealth Parliament, that the legislative majority would be geographically distributed across the Commonwealth. In other words, it would be impossible to form a majority in the legislature out of the representatives of only one or two states. Without that equal representation in one house, the legislative majority could consist of the representatives of only two states, indeed, of only two cities, Sydney and Melbourne, and this would lead to neglect and alienation of the outlying parts of the country.

This rationale of the Senate is illustrated by two statements by framers of the Constitution, one conservative and one radical democrat:

> … it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives …[1]

* This article was first published in *Reform*, Australian Law Reform Commission, no. 78, Autumn 2001.

> … the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent them as grouped in the states. Of course majorities must rule, for there would be no possible good government without majorities ruling, but I do not think the majority in South Australia should be governed by the majority in Victoria, or in New South Wales … If we wish to defend and perpetuate the doctrine of the rule of majorities, we must guard against the possibility of this occurring.[2]

This concept of a geographically distributed majority was also embodied in the provision for alterations to the Constitution: an alteration cannot pass unless agreed to by a majority of voters in a majority of states as well as an overall majority.

This rationale explains why the Senate was given powers in relation to proposed laws virtually equal to those of the House of Representatives. The Senate must assent to every law to ensure that it has the support of the geographically distributed majority. Section 57 of the Constitution, however, provides that, in cases of deadlock between the houses as described in that section, following a general election for both houses, if the deadlock persists, a proposed law in dispute can be passed by a joint sitting of the two houses. In other words, the simple majority represented in the House of Representatives can in those limited circumstances override the geographically distributed majority in the Senate, provided that the simple majority is not too narrow.

Common misconceptions

There are several common misconceptions about this constitutional arrangement, which confuse constitutional discussion in Australia, and it is necessary to dispose of them.

Because the framers used the shorthand expression 'States' House' in relation to the Senate, it is assumed that they intended that senators vote in state blocs and according to the effect of proposed measures on the interests of particular states. Because senators have never voted in this way, it is assumed that the Senate has not achieved its original purpose. The framers' concept of a geographically distributed majority, however, did not entail any such strange behaviour on the part of senators. That concept is perfectly consistent with the formation of a legislative majority across all states and a legislative minority also formed across all states; the point is that it is not possible for the majority to come from only the two cities of the two biggest states.

A related misconception is that Australia was intended to have a system of government basically similar to that of the United Kingdom. This misconception is embodied in the frequently heard statement that we have a 'Westminster system'. On

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1 Sir Samuel Griffith, quoted by Sir Richard Baker, *Official Records of the Debates of the Australasian Federal Convention* (hereafter *Debates*), 23 March 1897, p. 28. The convention debates are online at www.aph.gov.au/senate/pubs/index.htm.

2 *Debates*, Dr John Cockburn, 30 March 1897, p. 340.

the contrary, the framers of the Constitution explicitly and deliberately departed from the British model. As one of them said:

> Why, in this constitution which we are now considering, we have departed at the very start from every line of the British Constitution … We are to have two houses of parliament each chosen by the same electors … We are to have, instead of a highly centralised government such as they have in Great Britain, a division of powers.[3]

These non-British elements were combined with the British system of the executive government consisting of a cabinet formed out of the party having a majority of the House of Representatives. The total system, however, was unlike any other.

Related to the 'Westminster' misconception is what might be called 'the 1911 myth'. On the assumption that the Australian framers simply copied the British constitution, it is said that, if only they had drawn up the Constitution after 1911, they would have followed the British Parliament, which effectively deprived the House of Lords of its legislative powers in that year. On the contrary, the framers explicitly stated that the Senate was to be quite different from the House of Lords, which was regarded as effectively powerless by convention even in the 1890s: the Lords were then referred to as approaching 'a mere gilded ceremony'.[4]

Has the intention been achieved?

When the intention of the framers in devising the Senate is properly understood, it is readily seen that the intention has been fulfilled. It has not been possible for a majority in the legislature to be formed out of one or two states; governments have not been able to rely on the votes of Sydney and Melbourne alone.

This is demonstrated by the contrary case of Canada, where the absence of an Australian-type Senate and only one elected house has allowed governments to be formed largely on the votes of Toronto and Montreal. This has led to the extreme alienation of the outlying provinces from the central government and consequent political difficulties in that country.

The geographically distributed majority continues to work even where voters in the various states vote for the same political parties, because no political party can afford to neglect any state.

This feature of Australia's constitutional design is like the operating systems software on a computer: the user is largely unaware of it as he or she employs the applications software to perform various tasks, but without it the system does not work. The applications software in the Senate is proportional representation.

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3 *Debates*, Sir Richard Baker, 17 September 1897, p. 789.

4 ibid., p. 784.

Proportional representation

The use of proportional representation for Senate elections since 1948 has ensured that, as well as producing a geographically distributed majority, the Senate produces what might be called an ideologically distributed majority. Proportional representation ensures that the legislative majority more accurately reflects the division of views and opinions in the country and the voting pattern of the electors. In particular, it awards seats in the Senate to political parties nearly in proportion to their share of electors' votes.

The single-member constituency system used to elect the House of Representatives seeks to ensure that a party majority is produced representing a plurality (not necessarily a majority) of the electors. Governments are formed in that house by the party which receives more seats and, it is hoped, more votes, than any other party. That majority party, however, usually does not represent a majority of the electors; normally, a majority of seats is won with forty-odd per cent of the electors' votes, that is, a plurality of votes. In some cases a majority is achieved even without a plurality of votes; in other words, the majority party receives fewer votes than another party. This system also awards representatives only to major parties, and electors who vote for other parties go unrepresented.

These features are illustrated by various federal elections, but the 1998 election illustrates all of them. In that election, only the Liberal/National parties and the Labor party won seats in the House of Representatives, although they achieved only about 40 per cent of the votes each, and about 20 per cent of the electors who voted for other parties were not represented (one independent was elected). Moreover, the winning coalition, the Liberal/National parties, won fewer votes than the 'losers', the Labor Party, the 'winners' gaining 39.5 per cent and the 'losers' 40.1 per cent.

This situation of the 'winners' achieving fewer votes than the 'losers' is quite common: since 1949 the winning party has received fewer first preference votes than the other major party in three elections, 1954, 1987 and 1998. Preferential voting does not overcome this problem. In five elections since 1949 the winning party has had fewer votes than the losing party after the distribution of preferences, in 1954, 1961, 1969, 1990 and 1998.

The system of proportional representation in the Senate ensures that parties win seats very nearly in proportion to their share of votes. A party cannot gain a majority with a minority of votes. Thus, in the 1998 Senate election the major parties gained about 40 per cent of the seats each, while the electors who voted for other parties shared out the remaining seats. (The actual percentages of votes are different for the two houses, because some electors vote for different parties in the two houses.)

This situation makes the claim by governments to possess a 'mandate' meaningless. In accordance with the intention of the framers, the two houses provide two different reflections of the electors' voting patterns. Equal representation of states in the Senate ensures that a law does not pass unless it is supported by majorities in a majority of states. Proportional representation in the Senate ensures that a law does not pass unless it has the support of the chosen representatives of a majority of voters, thereby enhancing the performance of the framers' intention.

Accountability

Governments are supposed to be accountable to parliament, and through parliament to the electorate; that is, governments are supposed to give account of their conduct of public administration so that the electorate can pass judgement on their performance.

Under the cabinet system, however, governments normally control lower houses through disciplined party majorities. Lower houses are not able to hold governments accountable, because governments simply use their majority to limit debate and inquiry in relation to their activities. Indeed, governments use their lower house majorities to suppress and limit accountability. They thereby seek to conceal their mistakes and misdeeds and prevent the electorate passing an informed judgement.

In this situation, upper houses not controlled by the government of the day are the only avenue for accountability to parliament.

The Senate, by inquiring into the activities of government, often through committees, regularly compels government to account for its activities when it would not otherwise do so.

The Senate has adopted a range of accountability mechanisms:

- A committee scrutinises delegated legislation, laws made by the executive government, with independent advice and in accordance with criteria related to civil liberties and proper legislative principle. In some other jurisdictions delegated legislation has escaped parliamentary scrutiny and governments can virtually make laws by decree. In conjunction with the establishment of the committee, the Senate developed laws to ensure that delegated legislation may be vetoed by either house.

- A comprehensive standing committee system allows regular inquiries into, and the hearing of public evidence on, matters of public concern, including proposed legislation.

- The Scrutiny of Bills Committee looks at all proposed laws, using the criteria applied to delegated legislation.

- If ministers fail to answer questions on notice (questions submitted by senators in writing) within 30 days, they may be required to explain that failure in the Senate.

- Orders for production of documents require governments to produce information on matters of public concern. (For example, the Senate requires all government departments to place on the Internet lists of their files, as guidance to people making freedom of information requests.)

- Legislation is frequently amended in the Senate to include provisions for the appropriate disclosure of information (in this category is the Freedom of Information Act itself, which was extensively amended in the Senate).

- Procedures allow the regular referral of bills to committees, so that any bill may be the subject of a public inquiry with opportunity for public comment. (The current government initially resisted the reference of the GST legislation to committees, even though, as was pointed out, such a complex legislative change merited close scrutiny and public comment.)

- Standing committees have the power to examine the annual reports of departments and agencies to determine the adequacy of the reports, and to inquire into the operations of particular departments and agencies at any time.

- Twice-yearly estimates hearings provide opportunities for senators to inquire into any operations of government departments and agencies, with the ability to have follow-up hearings on particular matters.

- Deadlines for the receipt of government bills prevent governments introducing large numbers of bills at the end of a period of sittings with the demand that they be passed during that period of sittings. These deadlines attempt to remedy the 'end-of-session rush' and 'sausage-machine legislation'.

- Governments are required to explain any delay in bringing into effect Acts of Parliament duly passed by the two houses.

- Taxation legislation is amended to ensure that it is not backdated to vague pronouncements by ministers (retrospectivity is accepted if the backdating is to a clear statement of government legislative intent).

- Other measures, for example, require governments to respond within a limited time to parliamentary committee reports or to explain a failure to do so, and place time limits on answers at question time, so that ministers cannot give 20-minute speeches when they are supposed to be answering questions.

The significant point is that most of these measures were opposed by the government of the day and were put in place only because the Senate is not under the control of the government.

Recent examples of the Senate forcing governments to be accountable are provided by the procedure of requiring the production of documents. But for this procedure, the public would not have discovered the facts about the importation of magnetic resonance imaging machines involving possible fraudulent and excessive claims on the Commonwealth, and nor would the basis and actual results of the government's policy for determining grants to public and private schools have been discovered.

Upper houses have only one hold over governments, their ability to withhold assent from government legislation. This is the only reason for governments complying with accountability measures: as a last resort, an upper house with legislative powers may decline to pass government legislation until an accountability obligation is discharged. An upper house without legislative powers could simply be ignored by a government assured of the passage of its legislation. A reviewing house without power over

legislation would be ineffective. This is why the framers gave the Senate full legislative powers.

This does not mean that the Senate rejects many laws proposed by the government; many government bills are amended to make them more acceptable, and many are framed so as to secure passage by the Senate.

The future

So long as the electors continue to deny any party a majority in the Senate, the Senate will be able to continue to ensure that legislation is not passed without the support of a majority of electors, as nearly as that support can be ascertained, and to hold governments accountable for their conduct of public affairs.

There are certainly areas in which the Senate's performance could improve. Although the committee system provides a valuable opportunity for the public to participate in the legislative process, legislating is an over-hasty process and could be made more deliberate. The Australian houses pass more bills in less time than their counterparts in comparable countries. The scrutiny of legislation through committees is not given sufficient time to work, and interested members of the public are set unreasonable deadlines. A more consistent and systematic approach to requiring ministers and government departments to account for their activities would also be valuable; at present the accountability mechanisms operate very patchily.

The performance of the Senate, and any house of a parliament, is ultimately in the hands of the electors. There may well be room for improvement in the civic-mindedness and attention to public affairs of the members of the public, but here as elsewhere they need information to make judgements. Public interest groups should monitor the performance of houses of parliaments in looking at legislation and holding governments accountable. Then, informed by the resulting information, enough electors might use their votes to bring about better parliaments.

An Elected President for an Australian Republic: Problems and Solutions*

Harry Evans

It is self-evident to some people that it is anomalous for Australia to continue to share a head of state with another country on the other side of the globe, a country which is now not an independent nation but a member of a foreign quasi-federation. Following the referendum of 6 November 1999, however, it is also obvious that the Australian electorate is not willing to accept just any proposal to correct the anomaly.

A large part of the difficulty of making the change to a republic appears to be the resistance of the political elite to the strong public preference for a popularly elected head of state if there is to be any replacement for the Queen.[1] Overcoming this difficulty would be a substantial step towards reversing the result of November 1999. The proposal then put to referendum not only ignored this public preference, but proposed a replacement as far as possible removed from an elected president: an appointed head of state dismissible at any time by the prime minister. This proposal reflected the complete and dogmatic rejection by the official republican movement of the notion of an elected president. That rejection was based, in effect, on a claim that there would be insurmountable difficulties in combining such an office with the

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* This article was first published in H.D. Irving et al., *Trusting the People: An Elected President for an Australian Republic*. Cottesloe, WA, Design by Design Practitioners, 2001.

1 J. Kelley et al., 'Monarchy, republic, parliament and the people: 20 years of survey evidence', *Australian Social Monitor*, Melbourne Institute of Applied Economic and Social Research, November 1999, pp. 104–113; C. Hull, 'Get used to it, we want direct election', *Canberra Times*, 5 February 2000, C3.

current system of government.[2] It is therefore desirable to analyse those alleged difficulties to see whether they are indeed insurmountable or whether there are solutions to them.

The underlying assumption of the official republican position is that we must keep the existing cabinet system of government, that is, the system whereby the executive government is carried on by a ministry who are members of the Parliament and who depend for their collective holding of office on the support of a majority of the House of Representatives. It is assumed that we wish to rule out of contention an executive presidency like that of the United States, or a hybrid system in which the head of state participates in the exercise of the executive power as in France. Pure democrats may contend that the electorate should be consulted on those options and given the opportunity to choose either of those systems, but for the purpose of analysing the alleged difficulties of combining an elected president with a cabinet system those possibilities may be put aside and the assumption of continuance of cabinet government accepted.

The alleged difficulties relate to the powers, the method of nominating and electing, and the method of removal, of the replacement head of state.

Powers

The current Constitution confers on the Governor-General the executive power, including the power to appoint ministers to administer the departments of state. Under the conventions of the monarchy and cabinet government, the Governor-General does not personally exercise the executive power, but normally acts on the advice of the prime minister and the ministry of the day, which is supported by a majority of the House of Representatives. Those conventions envisage, however, that in certain circumstances the Governor-General may exercise the powers of the office independently to preserve and facilitate the operation of the system of government. The powers exercised in those circumstances are referred to as the reserve powers.

The fear is that an elected president, replacing the Governor-General with powers unchanged, might use the 'mandate' of the office provided by popular election to exercise the reserve powers contrary to the conventions, or to take over the executive power and change the system of government. In short, we could find ourselves with an American-type executive presidency or a French-type hybrid system without intending to make that change.

This problem is related to the lack of specification in the Constitution of the rules of cabinet government as it actually operates.

The powers of the Governor-General hinge on the power to appoint and dismiss the prime minister and the ministry and the power to dissolve the House of

[2] 'The proper balance of authority between president and prime minister would be gravely threatened, if not severely distorted, were a directly elected president to co-exist with a prime minister unable to claim such a direct popular mandate'., G. Winterton, *Monarchy to Republic: Australian Republican Government*. 2nd edn, Melbourne, Oxford University Press, 1994, pp. 112–13.

Representatives (or both houses in the situation set out in section 57 of the Constitution) and to refuse a recommendation for a dissolution. It is these powers which are exercised normally on advice, or as reserve powers independently in certain circumstances. Other powers, for example, the power to assent to proposed laws or to withhold assent, are subsidiary to these main powers.

It is often said that, to avoid an elected president taking over the executive government, it is necessary to codify the powers of the head of state and the conventions of cabinet government. The use of the word 'codification' suggests that this is a lengthy and difficult task, full of opportunity for disputation about the conventions.

In reality, it is not a lengthy or difficult task. It is necessary only to make the following provisions in the Constitution:

- to provide for the office of prime minister as the head of the ministry and the person who specifies the ministers and the departments of state they are to administer

- to provide that the person appointed as prime minister is the person who has the support of a majority of the House of Representatives as indicated by a resolution of the House to that effect

- to provide that the House of Representatives is to be dissolved only on the advice of the prime minister, unless it passes a resolution expressing lack of support for the prime minister and does not, within a specified time, pass another resolution expressing support for another person as prime minister

- to provide that, where the conditions specified in section 57 of the Constitution exist, a dissolution is not to occur except in accordance with a resolution of the House of Representatives (the head of state would still have to be satisfied that the conditions exist).

This is all that is necessary for a 'codification' of the powers of the head of state and the conventions of cabinet government. These provisions are not novel. Most of them were contained in a bill to amend the Constitution which was passed by the Senate in 1982 but which was refused passage by the then government in the House of Representatives, the Constitution Alteration (Fixed Term Parliaments) Bill 1982. The only novelty in the above list is the suggestion that a section 57 dissolution occur only in accordance with a resolution of the House, to prevent the head of state exercising that dissolution power independently. That bill should have been put to a referendum by the incoming Labor government in 1983, and, having the support of the Labor party, the minor parties and a considerable number of the non-Labor senators, it would have had a good chance of success. For reasons not explained, it was dropped by the incoming government.

As the title of the bill indicates, its purpose was not to make the change to a republic but to provide for fixed term parliaments. The provisions listed above could be inserted in the Constitution with or without provision for a fixed term parliament, but

the latter has the advantage of depriving the government of the day of the power to go to an election at a time of its choosing, and is seen by many as an additional reform which could be made in the change to a republic.

Other adjustments to the executive power should be made. One such necessary change, which is seldom mentioned, is the abolition of the power of the executive to prorogue the Parliament (section 5 of the Constitution). This monarchical power, much used by Stuart monarchs to dispense with troublesome parliaments, and more recently by the New South Wales Government to stop the Legislative Council inquiring into its activities, has no place in a republic.[3] It could be used to disrupt the system of government; for example, a prime minister about to be overthrown by the House of Representatives could resort to prorogation to cling to office.

Under the proposed provisions, in conjunction with current constitutional provisions which would remain unchanged, the head of state would still have ample scope to be the 'umpire' of the system of government, as well as to 'represent the nation to itself' as only an elected person could.

Moreover, the provisions should be thought of not as regulating or limiting the powers of the head of state, but as clarifying the position of the executive government, of which the head of state is the apex, in its relationship with the legislature. In normal circumstances it is prime ministerial power which is exalted by the lack of specification of the executive power.

The suggested provisions ignore a large red herring which has been dragged across the trail. This is the claim that, in the change to a republic, it will be necessary to change the powers of the Senate so that the Senate cannot 'refuse supply'. Those making this claim, if pressed, justify it by reference to the events of 1975 and make the further claim that it is necessary to avoid a repetition of those events. If pressed further, they claim that an elected president might be in a stronger position to dismiss a government and decree a dissolution, of the House of Representatives, or of both houses in a section 57 situation, contrary to the wishes of the government of the day, where there is a disagreement between the houses over appropriation bills. This formulation, however, makes it clear that the problem is not the legislative powers of the Senate but the ability of the head of state to dismiss the government and call a dissolution independently. That situation pertains under the current arrangements and regardless of any change to a republic. The provisions listed above, by 'codifying' the powers of the head of state, remove the problem. Under those provisions, it would not be open to the head of state, Governor-General or president, to dismiss the government and call a dissolution independently, whether or not there is a disagreement between the houses over appropriations.

The suggestion that the change to a republic should be combined with 'stopping the Senate blocking supply' raises numerous difficulties. Such terms as 'supply' and 'budget measures' have no fixed meaning. Any bill can be turned into an appropriation bill. It is therefore difficult to formulate a constitutional change whereby the government could pass its appropriations in the absence of the consent of the Senate, without creating loopholes whereby the government could pass *any* laws

[3] H. Evans, 'Power to prorogue a relic of imperial past', *Canberra Times*, 1 February 1996.

without the consent of the Senate. This would create de facto unicameralism and a prime ministerial dictatorship; with control of the House of Representatives a government could legislate by decree. Even if the power to bypass the Senate could be confined strictly to annual appropriations, this would be an unacceptable elevation of executive power: governments can commit enormities through annual appropriation bills.[4] Those who consider that the executive government is entitled to automatic endorsement of its appropriations, or any legislation, should explain why we bother to elect houses of parliaments at all. Lack of government control over the Senate is a residual safeguard, in an otherwise deteriorated parliamentary system, against abuse of the legislative power.

There is and would continue to be a residual risk of a deadlock between the two houses over financial legislation where the double dissolution provisions of section 57 of the Constitution would be too slow to provide a resolution. Such a deadlock could have arisen, for example, over the States Grants (Primary and Secondary Education Assistance) Bill 2000: the majority of the Senate could have refused to pass the bill while it contained grants to wealthy private schools, and the government could have refused to pass the bill without those grants, and schools could have been forced to close. This would have been a genuine deadlock. The absence of such events hitherto indicates that preserving the legislative safeguard is worth the slight risk. Voting patterns suggest that many electors see it that way.

Reference to the electors' perception leads to an equally serious difficulty with allowing legislation to bypass the Senate. By combining such a power shift with the change to a republic, the latter would be likely to be poisoned by the association with another agenda, and a republic would again be rejected because of the defective model offered. The proposal for a republic, in this combination, would be represented as a 'grab for power' and as 'Gough's revenge'. Apart from the enormous enhancement of prime ministerial power, it would raise objections associated with federalism and the equal representation of states in the Senate. Those who wish to have a republic and incidentally solve the problem of the unspecified powers of the head of state would wish to avoid poisoning the well by this combination with another agenda.

Nomination and election

The opponents of an elected president have raised difficulties with nomination and election procedures. These difficulties boil down to the alleged propensity of any popular nomination and election process to produce a partisan president. It is said that however you devise the nomination and election procedures, a partisan contest and therefore a partisan president is inevitable.

A preliminary point needs to be made about this thesis. In any system of popular election, the electors would choose the president, and it is necessarily open to the electors to choose a partisan nominee. If that is the choice of the electors, true democrats and republicans are constrained to accept the people's choice.

[4] In 1995 the government attempted, by an annual appropriation bill, to pay the legal fees of a minister in a matter unconnected with the minister's Commonwealth ministerial capacity. The Senate amended the bill to remove the offending sum.

A partisan president is much less to be feared if the provisions listed above are made in relation to the office. If the powers of the office are provided as suggested, a partisan head of state could be merely an embarrassment but not a danger to the system of government.

It is possible, however, to devise nomination and election procedures to discourage partisan contests for the office and partisan choices by the electorate.

There is one set of proposed measures which needs to be put aside. Provisions intended to prohibit direct participation by political parties in nominations and elections in an attempt to achieve a non-partisan process are superficially attractive. Examples of such measures are prohibitions on candidates being, or having been, members of political parties, prohibitions on political parties sponsoring nominations, prohibitions on campaigning or campaign expenditure by parties, and so on. All such measures are likely to be full of loopholes and eventually circumvented. If political parties are determined to field partisan candidates and to run partisan campaigns, they will soon find a way around prohibitions of this sort. Intended candidates could resign from parties while entering into secret agreements to represent those parties, parties could organise nominations under another guise, campaign expenditure could be channelled through other organisations, and so forth. Constitutional prescriptions of such prohibitions are likely to be lengthy (how, for example, is 'political party' to be defined?), but still full of loopholes. If the details of the prohibitions are left to ordinary legislation rather than constitutional prescription, the danger of partisan manipulation of the rules arises, and there could also be constitutional difficulties, such as conflict with the implied freedom of political communication which the High Court has found in the Constitution. In short, attempts to exclude political parties are likely to be counter-productive.

Under any nomination and election system for a president, political parties would probably realise that it would be in their interests to support non-partisan candidates generally sympathetic to their view of the world but more attractive to the electors than conventional politicians. The relevant provisions should be framed to encourage them, rather than to require them, to do so.

In relation to nominations, this formulation would involve avoiding any arrangements which give political parties effective control of nominations, or even a leading role. In any event, such provisions would revive objections to a 'politicians' republic' which were a feature of the defeat of the 1999 proposals. On that basis, we should avoid confining nominations to parliaments or their members or other bodies or persons in the political structure.

This leads to nomination by the electors. Nomination of candidates for president could be by the signature of a particular number or a particular percentage of persons enrolled as electors. The number or percentage would be set fairly high to ensure that only candidates with significant public support would be nominated. Similarly, signatures should be required from all states and territories, with the numbers or percentages varying by state and territory, to ensure that candidates have wide geographical support. The numbers or percentages of signatures required could be varied by legislation but with a formula set by constitutional prescription.

This would mean that the collection of signatures would have to be organised, which would mean that organisations would be involved in collecting signatures. Political parties could organise the collection of signatures, but so could other bodies. Electors nominating candidates would know in advance the candidates they were being called on to support; it would not be a matter of simply endorsing a party or organisation, so there would be an incentive to put forward popular candidates with widespread support before the process of collecting signatures began. Any candidate with the required number of signatures, duly verified, would appear on the ballot. The time of nomination would be fixed sufficiently in advance of polling day to allow time for verification of nominations.

In this connection the importance of having a fixed presidential term is evident. It is necessary that the election timetable be known in advance so that there is time for the nomination and voting processes to be completed in an unhurried manner, to produce a president-elect well before the end of the presidential term. A fixed presidential term entails elections for president separate from parliamentary elections, unless provision for fixed-term parliaments is also to be made. As has been pointed out elsewhere, separate elections for president, although more costly, would discourage partisan contests for the office.

In relation to election campaigning, there would be no restriction on organisations campaigning for particular candidates. Any attempt to restrict campaigning would, as has been indicated, probably be in vain, and, if done by ordinary legislation, possibly unconstitutional. This would mean that there would be nothing to prevent more money being spent in support of some candidates than others. No democracy has solved the problem of limiting campaign expenditures, particularly the expenditure of 'soft money' by organisations other than political parties, and it would be unrealistic to expect a solution in this context. It must be hoped that the electors would view massive spending on election campaigns with distaste because of the nature of the office, and that any attempts to buy elections would be counter-productive when exposed.

Direct election of course rules out any intermediate body, such as an electoral college.

Voting should be preferential, and the candidate with the most votes, after distribution of preferences if necessary, should be elected. Australians are accustomed to preferential voting, and there would seem to be no reason for adopting the more expensive alternative of run-off elections.

If the nominating procedure described above were adopted, there would seem to be no reason to require a special majority, such as a majority including majorities in three or four states, or some percentage of the votes in a number of states, as is sometimes suggested. The nomination procedure should ensure a sufficient geographical spread of support for a candidate.

Removal

For an elected president, removal from office should not be an easy process. Certainly removal by prime ministerial decree, as in the 1999 proposal, would not be

acceptable. Nor should either or both houses of the Parliament be able to remove an elected president at their discretion.

The provisions in section 72 of the Constitution for the removal of federal judges provide the appropriate model: removal by resolution of both houses of the Parliament only on the grounds of proved misbehaviour or incapacity. These grounds have been the subject of much exposition, and are now fairly well understood. With judges there is the additional safeguard that the concurrence of the Governor-General is required, but it is not clear on what grounds, if any, the High Court would be able to review a removal. For a president an additional safeguard of a special majority of each house of the Parliament could be required.

There remains the question of the replacement of the president in case of removal, death or resignation. It is suggested that the houses of the Parliament be empowered to appoint, by a special majority, an acting president until an election can be held. Provision could be made for the houses to meet speedily in case of a vacancy suddenly occurring (the abolition of the prorogation power would assist here). If either or both houses were dissolved when a vacancy occurred, the government could make a temporary appointment until the houses met again.

The alternative, suggested by the Keating Government's Republic Advisory Committee, that the most senior of the state governors act as president, unduly depends upon the states having the same constitutional arrangements as the Commonwealth. Some or all of the states may choose different arrangements, for example, having no separate head of state, or having an executive governor. This presumption that the states will have similar arrangements should be avoided. There would seem to be no other suitable offices to provide an ex officio acting president. Modern communications make it unnecessary to provide for the overseas absence of the president.

The essential ingredients

The following elements have been identified as governing the change to a republic:

- replacing the Queen with a non-executive head of state
- preserving the system of cabinet government
- deferring to the public preference for an elected head of state
- providing democratic procedures and avoiding the defects of a 'politicians' republic' or an 'elitists' republic'
- filling gaps in the existing Constitution, particularly the lack of specification of the powers of the head of state
- avoiding any combination with other agendas, such as the 'grab for power' (executive domination) or 'Gough's revenge' (removing or weakening the safeguard provided by the Senate).

A consideration of these elements strongly points to the kind of scheme here outlined.

The proposed provisions would provide a truly republican republic, combining the quintessential republican elements of popular sovereignty and safeguards against undue concentrations of power. The Australian electorate has shown a sound, instinctive understanding of these republican principles.

Hobbes Versus Madison and Isaacs Versus Baker: Contrary Theories and Practices in Australian Democracy*

Harry Evans

In his landmark work *The Political Theory of a Compound Republic*,[1] the American political scientist Vincent Ostrom identified two theories of government which have contended in the intellectual and political history of modern civilisation.

Two theories of government

The first theory he associated with the seventeenth century English philosopher Thomas Hobbes, although it could be traced back to ancient times. This is the idea that sovereignty is indivisible, that in every state there must be some person or body in possession of the ultimate, final and overriding power. That repository of sovereignty may be the whole people gathered together, as in an Athenian democracy, or a representative assembly, or a king, but sovereignty must exist somewhere in the state and somebody must possess it, otherwise there is no government.

The other idea Ostrom identified with the American founder James Madison, although again it is an idea with a very ancient lineage. This is the theory of countervailing

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* This article was first published in *The University of New South Wales Law Journal*, vol. 24, no. 3, 2001.

1 V. Ostrom, *The Political Theory of a Compound Republic* (first published Virginia, Centre for Public Choice, 1971, 2nd edn, Lincoln, Nebraska, University of Nebraska Press, 1987). Quotes from Hobbes and Madison introduce the work.

power. It holds that the establishment of a system of government does indeed require that power be conferred on persons or bodies, but also holds that those persons or bodies will turn their powers to unexpected ends and abuse them unless they are subject to limitations and constraints. To vest all power in the whole people, as in an Athenian democracy, merely transfers and enlarges the problem. To give the people control over the government through the medium of election is not sufficient, because majorities can abuse their powers as well as kings. The way to guard against this is to confer different powers on different persons or bodies and set them to check and balance each other. It is not necessary to give supreme power to anybody.

These differing ideas of government affect the way in which systems of government work, as people who follow the two theories of power attempt to put them into practice. Ostrom's purpose was to re-explain and revive the Madisonian theory of countervailing power, because it had fallen into some disfavour, and to demonstrate its relevance to the practice of government in the United States and the wider world.

The theories in Australia

Australians are largely unaware that these two theories of government were major contenders at the constitutional conventions which drew up the Australian Constitution ('the Constitution') in the 1890s, and have been major contenders in the workings of Australian government ever since the country's founding. The Australian founders were practical men, not much given to theory, but they included the followers of Hobbes and the followers of Madison, and this fundamental disagreement is reflected in the structure of government they erected. The contrary elements of the structure have kept the rival theories in play in our subsequent political history.

The Hobbesian theory of undivided sovereignty re-emerged in the nineteenth century in Walter Bagehot's classic exposition of the British parliamentary system, *The English Constitution*.[2] Quoting Hobbes with approval, Bagehot sought to demonstrate that the British system was far superior to any other, precisely because it vested sovereignty in a single place, the House of Commons. The fusion of the executive and the legislative powers through the House of Commons and the cabinet gave British government a quality and efficiency which could not be matched by systems of divided power such as the American. Having the people elect different levels of government and different bodies within the government in the hope that they would check and balance each other merely resulted in a muddle, and was the source of America's failings. Having the people (on a limited franchise) elect the all-powerful House of Commons, and the house elect the cabinet, was the secret of imperial Britain's great success.

The Madisonian theory of countervailing power was represented for the Australian founders by the work of another Englishman, James Bryce, in his book *The American*

[2] W. Bagehot, *The English Constitution*. London, Chapman & Hall, 1867. Chapter I, 'The Cabinet', chapter VI, 'Its supposed checks and balances'.

Commonwealth.[3] Bryce's exposition of how the American people, scattered across a vast continent, delegated their powers to the different levels of government and to the two houses of the legislature, which represented them at different levels, was frequently quoted by the Australian founders, many of whom hoped that Australia would emulate both the democracy and the immense scale of the Great Republic.

The Australian Hobbesians were the 'responsible government men', those who believed that the British parliamentary system was best and who wished to follow it as closely as possible. They insisted that Australia had to have a cabinet system, with the executive government carried on by a ministry supported by a majority of the House of Representatives. Their most vociferous spokesman was Isaac Isaacs, who believed that the Australian people would elect a national government through the House of Representatives, and who was sceptical of the notion of setting a Senate representing the people equally by states to check the House.[4]

The Australian Madisonians were those who styled themselves the true federalists, those who considered that the division of power between the state and federal governments and between the two houses of the central legislature would be the vital ingredients of the new system. Their chief spokesman was Richard Baker. He expounded and defended the theory of the double majority: with the House of Representatives representing the people as a whole, and the Senate representing them equally by their states, a law would not pass unless it was supported by a majority of the people and by a majority of the people in a majority of states, which is the true formula of a federation. So important did Baker regard this principle, and the concomitant requirement that the two houses be equal in power, that he endeavoured to persuade the convention to abandon the cabinet system of government whereby the cabinet is responsible to one house only. He attempted to substitute a separately constituted executive, as in the United States or Switzerland, but on this point he was outvoted by the responsible government men and those who wished to stay with the system they knew.[5]

The constitutional compromise

The two factions had to compromise, and their compromise emerged in the structure of the Constitution. Isaacs had to live with a Senate based on the equality of the states. Baker had to live with cabinet government. They fought their major battles over the powers of the Senate. The responsible government men wanted it to be inferior in power to the House of Representatives, so that the exclusive responsibility of the ministry to that house would be reinforced. The federalists wanted the two houses to be equal in power to preserve the essence of federalism. The struggle focussed on financial powers, because the House of Commons had become supreme through its

3 James Bryce, *The American Commonwealth*. London, Macmillan, 1888. Vol I of this monumental work opens with a series of lucid sketches of the federal and democratic character of the American polity.

4 Isaacs' major speech was on 13 April 1897. See *Official Report of the National Australasian Convention Debates*, 13 April 1897, pp. 542–6. The convention debates are online at www.aph.gov.au/senate/pubs/index.htm.

5 Baker's major speech was on 17 September 1897. See *Official Record of the Australasian Federal Convention Debates*, Sydney, 17 September 1897, pp. 782–9.

control of finance. The ultimate compromise is reflected in s.53 of the Constitution: the Senate may not amend some kinds of financial legislation but may request amendments, and may withhold assent from any legislation until its requests are met. This arrangement was regarded as a victory for the federalists, because the difference between amending a bill and requesting an amendment was rightly held to be a matter of procedure only. The federalists, however, had to live with s.57 of the Constitution, providing for simultaneous dissolutions of the two houses followed by joint sittings to resolve deadlocks between the houses over legislation.

To an extent both sides were vindicated by subsequent developments. As Isaacs thought, federal elections came to be seen as the selection of a central government through a majority of the House of Representatives. Baker's attack on the 'British sham' of responsible government as producing autocratic prime ministers and feeble parliaments was borne out by the rigid ministerial control over the House of Representatives to which we are now resigned. The system developed in ways which disturbed both schools of thought.

Post-1901 contentions

The battle did not end when the Constitution was settled; on the contrary, it continued in 1901 and continues to this day.

Hostilities were resumed in 1901, when the first ministry presented to the Parliament the first two supply bills to provide the new government with the money it needed to operate. The wording of one bill suggested that the grant of money was the sole prerogative of the House of Representatives, and the funds in the other bill were sought in a single sum, with the implication that the Senate did not need to know what the money was to be spent on. Was this merely a slavish adherence to British practices, or was it a last-ditch attempt by the responsible government men to rewrite the Constitution? The Senate did not care what it was. Incited no doubt by Richard Baker, then its President, the Senate refused to pass the bills until the offending words were removed and a list was provided showing what the money was for. For the sake of the money, the government was willing to comply.[6]

The arrival of organised political parties and the presence of the same parties in the Senate as in the House of Representatives did not end the ideological divide, but perpetuated it in a different form. Parties simply change sides according to whether they are in government or in opposition. The party in power tends to support the prerogatives of the executive government and the exclusive rights of the House of Representatives, while the party in opposition tends to support parliamentary checks and balances, and they adjust their theoretical positions accordingly. Thus in 1914, the Labor Party opposition holding a majority in the Senate presented to the Governor-General an address objecting to the Cook government's advice that both houses should be dissolved under s.57 of the Constitution for the first time. The address was a

[6] The decisive votes by the Senate were taken on 14 and 19 June 1901. See *Journals of the Senate*, 14 and 19 June 1901, pp. 35–6, 42–3.

resounding defence of the Senate's right to reject or to amend any legislation and a forthright statement of the theory of checks and balances.[7]

Two factors have modified this pattern of partisan rotation. First, in the period from about 1920 to about 1950 the theory and practice of checks and balances went into something of a hibernation, with only occasional outbreaks, such as those of 1929–32 when the Senate made life difficult for the Scullin Government. During this period, for reasons related to wider historical developments, a 'Westminster hegemony' prevailed. Australians came to see their system of government as fundamentally British, or at least one that should aspire to emulate the British model. The federal system was seen as something of an historical encumbrance, and the Senate as a unfortunate colonial substitute for a House of Lords. This prevailing view corresponded with intellectual trends in the rest of the world. Federalism and Madisonian theories of divided power were out of fashion, a situation which authors like Ostrom later set out to correct.

Secondly, the events of 1975, when the non-Labor parties used a fortuitous majority in the Senate to force the Whitlam Government to an election, with the assistance of the Governor-General, has somewhat dampened the Labor Party's enthusiasm for checks and balances. In more recent times, however, the Labor Party when in opposition has not hesitated to join with minor parties in the Senate to reject or amend government legislation and to use the Senate's inquiry powers to expose government misdeeds and mistakes.

The revival of Madisonian theory and practice in Australia was influenced by one highly significant institutional change: the introduction in 1949 of proportional representation for elections to the Senate. The new electoral system resulted in the Senate becoming arguably more representative than the House of Representatives, in the sense that parties win seats in the Senate very nearly in proportion to their share of votes. By contrast, under the House of Representatives electoral system parties usually win majorities with less than 50 per cent of the vote and often with fewer votes than their main rivals.[8]

This situation has given legitimacy to the Senate's use of its legislative powers under the Constitution. A majority of the Senate, by whatever combination of parties it is composed, can claim to represent a majority of the electors, whereas a government in the House of Representatives usually represents only a plurality of the electors, and sometimes not even that.

Recent events

A recent manifestation of the continuing struggle between the Hobbesian and the Madisonian theories of government in the Australian political system was the debate which occurred in 1998 over the newly re-elected Howard Government's 'mandate'.

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7 The address was adopted by the Senate on 17 June 1914, and appears in *Journals of the Senate*, 17 June 1914, pp. 86–8 and is quoted in part in H. Evans (ed.), *Odgers' Australian Senate Practice*. 9th edn, Canberra, Department of the Senate, 1999, p. 87.

8 Evans, op. cit., pp. 23–6 has figures for percentages of votes and seats in each election for each house since 1949.

Nowadays, the belief in undivided and unlimited sovereignty often appears in the guise of the mandate theory. The power of a government to rule is legitimised by its supposed possession of a mandate from the people. Mr Howard claimed that his re-election gave him a mandate to put into law the changes to the tax system which he foreshadowed during the election campaign. There were several problems with this claim. When in opposition, he had rubbished the mandate theory, and he and several of his party colleagues had vociferously supported the right of the Senate to exercise its legislative powers.[9] Also, his mandate was very dubious, as his party received fewer votes in the general election than the opposition, before and after the distribution of preferences. The non-government parties in the Senate therefore claimed the right to represent a majority of the electors by carefully scrutinising his legislative proposals and rejecting or amending them. In so doing they conformed with the pattern of parties out of power preferring checks and balances to mandates, but also with Baker's view that each house possesses a distinct mandate. Mr Howard soon tacitly abandoned the mandate theory and began to seek the support of other parties in the Senate to have his legislation passed. We have not heard the last of the mandate, however. It is sure to re-emerge whenever there is an election which a government can claim to have won. And whoever is then in opposition will no doubt be impressed with the requirement for checks and balances.

The revival in Australia of the theory and practice of countervailing power reflected a world-wide development. The intellectual reappraisal, led by authors like Ostrom, developed into a flood of literature on the subject, largely but not exclusively focussing on the founders of the United States and the problems of the British polity.[10] The decline of Britain was accompanied by a decline of the British model. In Britain a constitutional and parliamentary reform movement sought the adoption of institutions to divide the hitherto concentrated power of the state. Membership of the European Union imposed a bill of rights and a quasi-constitutional court on the previously sovereign Parliament, and a quasi-federal system has now been established. The other old European states similarly ventured down the road of decentralisation and restraining the state. The collapse of the command economies and the complexity of contemporary issues have destroyed the naive faith in centralised government power as the solution to all problems. Countries with constitutions which restrain government power appear to have fared rather better on most measures of success.

In Australia, the Constitution may be changed only with the consent of the electors, who are thereby the real possessors of sovereignty. They have demonstrated a strong suspicion of proposals to increase government power. They are instinctive Madisonians. It has often been observed that most proposals for constitutional change have been rejected because they would have enhanced the power of the central executive government. The rejection of the proposed republic model in the November 1999 referendum conforms with this pattern. The 'minimalist model' of an appointed head of state dismissible by the prime minister was designed to preserve the

9 See Harry Evans, 'The Howard Government and the Parliament' in G. Singleton (ed.), *The Howard Government*. Sydney, University of New South Wales Press, 2000, pp. 26–36.

10 A recent example is S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge, Mass, Harvard University Press, 1999, with chapters on American constitutionalism and modern Britain. An Australian example is B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*. Cambridge, Cambridge University Press, 1995.

ministerial monopoly of executive authority, but could not be 'sold' to electors generally believed to favour a republic in principle.

A continuing contest

Given these contemporary developments and the spirit of the Australian people, our native Madisonians of the 1890s seem to have ultimately had the better of the argument, and their concern with restraining central power with safeguards now looks more modern than their rivals' faith in ministerial responsibility under the Crown.

The contest, however, will continue. The notion that Australia has, or should have, a 'Westminster system' is deeply entrenched in the political classes and in both major parties. When in power they often try to act as if it were true. So long as prime ministers and governments believe that their powers provide the key to success, and that enhancement of those powers would be in the best interests of the country, Hobbes and Madison will remain at war in the Australian political system and the ghosts of Isaacs and Baker will haunt our public forums.

Bryce's Bible: Why Did It Impress the Australian Founders?*

Harry Evans

When the framers of the Australian Constitution convened in 1897–98 to compose the instrument under which the country is still governed, they were under the sway of one book above all others. Widely read as they were, and multifarious as were the sources of their quotations, one source was referred to more than any other. According to the clerk of the convention it lay on the table during their deliberations for ease of consultation, and has been referred to as their bible.[1] It therefore had a great influence on the shape of the Constitution. The book was *The American Commonwealth* by James Bryce, a law academic who was also a member of the British Parliament.

The centenary of the Constitution is an appropriate time to consider again why this book had such an influence. In order to frame a fresh answer to that question, it is desirable to re-examine the book in the light of what we have learned up to 2001. Copies of the work which had such significance for the birth of the nation are now not easily found, although some prints of the various editions are appropriately held by the National Library. Resort was had to an American secondhand bookseller to obtain

* This article was first published in *The New Federalist*, no. 8, December 2001.

1 Letter from the clerk, Edwin Blackmore, to Bryce, cited by J.A. La Nauze, *The Making of the Australian Constitution*. Carlton South, Vic., Melbourne University Press, 1972, p. 273. La Nauze uses the Bible analogy.

a copy of the 1891 print of the second edition, which probably was the version most readily available to the founders.[2]

What was it about this book, then, which fixed their attention?

Bryce's work was a very detailed, lively and colourful account of American society and politics at the end of the 19th century. He knew the country intimately, and was able to convey a great deal of that first-hand knowledge to his readers.

He painted a compelling picture of a new society, a settler society, with no political or social aristocracy, with virtually unlimited upward social mobility, a great deal of economic freedom and no limitation on the opportunity of anybody to participate in the general prosperity. This society presented a distinct contrast to those of the older nations of Europe, including the United Kingdom, where there were established aristocracies, more or less open to new recruits, depending on the country, but still excluding the masses and holding on to social prestige and political power. That hold was, however, obviously breaking down. While not endorsing the apprehensions about the spread of democracy of that earlier commentator on American society, Alexis de Tocqueville, Bryce left no doubt that the society across the Atlantic represented the future, in that European societies would probably come to resemble it by a process of social and political evolution.[3] The question was, therefore, how was such a society successfully governed, and how could it best be governed?

This question was important for Australian readers, because they recognised that, as a settler society, with a great deal of political evolution behind it, Australia had already reached the future to a greater extent than Britain, and the model for the future was of great significance to the process of drawing up a legal instrument of government.

Bryce showed how the kind of society he depicted was ruled by public opinion, which was ultimately shaped by the views and feelings of the masses, through a class of politicians who were not in any sense an aristocracy and who did not have aristocratic views and values different from those of the rest of society. Politics was a profession, not a part-time playing field for the nobility, their relations and adherents. This had some disadvantages for the quality of government, but the institutions of government had to adapt to it, to fill the gap left by the absence of an aristocratic code, and to counteract those disadvantages. Although he readily acknowledged the evils of

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2 The first edition was in 1888, and there were three subsequent editions up to 1910, with various revisions and reprints. It is apparently not recorded which version lay on the table at the convention. In most cases it is not possible to tell which version was referred to by the framers in their debates, although Patrick Glynn's quotation allows us to identify it as coming from the third edition, 1895 (*Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, p. 963), while Josiah Symon quoted the first edition (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, p. 344). The work was referred to as early as February 1890, by Alfred Deakin, at the Melbourne Conference on federation (*Official Record of the Proceedings and Debates of the Australasian Federation Conference*, pp. 25, 95–6), and cited by Andrew Inglis Clark in a memorandum dated 6 February 1891 (see F.M. and L.J. Neasey, *Andrew Inglis Clark*. Hobart, University of Tasmania Law Press, 2001, p. 257).

3 J.B. Bryce, *The American Commonwealth*. 2nd edn, Toronto, Copp, Clark, 1891, vol. II, p. 488: 'She [America] is walking before them [European nations] along a path which they may probably follow'.

American society and politics, Bryce also showed how the institutions were basically well adapted to this society of the future. Moreover, he did not lament the likely passing of the old societies, but keenly appreciated the advantages of the new democratic model.[4] He therefore perceived more clearly that the old institutions of Britain were not well adapted for the future. His influence was to steer Australians away from any attempt to recreate the institutions of the old country in the Antipodes, even if that were possible, and even if their history and experience had not already indicated to them that it was not. Bryce was a cure for excessive Anglophilia.

With this understanding, Bryce was able to overcome the usual British prejudice against a written, 'rigid' constitution. He could see that, in the society of the future, such a constitution had definite advantages. It compensated for the loss of an aristocracy as a barrier between the masses and unbridled political power, by dividing and imposing restraints on that power. It inculcated the notion that power is limited and it taught habits of restraint. The older the constitution and the greater the reverence with which it was regarded, the greater its value in taming political power which might otherwise wreck the state in the wrong hands.[5]

In particular, Bryce could see the value of federalism, which British people have also been slow to understand. He fairly presented the problems it creates of delay, duplication, uncertainty and conflict, but he also saw that it has overwhelming advantages in the new society. He anticipated all of the arguments for federalism which have been employed in the extensive literature from the 1970s onwards in the revival of federalist thought which we have witnessed. Above all, he saw the advantage of federalism as a safeguard, as a restraint on power, but he also presented its other values: its adaption to a geographically large and diverse country which might otherwise be ungovernable and fragment under any centralised authority; the adaption of local policies to local circumstances; the ability of states to conduct experiments and innovations in policy without involving the whole country; the confinement of problems to particular states when they would otherwise affect the whole country; a healthy competition between states for the best policies; more opportunities for citizens to participate in decision-making, to be educated in government and to gain experience by holding public office. In any event, he pointed out, federalism had, in effect, already been adopted by the British Empire, by granting internal self-government to the dominions.[6]

In analysing the details of the federal system, Bryce could also see the real advantages of the Senate, the upper house of the legislature representing the people of the separate states equally regardless of their population. He could go beyond the facile and fatuous argument, still current in Australia, that because the Senate had become a house of political parties it could not be a 'states' house'. He appreciated the value of the Senate in providing a geographical spreading of the legislative majority and in

4 ibid., vol. II, ch. XCV, 'The strength of American democracy', ch. CXI, 'The pleasantness of American life'.

5 ibid., vol. I, pp. 396–7.

6 ibid., 1891, vol. I, ch. XXX, 'The merits of the federal system'; the observation about the British Empire being a federal arrangement is at p. 346. He also points out that the former system of government of the English universities had all the essential features of federalism: vol. I, pp. 652–3.

giving one house a larger representational base than local constituencies. He could see that, in the new society, with government by professional party politicians of generally middling quality, it was all the more important to have the safeguard of bicameralism in the legislature. The representational base of the Senate, linked to the federal nature of the country, provided a viable basis for such a safeguard, when Europeans were having difficulty finding some alternative to an hereditary nobility. He referred to the moves to have the Senate directly elected by the people rather than indirectly elected by the state legislatures, but he noted that, in the practical workings of politics, the senators already directly represented the people of the states in fact.[7] This analysis probably smoothed the way for the Australian framers to anticipate the 1913 amendment of the American constitution by having their senators directly elected from the start.

Bryce was therefore an authoritative correction to the usual negative British view of federalism, and particularly to that other great British constitutional authority, Walter Bagehot. In his earlier work, *The English Constitution*, Bagehot scathingly dismissed federalism and constitutional checks and balances as creating merely a muddle, and extolled the simplicity and efficiency of the British cabinet system, whereby the all-powerful House of Commons appointed the executive government, the ministry.[8] While Bagehot noted the deficiencies of the British constitution, such as the inability of the hereditary House of Lords to perform a real legislative role, and thought that the monarchy relied on a sort of 'magic' which was necessary to conceal the actual operation of the system from the uneducated masses, Bryce could see the real problem of the British system in the very simplicity and efficiency which Bagehot applauded: it lacked the safeguards which would be sorely needed as the new society evolved. Bryce quoted a very perceptive passage by a gentleman whom he described as a publicist and ex-Mayor of Brooklyn, who wrote that, as Britain evolved into a democracy, the unlimited power of Parliament would prove to be a menace, and constitutional safeguards would have to be devised to remove the danger.[9] British reformers are still struggling with that problem. It is significant that Bagehot, unlike Bryce, was seldom quoted at the constitutional conventions. The inadequacy of his message to Australia and to the future was apparent by the 1890s.

It is very remarkable, but seldom remarked, that a country purely British in background should have adopted a set of foreign institutions, federalism, from a foreign republic. Reading Bryce helps us to understand why the Australian framers adopted a federal system (in the classic form, not as disguised centralism as in Canada), with two elected houses of the Parliament, one representing the states by population and one representing them equally. There could be little doubt that this was the appropriate model for Australia.

At the Australian constitutional conventions the ranks of the true federalists, those who wanted to follow the classic federal model of the United States as closely as possible, included conservatives like Richard Baker and radicals like John Cockburn.

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7 ibid., vol. I, ch. XII, 'The Senate: its working and influence'; the observation about the Senate being in fact elected is at pp. 111–12; the reference to proposals for direct election is in ch. X at pp. 96–7.

8 First published in 1867. ch. VI, 'Its supposed checks and balances'.

9 Bryce, op. cit., vol. I, pp. 396, 657–8.

The most radical of them all, Andrew Inglis Clark, was the most devoted to classical federalism, and was largely responsible for the Constitution adopting so many features of the American prototype. Bryce's analysis helps to explain why this was so. The conservatives knew that, in the new society, federalism provided the only basis for constitutional safeguards against the misuse of political power by popular demagogues. The radicals knew that federalism preserved the right of local democracies to engage in advanced social reform which might not be supported over the whole country. Bryce provided both groups with ample supportive material.

The other major faction at the conventions consisted of the responsible government men, those who wanted to follow the British model as closely as possible, and who were particularly wedded to the cabinet system, whereby the executive government is a ministry supported by the majority of the lower house. Some, like Isaac Isaacs, were openly critical of the institutions of federalism, particularly the Senate.[10] It is also remarkable, but also seldom remarked, that the most they were able to achieve was to beat off an attack by Baker on the cabinet system and to avoid the adoption of a different plan for the executive government.[11] On most other questions the federalists had the better of it, and the basic structure of the Constitution is theirs. Bryce's frank presentation of the drawbacks of federalism and of checks and balances provided the responsible government men with seemingly favourable quotations. The underlying message of his book, however, was that, in the kind of society Australia was sure to be, the federal system and its divisions of power would provide the safeguards that would be needed.

The American Commonwealth is therefore an icon (to use the current jargon) of Australian history. It should have been displayed in all those centenary exhibitions on the Australian Constitution, if copies were available. Readers of it now may still feel the force with which it spoke to our founders. Something of that force may be felt in the following passages, which still convey a message worth hearing:

> Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.
>
> It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements.

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10 *Official Report of the National Australasian Convention Debates*, Adelaide, 13 April 1897, pp. 542–6. The convention debates are online at www.aph.gov.au/senate/pubs/index.htm.

11 *Official Record of Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, pp. 782–9.

It makes them feel that to comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarises them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based.

These are enormous services to render to any free country, but above all to one which, more than any other, is governed not by the men of rank or wealth or special wisdom, but by public opinion, that is to say, by the ideas and feelings of the people at large.[12]

[12] Bryce, op. cit., vol. I, pp. 396–7.

The Pedigree of the Practices: Parliamentary Manuals and Australian Government*

Harry Evans

Most denizens of Parliament House in Canberra and other participants in the parliamentary process are aware that each house of the Australian Parliament has its own manual of its law and practice. The Senate has *Odgers' Australian Senate Practice*, first published in 1953 and now in its tenth edition, and the House of Representatives has *House of Representatives Practice*, first published in 1981 and now in its fourth edition. Other houses have similar manuals; there are, for example, Canadian and New Zealand versions.[1] It is also generally known that these books are the descendants of earlier works on parliamentary procedure. Most people, if asked about their origins, would be able to nominate Erskine May's *Parliamentary Practice*, first published in 1844 and now in its 22nd edition, as the original ancestor of all the tribe.[2] This is the conventional view. As with many conventional views, it is wrong, or at least misleading. This is not an obscure historical point, but a matter with some significance for the assessment of Australia's system of government.

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* This paper was presented at the 33rd Conference of Australian and Pacific Presiding Officers and Clerks, Brisbane, July 2002.

1 D. McGee, *Parliamentary Practice in New Zealand*. 2nd edn, Wellington, NZ, GP Publications, 1994; R. Marleau and C. Montpetit (eds), *House of Commons Procedure and Practice*. Ottawa, House of Commons, 2000.

2 T. Erskine May, *A Treatise Upon the Law, Privileges, Proceedings and Usage of Parliament*. London, C. Knight and Co., 1844. Thus the title does not include the word 'practice'. Was the adoption of the conventional title *Parliamentary Practice* in later editions a nod to Jefferson? It was he who began the now near-universal use of that word in the titles of these manuals.

The reputation of Erskine May's work as the original handbook on parliamentary procedure is undeserved for two reasons. There were many works on aspects of the law and procedure of parliament before he compiled his manual. There were no fewer than fourteen of them which were particularly significant, leaving aside collections of debates and precedents which contained no commentary. These works, like Erskine May after them, came to be designated by the surnames of their authors: Smith, Sadler, Elsynge, Scobell, Hakewill, Selden, Petyt, Hale, Rushworth, Atkyns, Chandler, Blackstone and Hatsell. The earliest of the fourteen was Thomas Smith's *Common-wealth of England and the Manner of Gouvernement Thereof*, published in 1612, and notable for its use of the term 'commonwealth'. The most recent was John Hatsell's *Precedents of Proceedings in the House of Commons*, published in 1781.[3] In Erskine May's time, Hatsell was the great parliamentary authority, having been revised in editions up to 1818. In his preface to his first edition, Erskine May, while acknowledging Hatsell, claimed to provide the first comprehensive treatise on parliamentary law and practice. It must be conceded that the earlier works did not cover all of the material which Erskine May sought to encompass, and the latter's volume was certainly more comprehensive and authoritative, while relying heavily on Hatsell.

More significant than the existence of these books is the point that Erskine May was not the first comprehensive treatise. That title properly belongs to a work first published in 1801 by Thomas Jefferson, *A Manual of Parliamentary Practice*.[4]

The thesis that Jefferson's work was the real prototype of all parliamentary manuals rests not only on its comprehensive coverage, but on the way in which it draws upon

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[3] The complete list of the 14, in chronological order, with abbreviation of their sometimes enormously long titles, is:

Sir Thomas Smith, *Common-wealth of England and the Manner of Gouvernement Thereof*, 1612.

J. Sadler, *Rights of the Kingdom; or Customs of Our Ancestours: Touching the Duty, Power, Election or Succession of Our Kings and Parliaments …*, 1649.

H. Scobell, *Memorials of the Method and Maner of Proceedings in Parliament …*, 1656.

H. Elsynge, *The Ancient and Present Manner of Holding Parliaments in England …*, 1660, and subsequent editions.

W. Hakewill, *Modus tenendi Parliamentum: or, The Manner of Holding Parliaments in England …*., 1671.

W. Petyt, *Miscellanea Parliamentaria …*, 1680. He, or another Petyt called George, was the author of the anonymous but famous *Lex Parliamentaria …*, 1690.

J. Selden, *Of the Judicature in Parliaments …*, 1681.

Sir Robert Atkyns, *The Power, Jurisdiction, and Priviledge of Parliament*, 1689.

Sir Matthew Hale, *The Original Institution, Power, and Jurisdiction of Parliaments*, 1707.

J. Rushworth, *Historical Collections of Private Passages of State …*, 1721.

Richard Chandler, *The History and Proceedings of the House of Commons From the Restoration to the Present Time*, 1742.

Sir William Blackstone, *Commentaries on the Laws of England*, 1765, and subsequent editions.

J. Hatsell, *Precedents of Proceedings in the House of Commons; with observations*, 1781, and subsequent editions.

[4] T. Jefferson, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, 1801, and subsequent editions.

all of the previous sources, including the significant fourteen and many more. Jefferson's knowledge of these sources, most of which he acquired for his own library, is amazing. He cites them in a way which indicates that he had thoroughly mastered their contents. This disposes of something of a myth that Jefferson composed his manual only when he became Vice President, with the constitutional task of presiding over the Senate (a task now seldom performed by his successors), and had to take an interest in parliamentary procedure. On the contrary, he made a long and deep study of the subject, and had composed an earlier work, called the 'Parliamentary Pocket-Book', which he never had printed.[5]

In a belated recognition of the primacy of Jefferson's work, two clerks of the House of Commons, Kenneth Bradshaw and David Pring, in a comparative study published in 1972, *Parliament and Congress*, acknowledged that the *Manual of Parliamentary Practice* was the best statement of what had been at that time the law of the British Parliament.[6] This assessment is assisted by the way in which the manual was originally printed, with references to the United States constitution and Senate precedents in italics and House of Commons practices in Roman type, with the latter reported even when not strictly relevant in the American context.

Erskine May, however, ignored Jefferson's work. It is tempting to put this down to the British assumption of superiority and a determination not to acknowledge the upstart republic on the other side of the Atlantic, but there were other factors involved. Jefferson himself recognised that what he had written was not original in relation to the British Parliament but relied on the earlier sources, and Erskine May, while frequently citing Hatsell, preferred to return to the primary sources, the journals and debates of the two houses. The full title of Jefferson's book (most of these works had lengthy titles) described it as being 'for the Use of the Senate of the United States', thereby creating an undeserved impression of specialisation. Constitutional provisions and new precedents set by the Senate were irrelevant in the British context. Finally, even in this early period, Parliament and Congress had diverged in their procedures to an extent which limited any potential procedural cross-fertilisation between them. So Erskine May became the authority in the British Empire and subsequently in the Commonwealth of Nations, while Jefferson received greater attention in 'foreign' countries (he was soon translated into the major European languages and is still referred to in many non-British legislatures). Both works continued through their various editions, with the divergence increasing with each edition.

All this provides little excuse for the deference shown to Erskine May and the neglect of Jefferson in Australia. Australia's Constitution and bicameral parliamentary

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5 *Jefferson's Parliamentary Writings*, in W. Howell (ed.), *The Papers of Thomas Jefferson*. 2nd series, Princeton, N.J., Princeton University Press, 1988. According to the editor (p. 3), Jefferson began his study of parliamentary procedure as early as 1762 as an apprentice lawyer. By a curiosity of history, Jefferson's Manual was adopted by the US House of Representatives as an authority on its practice, and is included in its manual of practice, *but without those passages referring only to the Senate!* The Senate's manual consists of its rules and resolutions, which are more of a code.

6 K. Bradshaw and D. Pring, *Parliament and Congress*. London, Constable, 1972, p. 1. This statement appears to have been commonly made about Jefferson's work, but the origin of it has not been traced.

structure, unique in the British Empire, were largely based on those of the United States. This should have elevated the significance of Jefferson's work and the precedents to which he referred. His manual could have been more relevant in Australia. A striking example is Jefferson's description of the way in which the United States Senate, contrary to the House of Commons procedure, had adopted the practice of allowing senators to move amendments to different parts of a bill non-sequentially. This is now the practice of the Australian Senate, but has become so by a process of convergent evolution rather than imitation. In a chamber in which many amendments are moved and made to bills, and in which there is no limitation on the number of amendments which may be moved by any member or the time which may be spent considering them, the practice makes a great deal of sense. Had they looked into Jefferson, Australian senators might have come to that conclusion much earlier. Similarly, Jefferson records that the Senate had arrived at a rule that any senator could require a complicated question to be divided, which led to 'embarrassments' unless interpreted in application. Again, the Australian Senate has arrived at the same position, by evolution and not by imitation.[7]

While Jefferson was not called upon as an authority, there was in the early Australian Senate a greater consciousness that it was different from the British Parliament, and a greater willingness to consider other sources. For example, in 1904 the first President of the Senate, Richard Baker, declined to follow the British rule that an amendment to a bill must be in accordance with the principle of the bill as agreed to at the second reading, and held that relevance to the subject matter of the bill is the only test of acceptability of an amendment, citing the American procedure as a persuasive authority.[8] Baker was strongly of the view that the Australian Senate should establish its indigenous identity by building up its own precedents and rules. He dissuaded it from adopting a standing order, still in force in the House of Representatives, to provide that House of Commons procedures must be followed where the standing orders are silent or doubtful.[9] Baker's view of the independence of the Senate was not consistently followed by his successors, with the result that Erskine May came to be cited more frequently.

This acceptance of Erskine May as *the* authority on parliamentary matters in Australia was the result of historical and cultural factors. It has been argued elsewhere[10] that in the period from about 1920 to about 1950 there prevailed in Australia a 'Westminster hegemony': Australia's system of government was seen as a 'Westminster system', or it was perceived that it should be made to work as a 'Westminster system' ought, regardless of the provision of a very different set of institutions by the framers of the Constitution. The Westminster hegemony was partly the product of Empire loyalty, seeing Australia as part of a great world Empire, which was closely related to feelings of insecurity in a world that had become much more dangerous since 1901. The reverence accorded to Erskine May was part of that historical cultural phenomenon.

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7 1812 edition (by Jefferson himself), in *Jefferson's Parliamentary Writings*, pp. 383, 399–400.

8 Senate Debates, 14 July 1904, p. 3243.

9 For an account of this matter, see H. Evans (ed.), *Odgers' Australian Senate Practice*. 10th edn, Canberra, Department of the Senate, 2001, p. 20.

10 H. Evans, 'The other metropolis: the Australian founders' knowledge of America', *The New Federalist*, no. 2, December 1998, pp. 30–1; H. Evans, Introduction, *The Biographical Dictionary of the Australian Senate*, vol. 1, Carlton South, Melbourne University Press, 2000, pp. 7–8.

More recently, the severance of remaining constitutional links between Australia and the United Kingdom, and the weakening of political links, has led to a divergence between the Australian and British parliaments, which, in turn, has led to something of a decline in the authority of Erskine May. Australian parliamentary procedures now largely stand on their own. In the current edition of *Odgers' Australian Senate Practice*, there are no references to Erskine May or to Jefferson, virtually no references to British or American parliamentary procedures, and references to British or American law only where it has been explicitly adopted, or is likely to be of persuasive value in Australian courts. Baker's vision of indigenous Australian procedures has therefore largely been realised. The reference to Odgers around the world as a stand-alone manual adds to that realisation.

The establishment of an Australian parliamentary procedure, recorded in its own manual, may be regarded as an aspect of the recent rediscovery that Australia does not have a 'Westminster' system of government, that it was not intended to have such a system by the framers of its Constitution, and that we should stop trying to force our system to comply with what are thought to be Westminster norms. There is now a substantial body of literature on that theme, corresponding with a greater appreciation of Australia's independent character.[11]

The 'Westminster system', however, has powerful support, particularly by ministries of whatever political persuasion, because it has become a system of executive domination of parliament, and ministers would like to convince us that we have, or should have, such a system. The various editions of Erskine May have reflected the development of executive control over parliament. So quotes from Erskine May often find some favour with executive governments and their advisers. In 1998, in refusing to comply with the Senate's order for documents about the waterfront lockout affair, the government relied on 'the practice in this parliament', and referred, inaccurately, to the procedure of the House of Commons about matters sub judice as recorded in Erskine May, which is different from the formulation applied by Senate presidents.[12] Quotation of Erskine May could almost be regarded as a sinister sign, that the quoter is seeking to commit some anti-parliamentary and un-Australian sleight of mind in support of some executive outrage. It may be best that we leave Erskine May to the British.

As for Jefferson, may he rest in peace. It is now too late to make up for our earlier neglect of him, but at least we should now acknowledge that he was the true pioneer.

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11 Two examples: C. Sharman, 'Australia as a compound republic', *Politics*, May 1990; B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*. Cambridge, Cambridge University Press, 1995.

12 The statement of the alleged 'practice in this parliament' consisted of an incomplete and unsourced quotation of a resolution of the House of Commons as recorded by Erskine May, which, apart from being incomplete, ignored a subsequent modifying resolution also recorded in that work: see the advice to senators in the transcript of the estimates hearing of the Economics Legislation Committee, 2 June 1998, p. E125; *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edn, ed. D. Limon and W.R. McKay, London, Butterworths, 1997, pp. 383–4.

Fitzpatrick and Browne: Imprisonment by a House of the Parliament*

Harry Evans

A leading constitutional case and a cause célèbre arose in 1955 from the decision of the House of Representatives to imprison a newspaper owner and a journalist for a contempt of the House. Many people thereby discovered that citizens could be imprisoned not only after trial by a court but by a house of the Parliament, a fact not generally known and alarming to some. Since that time it has again become a little-known fact, because another such occasion has not arisen, but a fact (or rather, a law) it remains.

The constitutional basis

Section 49 of the Constitution provides:

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

The effect of this provision is to attach to the two houses of the Commonwealth Parliament several powers and immunities recognised by the common and statutory

* This article was first published in H.P. Lee and G. Winterton (eds), *Australian Constitutional Landmarks*. Cambridge, Cambridge University Press, 2003.

law of the United Kingdom and long regarded as part of the defining equipment of the legislature of a self-governing jurisdiction.

One of the powers attracted by this provision is the power of a house to take into custody and imprison any person adjudged by the house to be guilty of a contempt of the house. There could be no doubt about the existence of this power in respect of the House of Commons in 1901. It had been exercised as recently as 1880; indeed, in that case the imprisonment of the offender for the remainder of a session of the Parliament was thought to be insufficient and a further penalty was imposed in the next session.[1] The power had also been acquired by statute by some of the Australian colonial parliaments, and had been exercised by them within living memory. The power was therefore well known to the framers of the Constitution. It was listed among the undoubted powers and immunities attracted by section 49 in their magisterial commentary on the Constitution by John Quick and Robert Garran.[2]

The power to imprison for contempt may be said to be a characteristic of Anglo-American legislatures. The American law on the subject illustrates this. The United States constitution contains no equivalent of section 49 and no attempt to specify the powers exercisable under that section. The only references to privileges and immunities are two brief phrases conferring immunity from arrest in civil causes and the immunity known as freedom of speech, that is, the freedom of legislative proceedings from impeachment or question in the courts. Nonetheless, the Supreme Court found that each house of the Congress and each house of a state legislature has the power to imprison for contempt, on the basis that it is a power inherent in the legislative power conferred on those houses. The legal situation was summarised by Chief Justice Burger in a case in 1972:

> The past decisions of this Court expressly recognising the power of the Houses of the Congress to punish contemptuous conduct leave little question that the Constitution imposes no general barriers to the legislative exercise of such power … There is nothing in the Constitution that would place greater restrictions on the States than on the Federal Government in this regard.[3]

The power is not abridged in respect of the Congress by the enactment of a statute providing for prosecution in the courts of recalcitrant witnesses. It was last exercised, in preference to criminal prosecution, in 1934 by the Senate, and upheld by the Supreme Court on that occasion, in a case involving destruction of documents, when it was thought that swift action was necessary to prevent a continuation of the offence.[4]

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1 The case of Charles Edward Grissell, whose contempt was to make an offer to corrupt the proceedings of a committee of the House. *Journals of the House of Commons*, vol. 134, pp. 366, 432, 435, vol. 135, pp. 70, 73–4, 76–7. The power of the House of Commons and of the Australian houses to commit for contempt is limited to the duration of a session, which ends with a prorogation by the monarch or Governor-General.

2 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*. Sydney, Angus & Robertson, 1901, pp. 501–2.

3 *Groppi v Leslie* (1972) 404 US 496 at 499.

4 *Jurney v MacCracken* (1935) 294 US 125. As the Senate is a continuing body, its power to commit for contempt is not limited to the term of a congress: *McGrain v Daugherty* (1927) 273 US 135 at 181–2.

The power remained unexercised at the federal level in Australia, however, for the first 54 years of federation.

The case in the House

On 3 May 1955 Mr Charles Morgan, the Labor Party Member for Reid, rose in the House of Representatives and drew attention to an issue of a newspaper, the *Bankstown Observer*, in which an article relayed allegations that he was involved in an 'immigration racket', called upon him to respond to the allegations, and declared him unfit to be a member if they were true. Swirling in the background to the article were the furious political battles of the time, including the battles within the Labor Party which led to the Great Split of that year. Mr Morgan said that the article was an attempt to blackmail and intimidate him, and moved at once that it be referred to the Committee of Privileges for investigation and report. The Speaker informed the House that he had read the article, that it was a serious matter, and that it ought to be referred to the committee. Following a brief contribution by Dr Evatt (Labor Party), the Leader of the Opposition, who declared that it was not a party matter, the motion was carried.[5]

On 31 May, on the recommendation of the Privileges Committee, further articles in the newspaper, relating to the proceedings in the House, were referred to the committee.[6]

The committee heard Mr Morgan in support of his complaint, and then took evidence from the proprietor of the newspaper, Mr Raymond Fitzpatrick, and the author of the articles, Mr Frank Browne. The committee heard counsel for Mr Fitzpatrick on his application to be represented by counsel, but declined to allow him to be represented. Mr Fitzpatrick agreed that the purpose of the first article was to prevent Mr Morgan speaking in Parliament about certain matters. He had instructed Mr Browne to 'get stuck into' Mr Morgan in retaliation for matters raised in the House, and agreed that the articles referred to Mr Morgan in his capacity as a member. Mr Browne denied that the purpose of the articles was to intimidate Mr Morgan in his capacity as a member, but did not disagree with the proposition that part of their purpose was to keep him quiet. Both men stated that they had no evidence to support the allegations against Mr Morgan, although Mr Browne had declared in one of his articles that he would take to Canberra proof of the charges. This evidence was virtually the equivalent of both 'defendants' entering a plea of guilty as charged. (Parts of their evidence were included in the committee's report; the full transcript was released by the House in December 2000.)[7]

The committee presented its report on 8 June 1955. The committee found that Mr Fitzpatrick and Mr Browne had published material intended to influence and intimidate a member in his conduct in the House and had attempted to impute corrupt

5 House of Representatives Debates, 3 May 1955, pp. 352–5.

6 ibid., 26 May 1955, pp. 1114–17, 31 May 1955, p. 1239.

7 The transcript of evidence is a typescript with nonsequential and confusing page numbers. References are to: pp. 58, 61b, 62, 66, 70, 71A, 74, 1.3, 1.5–1.6, 4.J, supplementary transcript pp. 4–5. Some of Mr Fitzpatrick's answers border on self-contradiction.

conduct to the member for the express purpose of discrediting and silencing him. The committee also found that there was no evidence to support the allegations against Mr Morgan. It recommended that the House take 'appropriate action' in relation to this contempt. The committee observed that some of the articles constituted contempt by their references to the House and the committee, but recommended that no action be taken in relation to that contempt.[8]

On the following day, the Prime Minister, Mr (as he then was) Menzies (Liberal Party), moved that the House agree with the committee in its report. That the Prime Minister undertook the task of moving the necessary motion indicated that the matter had now assumed great political importance. After a short debate, arousing no disagreement, the motion was carried. The Prime Minister then proposed a further motion that the two offenders, as they had now been declared to be, be heard at the bar of the House on the following day before the House proceeded to decide what action to take in respect of their offences. That motion was also carried, the only discussion occurring on the suggestion by Dr Evatt that the two men 'be dealt with separately'.[9]

Messrs Fitzpatrick and Browne attended accordingly on 10 June. Mr Fitzpatrick made an application to be represented by counsel, but this was refused as contrary to the resolution of the House, which required that he be heard. Dr Evatt was apparently about to contest this ruling of the Speaker, but was interrupted by Mr Fitzpatrick beginning his statement. Mr Fitzpatrick offered a humble apology, indicating that he had no idea that the article was against parliamentary privilege. Mr Browne, however, made a fairly lengthy speech, declaring that he should not be convicted without a fair trial, and including in the speech references to Adolf Hitler and the Star Chamber.[10]

Following a short suspension of the sitting, the Prime Minister, after describing the gravity of the matter, moved that the two offenders be committed to prison until 10 September 1955 unless prorogation or an earlier discharge by the House intervened. At this stage the unanimity which had prevailed began to dissipate. Members realised the seriousness of the step they were called upon to undertake. Some objected to the imprisonment of the offenders without a proper trial, and to the whole notion of the House exercising a power generally thought to belong properly with the courts. Most members, however, thought that a finding that an attempt had been made to intimidate a member required the imposition of some penalty. Dr Evatt, no doubt mindful of the disagreement within his party on the propriety of imposing a punishment, moved an amendment that a fine should be imposed. This proposal was subject to the objection that, because the House of Commons had not imposed a fine since 1666, it was arguable that the power to fine had fallen into desuetude by 1901. After a lengthy debate Dr Evatt's amendment was defeated and the main motion was carried, with only a handful of members, including Dr Evatt, voting against it. Mr Morgan did not

8 *Report from the Committee of Privileges relating to articles published in the 'Bankstown Observer'*, 8 June 1955, Parliamentary Paper no. HR2/1955. It should be noted at this point that the membership of the committee included leading members of the House, including Percy E. Joske, QC (Liberal), who led the examination of the witnesses.

9 House of Representatives Debates, 9 June 1955, pp. 1613–17.

10 ibid., 10 June 1955, pp. 1625–7.

vote in the divisions. The offenders were then brought back to the chamber, the judgement was announced, and they were committed to prison.[11]

On 31 August 1955, Mr Allan Fraser, one of the Labor members who opposed the imposition of a penalty, moved to have the prisoners released. There again ensued a lengthy and vigorous debate on the propriety of the House's action. Dr Evatt attempted to move an amendment to have the whole question of penalties for contempt of Parliament examined, but was ruled out of order on the basis that the amendment was irrelevant. An attempt to overturn this ruling having failed, Mr Fraser's motion was lost, only three members voting for it.[12]

Messrs Fitzpatrick and Browne remained in gaol until released in accordance with the resolution of the House on 10 September 1955.[13]

The second substantive debate in the House was no doubt influenced by, and indeed references were made to, the storm of criticism which descended upon the House following the imposition of the penalty. Needless to say the press were not enamoured of the notion that politicians could imprison journalists for press articles attacking those politicians.[14]

The press had an interest in representing the case as one of suppression of free speech and of penalisation of journalists for criticising politicians. Perhaps arising from this misrepresentation, the case is often seen in those terms. It needs to be emphasised that the case was always seen by the members, from the time it was first raised, as a case of intimidation and improper influence of a member. Mr Morgan referred to it as such both in the House and before the Privileges Committee, and the Privileges Committee treated it as such.

The other point to be emphasised is that it was treated as a matter for a free vote of the members, and there is ample evidence in the debates that members were not slaves to party loyalty.

Confusions in the case

Discussion of the case in and out of the House was confused by the persistence of most of those involved, including the High Court, in referring to the case as one of 'breach of privilege'. Dr Evatt, with his usual fondness for correct and precise terminology, preferred the term 'contempt of Parliament'.[15] The expression 'breach of privilege' is properly applied only to actions which violate one of the legal immunities, or privileges, attaching to the houses and their members under section 49. For example, an attempt to sue a member for something said in Parliament would be a breach of the privilege of freedom of speech. As a breach of a legal immunity, it would provide of itself remedy: a court before which the suit was brought would be

11 ibid., 10 June 1955, pp. 1627–64.

12 ibid., 31 August 1955, pp. 207–30.

13 ibid., 13 September 1955, p. 563.

14 One editorial will serve as an example of many: 'The gaoling of Browne and Fitzpatrick', *Sydney Morning Herald*, 11 June 1955, p. 2. The unfavourable press comment continued over many days.

15 House of Representatives Debates, 10 June 1955, p. 1630.

obliged to dismiss it as contrary to the immunity. A contempt of parliament is any act which tends to obstruct a house or its members in the performance of their functions (see the definition in section 4 of the *Parliamentary Privileges Act 1987*, considered below). Calling contempts 'breaches of privilege' invites the misconception that there must be some identifiable privilege which is breached and that there must be some precedent for the offence establishing the identifiable privilege. This in turn leads to the erroneous conclusion that, if no 'privilege' can be found which is violated by the alleged offence, and no precedent establishing it, there is no offence. Use of the incorrect terminology conceals the fact that contempt of parliament is the equivalent of contempt of court, and the relevant law has the same rationale: to protect the integrity of parliamentary processes, just as the law of contempt of court protects the integrity of judicial processes.[16]

In this connection, consideration of the case is unnecessarily confused by the advice given to the Privileges Committee by the then Clerk of the House of Representatives, Mr Frank Green, and relayed in his book *Servant of the House*, published in 1969. This publication has unfortunately achieved the status of the gospel on the affair, and therefore must be examined. Mr Green recounted that he advised the committee that parliamentary privilege did not protect a member against 'allegations in respect of his actions outside the Chamber of the House; it was not a matter of privilege'. Because he could find no precedent in the British House of Commons, he thought that the House of Representatives was unable to create one.[17]

Mr Green's conclusion, as recorded in his book, is often cited as evidence that the Privileges Committee and the House acted wrongly because they did not take the advice of their learned Clerk.[18] The committee and the House, however, were more learned than the Clerk. His advice was wrong. It was obviously based on the confusion about 'breach of privilege' and 'contempt of Parliament'. If a person, outside the House, takes or threatens some action, also outside the House, with the purpose of intimidating a member and preventing the raising of matters in the House, this is clearly a contempt of parliament, just as threatening or taking some action outside the courts with the purpose of influencing a witness' evidence before the courts is a contempt of court.[19] The fact that no identifiable 'privilege' is breached by such action has nothing to do with the case. Neither the novelty of the method of intimidation nor the lack of precedent alters the tendency or purpose of the act. Mr Green was simply confused about the basis of the complaint against Fitzpatrick and Browne and the basis of the parliamentary contempt jurisdiction.

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16 For this conceptual and terminological confusion, see *Report from the Select Committee on Parliamentary Privilege*, 1 December 1967, House of Commons Paper no. 34, 1966–67, pp. viii, 89–91.

17 F.C. Green, *Servant of the House*. Melbourne, Heinemann, 1969, pp. 155–6.

18 Eg., E. Campbell and H. Whitmore, *Freedom in Australia*, rev. edn, Sydney, Sydney University Press, 1973, pp. 318–19, 321.

19 For threats to parliamentary witnesses (as distinct from penalties imposed on witnesses in consequence of their evidence) see Senate Privilege Resolution no. 6, 25 February 1988, para. (10), in *Standing Orders and Other Orders of the Senate*, p. 108; Reports of the Senate Committee of Privileges, no. 18, Parliamentary Paper no. 461/1989, no. 50, Parliamentary Paper no. 322/1994. For threats to witnesses or potential witnesses before the courts the classic exposition is in *R v Kellett* (1976) 1 QB 372, especially at 391.

His advice to the committee, as recorded in his book, that 'the civil courts were open to him [Mr Morgan]', indicates that he misunderstood the case as simply one of defamation. His memorandum of advice, released by the House in December 2000, was confined to the issue of defamation, a fact not made clear in his book.[20] He had consulted only the House of Commons precedents of libel of members. When the Privileges Committee identified the matter as one of intimidation, according to his book he consulted the precedents again and concluded that '"intimidation" would have to be physical intimidation, and it would have to be in relation to a vote or some definite matter before the House'.[21] (It appears that this conclusion was not conveyed to the committee.) He must have missed the precedents not involving 'physical intimidation'.[22] In any event, it is clear that to threaten or punish a member (or a potential witness in the courts) with something other than physical force to discourage them from speaking in parliament (or giving evidence in court), without reference to any particular vote or matter in issue (or imminent appearance before the courts), is a contempt of parliament (or contempt of court, or perversion of the course of justice).[23]

He also alleged that because the Prime Minister took the matter to cabinet and the party room for discussion, there was not a genuine free vote on the government side, an obvious non sequitur (the coalition parties do not purport to bind their members by cabinet or party room decisions or discussions).[24]

Finally, Mr Green crowned his confused comment on the case by alleging in his memoirs that Prime Minister Menzies, against whom he had a manifest antipathy, was influenced by a desire to take revenge on Mr Browne for some journalistic excursions against the Prime Minister.[25] That allegation follows a long tradition of attributing the worst imaginable motives to Australian politicians. We should consider the possibility, however, that Mr Menzies and Dr Evatt, both eminent constitutionalists, who agreed about the nature of the case if not about the appropriate penalty, understood the basis of parliamentary privilege, unlike Mr Green.

That is not to say that the committee and the House were justified in finding the offence proved largely on the basis of Mr Fitzpatrick's confession, or that the procedures used in coming to that finding were adequate, or that the penalty was appropriate. In order to assess those issues, however, it is necessary to dispose of the persistent confusion about the principle involved.

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20 Green, op. cit., p. 156. The memorandum of advice is a 1½ page document bearing a handwritten cover note by the Clerk of the Committee of Privileges indicating that the advice was not requested by the committee but was circulated to the members.

21 Green op. cit., p. 159.

22 As recently as 1946 the Privileges Committee of the House of Commons had found that the publication of a poster designed to intimidate members by threatening to defame them was a contempt, but recommended no action because of the insignificance of the matter. House of Commons Paper no. 181, 1945–46.

23 For an explication of this principle in contempt of court, see *Registrar of Supreme Court v McPherson* [1980] 1 NSWLR 688.

24 Green, op. cit., p. 156.

25 ibid., pp. 157–8.

The case in the High Court

Messrs Fitzpatrick and Browne did not suffer their imprisonment quietly. They took the case to the courts.

A challenge to the legality of the action of the House, mounted through the venerable process of a writ of habeas corpus, was heard by the full High Court in June 1955.

The challenge was completely unsuccessful. A unanimous court, speaking in the judgement of Chief Justice Dixon, dismissed the challenge in relatively brief terms.[26] The court followed the British law on the subject and held that the warrant of the Speaker committing the offenders to custody was conclusive. Contrary arguments advanced on the part of the applicants were dismissed in short order.

The contention that section 49 did not transfer the British law to Australia and apply it to the House of Representatives was held to be denied by the plain words of the section itself. The court observed that it would be 'quite incredible' that the framers of section 49 were not completely aware of the British law they were adopting.

The most substantial argument was that the Australian Constitution established a system of separation of powers, that section 49 should be read as subject to that separation of powers, and that a house of the Parliament could not exercise a judicial power by punishing a person for contempt. This thesis was also held to be contrary to the terms of section 49, and the court made the following significant observation about the nature of the parliamentary contempt jurisdiction:

> It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere. But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.[27]

This passage has been misrepresented as the High Court saying that the contempt power is judicial.[28]

Reference was not made in the judgement to the American law, but the co-existence of the separation of powers and the contempt jurisdiction of the Congress supports the

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

27 ibid., at 167.

28 Campbell and Whitmore, op. cit., p. 321; E. Campbell, *Parliamentary Privilege in Australia*. Melbourne, Melbourne University Press, 1966, p. 112.

thesis that the parliamentary contempt power is 'not strictly judicial but …. [belongs] to the legislature, rather as something essential, or, at any rate, proper for its protection'.

A claim that the Parliament had exhausted its power to declare its powers, privileges and immunities under section 49 by enacting piecemeal statutes, such as the *Parliamentary Papers Act 1908*, dealing with parliamentary immunities, was dismissed on the basis that those statutes do not purport to be such a declaration and could not be so regarded. They were more appropriately regarded as authorised by section 51(xxxix) of the Constitution, which empowers the legislature to make laws with respect to matters that are incidental to the execution of any power vested in the Parliament or in either house. Similarly, an argument that the power under section 50 of the Constitution, whereby each house of the Parliament may make rules and orders with respect to the mode in which its powers, privileges and immunities may be upheld, had not been utilised in relation to the committal of persons for contempt, and this prevented the exercise of the power under section 49, was dismissed on the basis that section 50 is permissive.

An attempt was made to take the matter to the Privy Council, but that body refused leave to appeal on the basis that the judgement of the High Court was 'unimpeachable'.[29]

Since 1955, the High Court has not had another occasion to consider the parliamentary contempt jurisdiction under section 49. There have, however, been significant changes to the law by way of statute.

Changes to the law

The *Parliamentary Privileges Act 1987*, unlike the earlier statutes referred to in the judgement of the High Court, is explicitly a declaration of the powers, privileges and immunities of the two houses under section 49.

The Act was passed in response to judgements of the Supreme Court of New South Wales, which were inconsistent with other Australian and British judgements, to the effect that parliamentary privilege did not prevent the cross-examination of witnesses before the courts on their parliamentary evidence. The Act also put into effect, with modifications, recommendations of a Joint Select Committee on Parliamentary Privilege which reviewed the law in 1984.[30]

Section 5 of the Act provides that, except to the extent that they are altered by the Act, the powers, privileges and immunities of the houses as in force under section 49 continue. There has thus not been a complete severance from the earlier law. Other provisions, however, significantly affect the parliamentary contempt jurisdiction.

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29 (1955) 92 CLR 171 at 172. Junior counsel in the High Court included Anthony Mason and Ninian Stephen, both subsequently justices of the High Court, the former Chief Justice, and the latter subsequently Governor-General. In the Privy Council the petitioners were represented by Sir Hartley Shawcross, QC, former Attorney-General.

30 For the background to the 1987 Act, see H. Evans (ed.) *Odgers' Australian Senate Practice*. 10th edn, Canberra, Department of the Senate, 2001, pp. 34–7.

Section 4 contains what amounts to a definition of contempt of Parliament and a prohibition on the houses treating anything which falls outside that definition as a contempt:

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

A house would not be able to treat any act as a contempt, as it presumably could under the old law; the offence would have to meet the statutory test, and the courts would be able to determine whether it met that test. In order to ensure that this jurisdiction of the courts is not excluded, section 9 provides that any warrant committing a person to custody for a contempt must set out the particulars of the matters determined by the house to constitute the offence. This overcomes an aspect of the British law referred to in the High Court's judgement, that a warrant simply stating that a person had been found guilty of a contempt was unexaminable (for the case of the imposition of a fine, see below in relation to section 7).

Section 6 of the Act clarifies section 4 by providing:

(1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.
(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

It is therefore not possible for the Commonwealth houses, as some other houses have done in the past, to treat a mere externally published defamation of a house or its members as a contempt. This provision, which was recommended by the joint select committee, was not recommended with Fitzpatrick and Browne in mind, but arose from cases in which defamations of members had been raised as matters of privilege.[31]

Sections 4 and 6 of the Act would not prevent a case identical to the Fitzpatrick and Browne matter being similarly dealt with again. As has been noted, it was not a case of defamation of a member but of attempted intimidation of a member in respect of his parliamentary duties. The publication of a defamatory attack on a member with the express purpose of preventing the member from speaking about certain matters in Parliament would clearly fall within the definition in section 4 and would not be excluded by section 6.

Section 7 of the Act codifies the penalties which may be imposed by the houses for contempts, setting the maximum penalties as six months imprisonment and a fine of

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31 Joint Select Committee on Parliamentary Privilege, *Final Report*, 3 October 1984, Parliamentary Paper no. 219/1984, pp. 83–7.

$5000 for a natural person and a fine of $25 000 for a corporation.[32] The doubt about the power to fine under section 49 is thereby overcome. The section provides that a fine is a debt due to the Commonwealth and may be recovered in the courts by a person appointed by a house for that purpose. An attempt to enforce a fine could thereby be brought before the courts.

In conjunction with the passage of the Act, the Senate adopted a resolution setting out procedures to be followed in cases of alleged contempts. These procedures are based on recommendations of the joint select committee, but with some significant modifications. Those recommendations were related to the Fitzpatrick and Browne case, in that they were intended to overcome some of the criticisms of the procedures followed in that case, particularly the refusal to allow the offenders to be represented by counsel.[33] For reasons which have not been explained, these procedures have not been adopted by the House of Representatives. The Senate procedures provide for the following procedural safeguards to apply to cases of alleged contempts referred to the Senate Privileges Committee:

- A person must be informed in writing as soon as practicable of any allegations made against them and of any evidence in respect of them.

- Such a person is to have all reasonable opportunity to respond to such allegations and evidence by written submission, by oral evidence and by having witnesses examined.

- All persons appearing before the committee may be accompanied by, and consult, counsel.

- A witness cannot be required to answer in public session any question which the witness has reason to believe may incriminate them.

- Evidence is generally to be heard in public.

- Counsel assisting the committee and counsel representing witnesses may examine any witnesses before the committee.

- Draft findings are to be made available to affected persons for further submissions before the findings are reported to the Senate.

- Witnesses may be reimbursed costs of representation in cases of hardship.

- Potential witnesses are to be informed of their rights.

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32 Unlike other statutory penalties, the fines specified in the Act are not updated in accordance with the formulae in the *Crimes Act 1914*, sections 4AB and 4B.

33 Senate Privilege Resolution no. 2, 25 February 1988, in *Standing Orders and Other Orders of the Senate*, February 2000, pp. 103–4.

When the Privileges Committee has reported, seven days' notice is required for any motion in the Senate to declare a person guilty of a contempt or to impose a penalty.[34]

These procedures have been followed in many cases of alleged contempts which have been referred to the Senate committee since 1988. There have been twelve cases in which persons have been found guilty of contempts of the Senate, but no penalties have been imposed, usually because of withdrawal of the offending acts and remedial action by the offenders. Most of these cases have related to interference with witnesses or unauthorised publication of committee documents, the latter also relating to the protection of witnesses.[35]

These procedures, and the nature of the cases dealt with in the Senate, have largely prevented the criticisms which arose from the Fitzpatrick and Browne case. Were a penalty to be imposed for a contempt, however, the matters at issue in that case could well arise again and come before the courts.

A High Court revisit?

If a penalty of imprisonment or fine were imposed, and were challenged in the courts, the likely basis of the challenge would be section 4 of the Parliamentary Privileges Act. The courts would have the task of determining whether the offence found fell within the terms of that section. That judicial scrutiny, and the Senate procedures for determining cases (which would probably in practice be followed by the House of Representatives in any event), would probably give rise to a public perception that such a matter had been appropriately dealt with.

There would remain, however, the underlying criticisms of the parliamentary contempt jurisdiction, that it involves politicians acting as judges in their own cause and exercising a judicial function. Would the High Court revisit the constitutional question and vary its findings of 1955?

Cases involving parliamentary privilege have come before the court in recent times. None has involved the imposition of a penalty for contempt on a person other than a member of the house concerned. The court has generally upheld the rights of the legislature. In those cases, one justice, Mr Justice Kirby, has clearly signalled that he would welcome an opportunity to revisit questions raised in Fitzpatrick and Browne, and his remarks leave little doubt as to how he would find on those questions.[36] Similarly, Justice McHugh has argued for a reconsideration of the judgement, not only on the separation of powers ground but on the implied freedom of communication, although he raised the latter on the basis that the case was one of 'punish[ing] persons for criticisms of members of Parliament'.[37] Given the recent

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34 Senate standing order 82, ibid., p. 54.

35 H. Evans (ed.), *Odgers' Australian Senate Practice.* 10th edn, Canberra, Department of the Senate, 2001, pp. 61–3, 587–613.

36 *Egan v Willis and Cahill* (1998) 158 ALR 527 at 574; *O'Chee v Rowley*, Queensland Court of Appeal (1997) 150 ALR 199: special leave to appeal to High Court refused: judgement not reported, transcript of hearing, 20 November 1998, pp. 4–5. See also *Arena v Nader* (1997) 71 ALJR 1604.

37 M. McHugh, 'Does chapter III of the Constitution protect substantive as well as procedural rights?', *Constitutional Law and Policy Review*, April 2001, p. 57 at nn. 67–70.

judgements, however, it may be predicted with reasonable confidence that the court, after a full argument, would uphold the fundamental finding in Fitzpatrick and Browne, that the power to punish contempts adheres to the houses under section 49 as part of the legislative rather than the judicial function.

A parliamentary revisit?

There is also no sign of the Parliament revisiting the contempt jurisdiction.

In December 2000 the House of Representatives agreed to a motion to release documents collected by the Privileges Committee in the Fitzpatrick and Browne case but not published by the committee, subject to an exemption for material likely to intrude upon the personal affairs of any person or which would otherwise be exempt under the Archives Act. Debate on this motion, which formally arose from a recommendation by the Privileges Committee, indicated that it was influenced partly by a lingering concern on the part of some members that Fitzpatrick and Browne were not fairly dealt with. That concern on the part of one member, however, explicitly relied on the misleading account by Mr Green in his book.[38] No further action arose from the motion. If the House were to reconsider the matter, a logical first step would be for it formally to adopt the procedures established by the Senate in 1988.

Future cases

As has been suggested, there is no guarantee that a Fitzpatrick and Browne case will not arise again. If a highly defamatory attack were to be made upon a member and the author of the attack were to state that this was done for the purpose of preventing the member raising matters in Parliament, the house concerned could well think it an appropriate occasion for the exercise of the contempt jurisdiction and the imposition of a penalty. Politics and journalism, however, may have acquired a subtlety and discretion lacking in the overheated atmosphere of 1955. Privilege cases in more recent times, particularly in the Senate, where most have occurred, have focussed on matters clearly meeting the obstruction test in section 4 of the 1987 Act. The Act seems to have had the effect of directing attention to the core rationale of parliamentary privilege, protecting the integrity of parliamentary processes and citizens involved in them. Privilege cases have been treated as occasions for educating those involved in parliamentary processes about the need to avoid any impairment of the integrity of those processes. In that context, the power to impose penalties for contempt is likely to remain an unused reserve power.

38 House of Representatives Debates, 7 December 2000, pp. 23688–93.

The Traditional, the Quaint and the Useful: Pitfalls of Reforming Parliamentary Procedures*

Harry Evans

Some parliamentary procedures and practices are valued because they are traditional and quaint. The question which must be asked is: Is their traditional and quaint character an added value, that is, added to their substantial value in facilitating the work of a legislature, or is it their only value? Very often the latter is the case. Some procedures and practices are valued simply because they are traditional and quaint, and have no other substantial legislative value. Some are not only empty of value, but obscure or damage substantial values. Their value may be symbolic, but the symbolism may be inappropriate to the point of subversion of legislative values. Their symbolic content may be misinterpreted or corrupted.

Examples lie scattered over the parliamentary landscape. It is said to be a parliamentary custom that the head of state or equivalent (only in monarchies?) does not enter the lower house. The basis of this custom is that the lower house must be free to deliberate in the absence of the Crown. It is often mistakenly claimed that this custom commenced with King Charles I's infamous armed raid on the House of Commons in 1642, but the whole point of that incident was that Charles violated an already well-established 'privilege', the freedom of the House to debate matters without the monarch listening in or over-awing the members by the royal presence. The custom is clearly no longer apposite. The Crown and its representatives are not a threat to freedom of debate. It also conceals the real problem for lower houses as

* This paper was presented at the 35th Conference of Australian and Pacific Presiding Officers and Clerks, Melbourne, July 2004.

legislatures, the stranglehold which prime ministers exercise over those houses through ministerial and caucus discipline. The harmless monarch is excluded, while the real tyrant is already in the cuckoo's nest. This supposedly ancient and revered custom also reveals another corruption, the tendency to substitute the building for the institution, which is a feature of many a traditional belief. It is frequently claimed that the custom is that the monarch or equivalent may not enter the lower house *chamber*. Thus there arise absurd claims, for example, that the Queen should not have inspected the House of Representatives chamber before opening the new Parliament House in Canberra in 1988 and that conferences which are to be attended by the Governor-General cannot be held in the House chamber.

This brings to mind the whole ceremony of the opening of parliament, which is often said to be based on the prohibition of the monarch appearing in the lower house. This ceremony is not only empty of any real legislative value but its symbolism is all wrong. It is based on the monarch being the head of government and summoning the parliament to humbly advise on the monarch's requirements. This does not represent the constitutional reality of the United Kingdom for the past 220 years at least. It is more inappropriate in Australia, even with the Australian modifications, for example, the members of the lower house being allowed to be seated during the 'speech from the throne', rather than standing at the bar of the upper chamber. The whole performance is totally contrary to the Australian Constitution. In a submission by the Senate Department to the House of Representatives Procedure Committee in one of its regular inquiries into the opening ceremony, the following constitutional anomalies were pointed out:

(1) The appointment of justices of the High Court as deputies of the Governor-General is contrary to the separation of legislative, executive and judicial functions entrenched in the Constitution, and a violation of the principle that judicial officers exercise only judicial functions.

(2) The Governor-General's opening speech, which sets out the government's program, involves the Governor-General, who is otherwise supposed to be a politically neutral head of state, in speaking as if he or she were the actual head of government and in making contentious and partisan political statements.

(3) The Governor-General purports to direct the two houses as to where they are to meet, which is not authorised by the Constitution.

(4) The Governor-General attends in the Senate chamber and summons the House of Representatives to attend there, as if the Governor-General had some particular relationship with the Senate as distinct from the House of Representatives, analogous to the relationship between the monarch and the House of Lords. There is no such relationship under the Australian Constitution, which provides for two elected houses as co-equal participants in the legislative process.

The concern of members of the House with the indignity of being summoned to the Senate chamber is therefore the least of the problems of the process. The

recommendation in the submission that the whole rigmarole be abolished, however, did not meet with approval. (In this connection it is noted in passing that, whatever else in the opening ceremony might survive any change to a republic, the office of Black Rod, being peculiarly associated with the monarchy, would at least have to be restyled and decrowned.)

Arising from the opening of parliament is an example of a traditional and quaint custom the symbolism of which is not only empty but has been completely distorted. Before the 'speech from the throne' is considered in the lower house, a proforma bill, which is never proceeded with, is introduced. This is supposed to symbolise the right of the house to attend to business of its own choosing before it considers the requirements of the Crown. The symbolism of the occasion, however, is reversed by the introduction of the bill by the prime minister or other minister. The real wielder of the royal sceptre has appropriated the parliamentary custom, thereby demonstrating the subservience of the house to the real monarch.

The supposed ban on the Crown's representative in the lower house is also cited as the source of a most peculiar custom: the swearing in of the Governor-General in the Senate chamber. It has never been explained why the ceremony should occur *anywhere* on the parliamentary premises. Whatever the origin of this practice (and it may be quite mundane—the lack of distinguished meeting places) the rationalisation of it seems to be a case of what might be called tradition transfer, the migration of a tradition-based belief from one event to an unrelated event. The swearing-in has had attached to it the alleged tradition of the opening.

Before leaving the opening of parliament, it may be asked why some of the framers of the Australian Constitution, who subsequently became members of the first Parliament, who were very insistent at the constitutional conventions that Australia's system of government was to be different from that of the United Kingdom, and who were mostly closet if not overt republicans, tolerated all this monarchical frippery. Was it imposed upon them as the anglophiles' revenge for their departure from the 'Westminster model', or did they accept it as a harmless indulgence of anglophilia and Empire loyalty? Some research ought to be done on this subject.

This also brings to mind that the main reason for the intense hostility of radicals on the left to these traditions is that the allegedly ancient customs are not ours, but bear the taint of colonialism. If only they could know some of the proposals which have been put forward in the past. At various times it was suggested, for example, that attendants in beefeater regalia should search the basement of Old Parliament House before an opening of Parliament, and that the President of the Senate should sit on a woolsack. These suggestions had to be defeated by purely practical considerations: the printers who occupied the old Senate basement would not appreciate the interruption and might throw pots of ink at the beefeaters; and a woolsack, we have it on the very highest authority, is extremely uncomfortable. The nationalists would really have been aroused if such schemes had been adopted. This would have had the unintended consequence of drawing attention to the paradox that many supposedly ancient customs are actually recent inventions, like the bogus ancient customs of the monarchy exposed as neo-gothic fabrications. (At one stage the Speaker of the House of Representatives decided to hold a Speaker's procession. Within a short time it was

being described as a long-cherished tradition of the *Australian* Parliament.) If traditions are to be invented, they might as well be local.

It must be said that some of the traditional and quaint practices have a surprising hold over the minds of members. When the Senate standing orders were rewritten in 1988–89, the requirement for senators to speak 'covered' to a point of order during a division was abolished. Senators taking such points of order, even senators who arrived after that time, frequently wave pieces of paper above their heads, or are urged to do so by others. How they get to know about this practice is a mystery.

Equally mysterious is the notion that a member filling a vacancy should be dragged in mock unwillingness into the chamber by the sponsors. This appears to be another case of tradition transfer, from the unwillingness of a Speaker to accept an office involving the hazard of offending the monarch. (It is observed in passing that there are traditions based on the Speaker being the spy of the Crown, and traditions based on the Speaker giving offence to the Crown, but seemingly no traditions based on proper Speaker behaviour.)

The inappropriate character of some customs is not the end of the problem. The seemingly most harmless customs may be detrimental to substantial legislative values. It may be dangerous to enter upon the subject of wigs and gowns, but they provide an example. No one has ever seriously suggested that they have any substantial value. The argument that they 'depersonalise the office' and put a barrier between the officiators and the disputants, sometimes used in relation to courts, would not seem to have any application to parliaments, as the participants in the parliamentary process necessarily function in a free-flowing proximity. They are, however, far from harmless. They convey a strong impression of parliament as an antiquated and decorative institution with no substantial function. Combined with the executive domination already referred to, they reinforce a perception that the real power and vital activity of government reside elsewhere. The courts may escape this consequence because it is obvious that courts exercise real power, and they suffer only the impressions that the law they apply is antiquated and the people who administer it are out of another century. The consequences for parliaments are more damaging.

A recent instance of the damage done by quaintness occurred after the flour-bombing incident in the British House of Commons on 19 May 2004. The government announced that it would take control of security arrangements for the House of Commons. The officer in charge of security would no longer be responsible to the Speaker, but would be appointed by the government and would be answerable to the Home Secretary, the relevant minister. This executive government takeover of a parliamentary responsibility was accompanied by a great deal of derisory comment about the traditional mode of dress of the Serjeant at Arms and his subordinates. Men attired in black silk tights and carrying swords, it was said, are obviously unfit to run a modern security function. The quaint tradition of the parliamentary office was turned against it and used to support a usurpation of its functions. Whether the takeover succeeds remains to be seen at the time of writing, but it is clear that the legislature has not been assisted by its continued adherence to the quaint and the traditional, regardless of how diligently it has pursued the useful and the efficient. Nothing could

better illustrate the danger for legislatures in the cultivation of the traditional for its own sake.

There comes a stage when the traditional and the quaint may not only conceal or repudiate substantial legislative values, but simply overwhelm them and bury them in such a pile of tradition and quaintness that they can scarcely be exhumed. This must surely be the case with the Mace. There has been what can only be described as an unhealthy obsession with the Mace. Citizens hungry for information about the legislature have constantly been told about the Mace. Luxurious publications have been devoted to it. It is almost as if parliament had no other purpose but to house this sacred object. Maces have been scattered around the world like the statues of the saints. If only vibrant legislatures could arise wherever maces were planted, parliamentary institutions could be everywhere secure. Alas, a mace does not a parliament make. Nor does it make a history of a parliament. It was recently announced that the custodians of Old Parliament House in Canberra had constructed a replica of the Mace at a cost of $235 000. A spokesperson for the museum said, echoing phrases oft repeated: 'The mace is a symbol of the authority of the Speaker in the Westminster parliamentary tradition and also symbolises the supremacy of parliament in our democracy'. The assumptions about the system of government built into that statement have polluted civic education for decades. To take only the statement which is indisputably wrong, parliament is not supreme in *our* democracy, but is subject to the Constitution, unlike its 'Westminster' original. It would not take $235 000 to educate the public on that point. There would be plenty left over for high-tech interactive educational materials to provide some real information about the operations of the legislature in the past and present.

Is the excessive attention given to things like maces the consequence of executive domination, leading to an embarrassing lack of real legislative activity? Has the degeneration of legislatures as legislatures reached the stage where we retreat to myths and decorations as the last shelter of the parliamentary shell? The alternative explanation, put forward by some popular educationalists, that legislating is difficult to understand and uninteresting, while maces are engaging, is potentially more disturbing. It involves capitulating to a Bagehotian philosophy that it is not given to children or the masses to understand the real workings of government, and they must be dazzled with ceremonies. There is an even darker theory: that the exponents and practitioners of executive absolutism uphold mummery as the mask of power.

Apart from the suppression of substantial legislative values, the greatest danger in the cultivation of the traditional and the quaint lies in the hostility which is aroused on the part of the radicals and nationalists, who wish to sweep it all away. It is not difficult to understand this reaction. When we get to the level of maces having to be covered (with what kind of cloth, and who wove it?) in the actual presence of royalty, we enter a realm of magic which even the most determined obscurantist finds hard to defend. Then the radical arrives to denounce it all as mumbo jumbo, and to set about jettisoning everything bearing the cursed mark of real or supposed antiquity. We are then in danger of losing procedures which may be traditional and quaint but which are also useful.

Take the venerable procedure of committee of the whole. Everyone has heard of its alleged origins in the subservience of the Speaker to the Crown. Traditional and

quaint it may be in a certain measure, but it is also extremely useful. Its usefulness ranges from the strictly practical to the purely procedural. It is very convenient to have the chair sitting at the table where it is easy to consult with members and the clerks when dealing with complex bills involving a large number of amendments and a large number of documents which have to be assimilated. The legislative process greatly benefits from having the additional procedural stages involved with committee of the whole, whereby more opportunities are given to members to consider and reconsider the contents of bills and to discuss where and how they should be changed. In a truly legislative chamber, committee of the whole is a very useful tool.

Some years ago an ardent reformer presented for clerkly examination a scheme to 'streamline' the procedures involved in the passage of legislation and to abolish what were regarded as the associated arcane rituals ('readings', committee of the whole, etc). Perusal of the plan revealed that it would remove several substantive stages in the consideration of legislation and deprive members of several opportunities for deliberation. There was also an unarticulated assumption that the purpose of the legislative process is to allow the passage of legislation as expeditiously as possible, rather than ensure adequate deliberation and opportunity for scrutiny and amendment. When this was pointed out, it was agreed that deliberation should not be restricted. It was then suggested that perhaps it was only some of the names which were objectionable ('readings', committee of the whole, etc), and the 'reform' could achieve its purposes by renaming those aspects of the process. At that stage the whole project was dropped. If an objection to the traditional and the quaint had been allowed to overwhelm a sober assessment of usefulness, a process would have been put in place which eventually would have left members wondering why it was so easy for them to be steamrollered into passing dodgy bills.

It has also to be recognised that the usefulness of procedures may be purely symbolic, and their symbolism may be of substantial legislative value in itself. An example is provided by the practice of members standing when the chair is taken and acknowledging the chair. This is a salutary reminder of the importance of the office and the value of orderly deliberation. Even some of the most hardened of radicals and nationalists have recognised this, noting that the chair may be occupied by one of their own, and ideally protects all equally. This is a case where symbolism and real values are in happy concurrence.

The present danger for parliaments, however, is that they will be seen as merely a bizarre combination of impotent yelling and funny costume mimes. Take away the pantomime, and only the bad behaviour remains, to receive its proper censure. Complete obsolescence is then not far away. If they are to be respected as legislatures, they have to demonstrate that their processes perform useful work.

What is required is a careful and rigorous consideration of procedures and practices which are traditional and quaint, to see whether they have substantial legislative value and whether we may contentedly accept their traditional and quaint character while taking pride in that value.

Having the Numbers Means Not Having to Explain: The Effect of the Government Majority in the Senate*

Harry Evans

In the 2004 federal election the coalition parties gained a one-seat majority in the Senate, taking effect on 1 July 2005. This was the first time in 24 years that a government would have such a majority, and before that it is necessary to go back to the early 1960s to find such a phenomenon. Because of the proportional representation system on which the Senate is elected, and which awards seats more nearly in proportion to votes than the single-member system of the House of Representatives, the normal situation in the Senate since the proportional system was introduced has been for no party to have a majority. This has allowed the Senate for most of its history to act with a measure of independence from the government of the day.

There was considerable apprehension about the implications of the government majority. The complacent and the partisan developed a stock phrase: 'The sky will not fall in and the sun will still rise tomorrow'. The apprehension, however, was not about celestial phenomena but the effect on the ability of the Parliament to hold the government accountable. There was a well-founded fear that a government majority would mean a decline in accountability. In the past, it was possible to believe that a government majority would not necessarily mean government control. The Fraser

* This article was published as chapter 10, 'The Senate', in C. Hamilton and S. Maddison (eds), *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate*. Crows Nest, NSW, Allen & Unwin, 2007.

Government, with a majority of six from 1976 to 1981, never really controlled the Senate, because there were up to twelve coalition backbenchers who were willing to vote against the government, particularly on accountability issues, and there was therefore little fear of a major decline in accountability.

Since that time government control of its backbenchers has greatly increased. There has also been a significant concentration of power within the government in the office of the prime minister in recent years. The past was therefore not a good guide to likely developments. For the first ten years of the Howard Government, no coalition senator voted against it on any issue. Large hopes were held for 'rebel' National Party Senator Barnaby Joyce of Queensland, who was elected in 2004, but in the first twelve months of the government majority he voted against the government on only two bills, and one of those passed with support from other quarters. He also unsuccessfully moved, in the name of protecting small business, a motion to disallow government regulations concerning petrol retailing. One Liberal senator voted against the government legislation to overrule civil union laws in the Australian Capital Territory. Dissident backbenchers successfully rebelled over treatment of asylum seekers, and were vilified by party colleagues for their pains. These occasions were remarkable because unusual. The 'rebels' may soon use up their tolerable quota of rebellion. Party discipline has generally been iron-tight, particularly on accountability issues, which are not worthy of any of that precious quota.

It was also remembered that the coalition government, before the 2004 election, showed a strong interest in gaining control of the Senate by other means, either by changing the electoral system to ensure a government majority, or by changing the Constitution to allow legislation to bypass the Senate.[1] It was very clear that the government was keen on controlling the upper house, and it was highly unlikely that the purpose of that control would be to enhance accountability.

Accountability measures

Over many years the Senate built up a structure of accountability measures designed to compel governments to explain themselves and to submit to greater scrutiny. Those measures ranged from the insistence in 1901 on appropriation bills setting out details of proposed expenditure to the 2001 order requiring publication on the Internet of details of all government contracts worth more than $100 000. All of these accountability mechanisms were made possible by lack of government control of the chamber, sometimes in the form of dissident government senators. For example, in 1981, during the time of the Fraser Government majority, the Senate established a Scrutiny of Bills Committee to examine and report on all legislation, using civil liberties and accountability criteria. The government opposed the establishment of the committee, but was defeated by seven of its own senators voting with the non-government parties. If the current degree of government control had applied over those years, none of the accountability measures would have come about.

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1 H. Coonan, *The Senate: Safeguard or Handbrake on Democracy?*, address to the Sydney Institute, 3 February 2003. Department of the Prime Minister and Cabinet, *Resolving Deadlocks: A Discussion Paper on Section 57 of the Constitution*, Canberra, 2003.

The fear was that the coalition government would use its majority to set about dismantling the accountability measures established in the past. The government had two options for doing so: simply to abolish those measures, perhaps in a disguised way (for example, by restructuring the Senate committee system); or to leave the structures in place but use its majority to ensure that they did not operate. Until mid-2006, when a restructuring of the committee system was announced, the second option was pursued, but the first option remains open to the government so long as its majority lasts.

According to classic notions of parliamentary government, the legislature imposes accountability on the executive through two main activities: legislating, if only by scrutinising and amending the legislative proposals of the executive; and inquiring into government activities and matters of public interest, partly to inform the law-making function and partly to expose government to public scrutiny, so that the public will know how they are being served.[2] Governments dislike both activities; they would prefer to pass legislation with the minimum of scrutiny and amendment, and to avoid the exposure of embarrassing mistakes or misdeeds. In recent times, governments have been able to use their tight control of lower houses, through ever-loyal party majorities, to avoid both streams of accountability in those chambers. Control of the upper house means that such avoidance can be virtually complete.

Legislation

For many years governments have had to accept that their legislation may be amended or rejected in the Senate after relatively lengthy scrutiny and debate. That situation was abruptly terminated on 1 July 2005.

Contrary to what governments would have us believe, outright rejection or obstruction of legislation has been relatively rare. In its last term without a Senate majority, the Howard Government had only seven pieces of legislation in deadlock between the two houses, such that the simultaneous dissolution provisions of section 57 of the Constitution could have been invoked to seek to pass them. Some bills in disagreement were subsequently passed by compromise. Considering that about 150 bills are passed per year, the area of continuing disagreement was relatively small. The bills were major items in the government's legislative program: partial repeal of the unfair dismissal laws, other industrial relations provisions, Telstra full privatisation, excision of islands from the migration zone, and changing disability entitlements. The more significant the legislation, however, the greater the scrutiny required, and the greater the requirement for support beyond the government parties, which after all represent only 40-odd per cent of the electorate. Most government legislation was passed without amendment or after compromise over amendments.

Now, however, it is clear that government legislation will be passed only in the form the government wants, and that non-government amendments will not be allowed,

[2] For such classic notions, see J. Uhr, *Deliberative Democracy in Australia: the Changing Place of Parliament*. Cambridge, Cambridge University Press, 1998, and the authorities cited at pp. 63–6, 70–4.

even where amendments have been supported in principle by government backbenchers.

The change is illustrated by before-and-after examples of the treatment of two pieces of related legislation. The government's first major anti-terrorism bill, the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, was passed only after extensive scrutiny and amendment in the Senate and compromise over many of the amendments. This treatment of the legislation was widely praised as ensuring that basic civil liberties were not fatally undermined and that the government's more draconian proposals were not passed. In 2006, however, the Telecommunications Interception Amendment Bill, greatly expanding the power of law enforcement agencies to intercept and access electronic communications, was passed after the rejection of all non-government amendments, including amendments for which government backbenchers had expressed support during committee examination of the bill. The same situation occurred with the Anti-Terrorism Bill (No. 2) 2005, which introduced for the first time detention without charge. Some government amendments to that bill were said to allay some concerns of government backbenchers, but other amendments for which they had expressed support were rejected. Even that degree of concession has now apparently disappeared. A package of fuel tax bills was passed unamended in June 2006, although government senators on a committee recommended that it not pass until outstanding issues were resolved, and other government senators expressed discontent with it. The government controls the legislative process and is able to get whatever it wants in the way of law-making.

The Senate chamber is not the only forum for scrutinising legislation. The system of subjecting bills to scrutiny in committees, including by hearing evidence from interested organisations and members of the public, was established by the Senate over many years to enhance government accountability for legislative proposals. This system is still in place, but the coalition government has used its majority to restrict the time available for committees to examine bills. The average time allotted declined from 40 to 28 days, which gives potential witnesses less time to prepare their submissions and to make their contributions in oral evidence. The government has also blocked the referral of some bills to committees. And the committees cannot amend bills, so their evidence and reports can simply be ignored, even when government members of the committees have expressed their support for changes to legislation, as the examples referred to indicate.

The coalition government also now has the ability to force legislation through the chamber by means of the gag, the termination of debate, and guillotine, the limitation of time for the consideration of a bill. The guillotine was used in periods of non-government majorities when the government could gain the support of other parties to set time limits for debate. Very often, these were 'civilised guillotines', in which the time limits were negotiated between parties. On one occasion, the Leader of the Opposition in the Senate moved the motion specifying the allotted times. Now the government has exclusive power to determine how much time will be allowed for debate, and has used that power on several occasions. From 1 January 2004 to 30 June 2005 there were no gag motions and only one guillotine; from 1 July 2005 to 30 June 2006 there were sixteen and five, respectively. The times allotted for major bills were less than those for bills of comparable importance in the past. The Anti-Terrorism Bill (No. 2) 2005 was given only six hours, the highly contentious Welfare to Work

legislation only seven hours, and the Radioactive Waste Management Bill three hours. By way of contrast, the Native Title Bill 1993 was considered for 50 hours with a 'civilised guillotine', and the Workplace Relations Bill 1996 for 49 hours.

A government with control over law-making has the power to alter the electoral law to favour its own re-election. The temptation is irresistible. A piece of electoral legislation passed in June 2006, shortening times for enrolment and increasing the limit on non-disclosable donations to parties, was seen by the non-government parties as the first instalment of such a project.

The number of days of meeting declined. In 2003 the Senate sat on 64 days, in 2005 on 57 (the 2004 sittings were shortened by the election). From 1 January to 30 June 2006 there were only 22 sitting days. This means that there is less time for non-government parties to devote to legislation and to exercise the accountability mechanisms available to them.

Inquiries

Until announcing a restructuring in June 2006, not implemented at the time of writing, the government left in place the structure of the Senate committee system. Under the existing system half of the subject-specialised standing committees have non-government majorities and non-government chairs. These committees, called references committees, were designed to inquire into matters referred to them by the Senate. The government, however, used its majority to control the matters referred to the committees for inquiry. It is clear that no inquiries will be allowed into matters which might expose dubious government activities.

Before 1 July 2005, for example, there were inquiries by references committees into the government's industrial relations advertising campaign, whereby $55 million of public funds were spent on advertising government proposals which had not even been *introduced* into Parliament, much less passed, and into the Regional Partnerships and Sustainable Regions Programs, under which millions of dollars in grants were given to private organisations and individuals for regional development projects, some of a dubious nature. In both cases, money had not been specifically appropriated for the purposes of the expenditure.

No such inquiries will be allowed in the future. Proposals for a range of inquiries in the Senate have been rejected by the government majority. These include proposed references to the references committees on the aviation safety regime and refugees and visa-holders which were rejected by the government on 2 March 2006, when government senators voted against the references in spite of some having expressed disquiet about the aviation safety issue. No ministers or government senators spoke to the motions, leading to charges of contempt for the committee system. In spite of that criticism, the same situation recurred, for example on 22 June 2006, when a proposed reference on the practical operation of welfare to work regulations was rejected with no reasons given. It is now expected that, if the committees are given any work to do, they will be like the House of Representatives committees, examining only matters referred to them, or approved, by ministers.

A lack of government cooperation with other inquiry processes has been evident. In the past the Senate has used orders for the production of documents as a major inquiry mechanism and information resource. Motions were passed requiring ministers to present to the Senate, or to Senate committees, documents about specified matters of public interest. If the government refused to produce documents in response to an order, the Senate could take other measures, such as committee hearings, to gain the required information, or impose procedural penalties, such as postponement of legislation, on the government. Even before gaining its majority, the government was building up a record of refusals to produce documents in response to Senate orders. Going back to just before the change of government, in the Parliament of 1993–96, 53 such orders were made, all but four being complied with. In the Parliament of 1996–98, 48 orders were made and five were not complied with. In the Parliament of 1998–2001, there were 56 orders, and 15 not complied with, in that of 2002–04, 89 orders and 46 not complied with. Since 1 July 2005 only one motion for production of documents has been agreed to. All others have been rejected.

For example, five motions for the production of documents were rejected by the government on 17 August 2005. A ministerial statement offered various grounds for refusing to produce the documents: the 'longstanding convention' that legal advice to government is not produced (this cannot be true because of the many occasions on which supportive advices have been voluntarily produced by government); the documents were cabinet documents (this ground is supposed to be confined to disclosing the deliberations of cabinet, not every document having a connection to cabinet); and the document concerned was 'not intended for public disclosure' (if a document *is* intended for public disclosure, presumably it would be disclosed and then there would be no point in calling for it). The view of the government is that 'requests' for documents should be made directly to ministers offices, but, even if such requests are met, this has the disadvantage that the documents are not tabled in the Senate and so their publication is not given the status of proceedings in Parliament.

A similar approach has been taken to requests by committees for information. A report on 13 October 2005 by the Finance and Public Administration References Committee on works on the Gallipoli Peninsula, a matter referred to it before 1 July 2005, reported the refusal of the government to provide relevant legal advices supplied to the government. This material disclosed a very large expansion of the grounds for refusal to provide such documents. At first the Department of Foreign Affairs and Trade attempted to argue that the documents could not be provided because Senate standing order 73 prohibits the asking of questions seeking legal opinions at question time. It was pointed out that this has nothing to do with the provision of documents to committees, that legal advices to government have often been provided in the past, and that under past Senate resolutions refusals to provide documents should be based on a ministerial claim of public interest immunity on specified grounds. The department then stated that the minister had refused to provide the material because of 'a longstanding practice accepted by successive Australian governments not to disclose legal advice which has been provided to government, unless there are compelling reasons to do so in a particular case'. It was pointed out that this 'longstanding practice' had in fact never been advanced before, and would

have prevented most of the cases of disclosure of legal advice which had occurred in the past. The response to this was simply a reassertion of the 'longstanding practice'.[3]

More recently there has been a tendency not to give any reasons at all for refusals to provide information. Following the 17 August 2005 episode, six motions for documents were rejected without any reasons given. If this lack of cooperation continues senators may just give up moving these motions.

Estimates hearings

In the past the major accountability mechanism of the Senate has been the estimates hearings. From their beginning in 1970 estimates hearings were an opportunity to question ministers and officers about any activity of government departments and agencies. They were a general inquisition into the operations of government. Successive governments have made the claim that when they were in opposition estimates hearings were confined to the estimates, questions about how much money would be spent on particular purposes, that since they gained office the hearings have been debauched from this pure purpose, and that the committees should be brought back to their original function. This is not true; the hearings have always ranged over any and all government activities.

In 1999 there appeared to be a concerted effort by ministers to restrict the estimates hearings to their claimed original purpose by declining to answer questions which were not about how much money was to be spent on particular functions. This led to a dispute which found its way into the Senate, to the Procedure Committee and back to the Senate again. The Senate adopted the report of the Procedure Committee, to the effect that all questions going to the operations and financial positions of government departments and agencies are relevant questions for estimates hearings. As the Procedure Committee made clear, this only reasserted what had always been the practice. In more recent times, when ministers and chairs of committees have indicated impatience with lines of questioning, they have been reminded of the 1999 resolution. In some cases they have been invited to move a motion in the Senate for the repeal of the 1999 resolution if they consider that the practice should be changed. So far this invitation has not been taken up, but the possibility now cannot be disregarded.

The 1999 incident also demonstrates an important aspect of the change brought about by the government majority. If a Senate committee encounters resistance to its inquiries, it can only report the matter to the Senate and it is then for the Senate to provide a remedy. In the past, where ministers have resisted inquiries in committees, the majority of the Senate has undertaken various steps to pursue the inquiries, including directing committees to meet again, directing particular witnesses to appear, instructing committees to conduct wider inquiries, ordering ministers to produce particular information and extending the length of question time in the chamber. These measures have the effect of raising the level of any dispute, and have generally been successful. In effect, if a government wished to be uncooperative it had to get

[3] This exchange is in correspondence and advices attached to the report of the committee, *Matters Relating to the Gallipoli Peninsula*, October 2005.

into a major fight in the chamber with the potential to disrupt its legislative program. This ability of the Senate to impose a remedy has effectively been removed because of government control.

The value of estimates hearings in improving accountability and probity of government has long been widely recognised. The hearings allow apparent problems in government operations to be explored and exposed, and give rise to a large amount of information which would not otherwise be disclosed.

It is often said that estimates hearings are largely devoted to party politics, with non-government senators attempting to put blame on ministers or particular officers and to win political points. This should not be a matter for reproach, and nor does it invalidate the hearings as an accountability process. Free states work through party politics. The ultimate safeguard against the misuse of power by a government is the ability of its opponents and rivals to find out about, and draw attention to, its mistakes and misdeeds. Accountability is not a refined process which operates on an elevated plane, above sordid politics. Accountability operates in the realm of politics.

The effect of the government control of the Senate was well demonstrated by the treatment in the February 2006 estimates hearings of the AWB Iraq wheat bribery affair. The hearings began with a declaration by the government that it had instructed all officers not to answer any questions about the matter. The only reason given was that it would be undesirable to have Senate committees looking at the affair while the Cole commission of inquiry was conducting its examination. It was explicitly stated that this was not a public interest immunity claim, that is, a claim that answering questions would be harmful to the public interest in some specific way. It was simply a refusal to answer. This was contrary to past Senate resolutions, which declared that ministerial claims to be excused from answering questions in Senate inquiries should be based on particular public interest grounds, and the claims would be considered and determined by the Senate. In the past, matters before commissions of inquiry were the subject of debate and questioning; such commissions are not courts and there is no question of the sub judice principle applying. Had the government's declaration been made before 1 July 2005 it is fairly certain that some action in the Senate would have followed. After its majority took effect the government was able to make its declaration secure in the knowledge that the majority of the Senate would not take any remedial action.

It might be thought that this episode did not disclose an accountability gap, because the Cole commission would be pursuing its inquiry. The most significant point about the Cole commission, however, is that it came about because of pressure from powerful bodies overseas, ironically starting with members of another legislature freer than our own, the US Congress, and flowing through the United Nations and its inquiries. Without that overseas pressure, a great deal of information about the matter would have never been disclosed, if the whole affair had become known at all. The accountability gap will be of greater concern in cases where such an external element is not present, the government is not forced to conduct its own inquiry, and the last remaining parliamentary avenue of inquiries, the estimates hearings, are frustrated.

The AWB matter could well be a model for further refusals to provide particular information in the estimates hearings, with no possibility of any remedy. It was

unprecedented in that an inquiry by a government-appointed commission had not previously been the basis for a general direction to officers not to provide information. There had been previous occasions of particular refusals to answer questions on various grounds, and of reluctance to answer questions because of other inquiries, but no general direction on that ground. It was a significant extension of past claims.

During the estimates hearings many questions are taken on notice by ministers or officers or placed on notice by senators. The committees are required by the Senate's procedures to set deadlines for answering questions on notice. To encourage ministers and departments not to ignore the deadlines, the Senate has a procedure known as the thirty-day rule. If answers are thirty days or more overdue, any senator can ask for an explanation in the chamber and initiate a debate. This potentially imposes a penalty of loss of legislating time. The procedure provides no remedy, however, against flat refusals to answer questions. The Senate now cannot impose any more effective remedy. The procedure is therefore not a significant disincentive for refusals to answer.

It has been suggested that more questions are now taken on notice and that fewer answers are provided, and more slowly provided, because ministers know that no more effective remedy can be taken in the chamber. Statistics have not been collected for a sufficient time to test this suggestion, but it appears that the practices of delaying answers to questions on notice and simply not answering them or providing non-responsive answers have become more common.

On 11 May 2006 the government passed a motion which had the effect of stripping two days from the time allotted for the main budget estimates hearings later that month. This may be the beginning of a winding back of the hearings. The May 2006 hearings were marked by several significant refusals to answer questions, and by responses to the effect that answering some questions would be too expensive. This placing of a price on accountability may be the beginning of a move to ration it.

The weakening of the estimates hearings as an accountability mechanism was illustrated by a motion in the Senate on 8 February 2006 to require the Managing Director of Telstra, Mr Sol Trujillo, to appear in an estimates hearing to explain his administration of the government-majority-owned communications carrier. The motion was rejected, although government senators had earlier said that Mr Trujillo should appear. Apparently they were pacified by an offer of a private briefing by him, again illustrating the government's control over when and how it will be accountable, if at all.

Effect on public service

Estimates hearings provide public servants with an opportunity to demonstrate their professionalism and to show how effectively they carry out their functions. In particular, they should be able to show that they have performed the role appropriate to public servants, of advising ministers and carrying out both ministerial and departmental decisions with legality and propriety. Difficulties arise when public servants are seen to be doing whatever ministers want and then helping to conceal illegalities or improprieties.

The inability of the Senate to pursue remedies for ministerial refusals to provide information, apart from posing a danger to accountability of government, also gives rise to a danger for public servants. It potentially deprives them of the opportunity to demonstrate their professionalism and capacity. It also removes a safeguard for public servants. Over many years reference has been made to the 'estimates test': if a person responsible for some government activity would not feel comfortable in defending that activity in the estimates hearings, then there is probably something wrong with the activity. Officers can use the test to check for themselves the operations in which they are engaged, but may also use it to deflect improper or inappropriate demands made upon them by the political wing of government, ministers and their ministerial staff. The political wing could be told that, while officers would provide appropriate assistance, they would also be obliged to explain their role at the next round of estimates hearings, and that ministers would have to take responsibility for explaining any politically based decisions and actions of dubious propriety. The 'estimates test' is now seriously weakened, because government does not need to worry about the Senate, and public servants may be told not to worry about the Senate either, and to get on and carry out their instructions.

Financial control

This undermining of the estimates scrutiny process has occurred in the context of a significant decline in parliamentary control of expenditure under the financial system put in place by the government since 1997. By a series of legislative changes supposedly of a technical accounting character, public finance has been transformed. In theory, and in accordance with the Constitution, Parliament annually appropriates money for specified purposes of government. Now in practice most government expenditure is funded from sources of money which are not annually subject to parliamentary approval. In the annual appropriations, money is allocated to outcomes which are so nebulous and vaguely expressed that the money can be spent on anything. For example, $3 billion was appropriated to the Department of Employment and Workplace Relations for 'higher productivity, high pay workplaces', a propaganda description which allowed $55 million to be spent on advertising the government's Work Choices legislation before it had appeared. In approving such appropriations, the Parliament is given no guarantees on what the money might be spent on.

A challenge was mounted in the High Court on the basis that the government's advertising campaign was not an authorised purpose of expenditure under the appropriations made by the Parliament for the Department of Employment and Workplace Relations. The majority judgement, in rejecting this claim, confirmed that appropriations are now a blank cheque, and the court will not correct this situation. It is Parliament's responsibility to ensure that expenditure is appropriate. The joint judgement of the majority was accurately characterised by dissenting Justice McHugh as authorising an agency 'to spend money on whatever outputs it pleases'.[4] Justices McHugh and Kirby, in the minority, pointed out that the majority repudiated the principle on which earlier judgements of the court were based, that expenditure was confined to the purpose specified by Parliament in the appropriation. The separate

4 *Combet v Commonwealth* [2005] HCA 61, reasons for judgement 21 October 2005, at 89.

judgement of Chief Justice Gleeson explicitly put the responsibility for control of expenditure back on to the Parliament:

> If Parliament formulates the purposes of appropriation in broad, general terms, then those terms must be applied with the breadth and generality they bear.[5]

In other words, if Parliament makes appropriations with vague descriptions of their purpose, it is Parliament's problem. Chief Justice Gleeson helpfully indicated what must be done:

> The higher the level of abstraction, or the greater the scope for political interpretation, involved in a proposed outcome appropriation, the greater may be the detail required by Parliament before appropriating a sum to such a purpose; and the greater may be the scrutiny involved in a review of such expenditure after it has occurred.[6]

The heavy responsibility resting on the Parliament to exert this kind of proper control and scrutiny over expenditure is now even less likely to be met with the government controlling the Senate. (Surprising, the Finance and Public Administration References Committee initiated, and succeeded in having passed, a reference to itself on the financial system, but this does not increase the chances of any changes.) The consequent ability of the government to spend as much money as it likes on whatever it likes greatly increases its power to keep itself in office, to reward obedience and to punish dissent.

Question time

Question time is the only part of parliamentary proceedings most people ever see, but is virtually useless as a forum of parliamentary inquiry and accountability. Notoriously, ministers are able to avoid answering non-government questions, while responding to government backbenchers' questions, prepared in ministerial offices, with barrages of propaganda.

Even this occasion has been significantly weakened by the government majority in the Senate. At the first sittings after 1 July 2005, the allocation of questions between the parties, which had in the past been determined by agreement between the parties, was changed by the government to give itself the great bulk of the time devoted to questions and answers.

The thirty-day rule also applies to questions placed on notice in the Senate, but is also not an effective remedy against simple ministerial refusals to answer.

In April 2003 a senator sent a letter to the Leader of the Government in the Senate asking him about procedures adopted by the government to determine whether it will release documents to the Senate. Having received no reply, in 2004 the senator put a

5 at 27.

6 at 7.

question on notice asking when the minister would respond to her letter. The letter and the question remained unanswered at the general election of 2004, so in the next parliament she placed the question on notice again. On two occasions she used the thirty-day procedure to ask in the chamber for an explanation of the failure to answer the question and the letter; on neither occasion did she receive either an explanation or an answer, except an off-the-cuff response in June 2005 when she summarised the letter. The Leader of the Government in the Senate retired in March 2006, with the question and the letter still unanswered, and the question was then redirected to the incoming Leader of the Government. Finally, in May 2006 the new minister responded that 'requests' for information would be considered on their merits. This is an extreme case, but differs from the general recent response pattern only in degree.

Integrity of processes

At one point it appeared that the government's majority had been used to threaten the very integrity of Senate inquiries.

The President (Senator Calvert, Liberal, Tas.) made a determination under the relevant standing order on 5 September 2005 according precedence to a motion to refer to the Privileges Committee a matter raised by the Finance and Public Administration References Committee. The matter involved evidence given by a mayor in the course of the committee's inquiry into Regional Partnership Program grants. The committee had evidence suggesting that the mayor's statements were untrue, and the committee was not satisfied with an explanation which he subsequently provided. Normally, motions to refer matters to the Privileges Committee are passed without debate following the President's determination. It was the intention of procedures for dealing with privilege matters adopted in 1988 to take them out of partisan controversy. The person concerned in this matter, however, was a member of the Liberal Party, and the government apparently decided to use its majority to reject the motion to refer the matter to the Privileges Committee.

The chair of that committee, Senator Faulkner, stated that this was a 'degrading' of the non-partisan method for dealing with privilege matters. A government senator stated in debate that there ought to be a prima facie case before the reference was made, but the procedures of 1988 were deliberately designed to avoid any judgement about a prima facie case.[7] The failure to refer the privilege matter to the Privileges Committee, unfortunate from an accountability view, may also have sent a message that committees may safely be trifled with if the trifler is of the right political allegiance.

Subsequently, it was put to the President in an estimates hearing for the Department of the Senate that he should adopt a process to ensure that privilege matters to which he gives precedence are referred to the Privileges Committee without debate and votes based on partisan considerations. The President accepted this suggestion. No further privilege cases have arisen so far to test the process.

7 Senate Debates, 7 September 2005, pp. 104–24.

Accountability in decline

The government majority in the Senate has greatly increased the ability of the government to do what it likes and not to explain itself except to the extent it chooses. The information available to the public on the performance of the government is now limited virtually to that which the government itself chooses to disclose. The accountability of government to the Parliament and the public, and the ability of would-be critics and dissenters to find out what is really going on, has been significantly reduced.

It is unrealistic to expect an investigative media to perform the role of a hobbled Senate. Many people, especially public office-holders, will not talk except in a protected forum. Only the parliamentary forum can offer the protection of parliamentary privilege, if, of course, it is allowed by government to have something to protect.

It would be unwise for supporters of accountability simply to wait until the electors change the situation. They should keep on raising accountability issues and vigorously pursue, by debate and by publication, every move to weaken the accountability procedures and processes which have been painstakingly built up over so many years by their predecessors.

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