# Chapter 2

# PARLIAMENTARY PRIVILEGE: IMMUNITIES AND POWERS OF THE SENATE

THE TERM "PARLIAMENTARY PRIVILEGE" refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes. These immunities and powers are very extensive. They are deeply ingrained in the history of free institutions, which could not have survived without them.

## Parliamentary privilege and the Senate

The law of parliamentary privilege is particularly important so far as the Senate is concerned, because it is the foundation of the Senate's ability to perform its legislative functions with the appropriate degree of independence of the House of Representatives and of the executive government which controls that House.

Parliamentary privilege exists for the purpose of enabling the Senate effectively to carry out its functions. The primary functions of the Senate are to inquire, to debate and to legislate, and any analysis of parliamentary privilege must be related to the way in which it assists and protects those functions. Although the relevant law is the same for both Houses, and is analysed accordingly in this chapter, its particular significance for the Senate must constantly be borne in mind.

## Constitutional basis

Section 49 of the Australian 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 incorporate into the constitutional law of Australia a branch of the common and statutory law of the United Kingdom as it existed in 1901, and to empower the Commonwealth Parliament to change that law in Australia by statute. The framers of the Australian Constitution, unlike their United States counterparts, did not attempt to fix the law of parliamentary privilege in the Constitution, although, as will be seen, the law in the two federations has remained substantially the same. Even in Australia, notwithstanding the power to legislate in section 49, some aspects of that law may be constitutionally entrenched as essential to

a legislature, and therefore not amenable to change by statute (see *Arena v Nader* 1997 71 ALJR 1604).

The power of the Parliament to legislate under section 49 was employed by the passage of the *Parliamentary Privileges Act 1987*. The powers, privileges and immunities attaching to the two Houses under the section and the statute are extensive. The principal privilege, or immunity, is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, the best known effect of which is that members of Parliament cannot be sued or prosecuted for anything they say in debate in the Houses. The principal powers are the power to compel the attendance of witnesses, the giving of evidence and the production of documents, and to adjudge and punish contempts of the Houses.

The *Parliamentary Privileges Act 1987* arose partly from a critical examination of parliamentary privilege as it existed under section 49. In 1984 a joint select committee of the Houses, after a comprehensive review of the subject, recommended a number of changes to the law and to the practices of the Houses in matters of privilege, partly based on earlier British reports and partly based on practices adopted by the Senate (Joint Select Committee on Parliamentary Privilege, Final Report, PP 219/1984; Report of the Select Committee on Parliamentary Privilege, HC 34, 1966-67; see also a review in 1977 by the Committee of Privileges of the 1967 recommendations, HC 417 1976-77).

The 1987 Act made the changes to the law recommended by the select committee, but with a number of significant modifications. The bill for the Act was introduced into the Senate by the President, the first such bill so introduced, in circumstances described below. In February 1988 the Senate passed resolutions (known as the Privilege Resolutions) making the suggested changes in its practices, again with modifications. (The texts of the Act and the resolutions are in appendices 1 and 2.) The House of Representatives has not adopted the resolutions. The changes made by the Act and the resolutions are outlined in this chapter in relation to the particular aspects of the law and practice affected.

**Privileges: immunities**

The term “privilege”, in relation to parliamentary privilege, refers to an immunity from the ordinary law which is recognised by the law as a right of the Houses and their members. Privilege in this restricted and special sense is often confused with privilege in the colloquial sense of a special benefit or special arrangement which gives some advantage to either House or its members. Privileges in the colloquial sense, however useful or well-established they might be, have nothing to do with immunities under the law. The word “immunity” is best used in relation to privilege in the sense of immunity under the law, and is used here.

**Relationship between immunities and powers**

The immunities of the Houses and their members and the powers of the Houses, particularly the power to punish contempts, although referred to together by the term “parliamentary privilege”, are quite distinct. The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of

that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.

In the past, references to contempts as "breaches of privilege" led to the erroneous notion that each contempt is a violation of an immunity. Obvious offences against the Parliament were referred to as if they were violations of particular immunities, and immunities were distorted, or new supposed immunities were invented, to correspond to each contempt. Thus intimidation of witnesses was supposed to be a violation of freedom of speech, and assaults upon members were supposed to violate what was called the privilege of freedom from molestation. There was some doubt about treating obvious offences against the Parliament as contempts because the particular immunity which they violated was not readily apparent. For example, the unauthorised publication of in camera evidence is clearly an offence, but which particular immunity does it violate?

Similarly, it is sometimes said that because the Houses of the British Parliament resolved in the 18th century that reporting of their proceedings was a breach of privilege (i.e. a contempt), and because those resolutions were not rescinded until after 1901, it must technically be an offence for anyone to report the proceedings of the Houses of the Australian Parliament. This misconception also stems from the confusion between immunities and powers. Section 49 of the Constitution confers upon the Houses of the Australian Parliament power to declare acts to be offences and to punish those acts; it does not mean that acts which have been declared to be contempts in the United Kingdom are automatically contempts in Australia. Since the Australian Houses have not declared reporting of their proceedings to be a contempt, the resolutions of the British Houses are of no consequence, and the problem simply does not arise in Australia.

This confusion between immunities and powers is still so deeply entrenched in much discussion of parliamentary immunities and powers that it is very difficult to avoid it. The matter is discussed more fully in the 1967 House of Commons report, at pp 89ff, in the Senate submission to the 1984 joint committee, and in various advices to, and reports by, the Senate Privileges Committee.

**Immunities and powers part of ordinary law**

In Australia parliamentary immunities and powers are part of the ordinary law by virtue of section 49 of the Constitution. The only way in which the Houses can definitely alter their immunities or powers is by passing legislation, as authorised by that section. The courts uphold parliamentary immunities by preventing any violation of those immunities in the course of proceedings before the courts, and they uphold parliamentary powers, especially the power to punish contempts, in any test of the legality of the exercise of those powers.

This reflects the evolution of the law in the United Kingdom. The law in respect of the immunities and powers of the Houses of the British Parliament was originally formulated by the two Houses. They also claimed to be the only courts which could interpret and apply that law. The ordinary courts rejected this claim, and maintained that the law of parliamentary immunities and powers was part of the ordinary law and could be interpreted and applied by the courts.

There were some famous clashes between the Houses and the courts resulting from this difference of view. After the middle of the 19th century, however, the Houses tacitly abandoned their claim and acquiesced in the view of the courts that the law is indivisible. For their part, the courts accepted and adopted the law as it had been expounded by the Houses. It is now regarded as firmly established in Britain that parliamentary immunities and powers are part of the ordinary law and are interpreted and upheld by the courts. This means that many of the resolutions and other precedents belonging to that earlier period are now irrelevant. For example, the declaration by the British Houses in 1704 that they could create no new privileges is sometimes given great importance in discussions in Australia. That resolution, however, belongs to the period when the Houses regarded themselves as courts formulating their own law, and it is now of no significance, because only the courts can say what powers and immunities exist and what is their extent.

In a few rare cases in recent times the British House of Commons has determined the extent of parliamentary immunities. One instance was the Strauss case in 1957, in which the House decided, contrary to the finding of its Committee of Privileges, that the writing of a letter to a minister was not included in proceedings in Parliament. Had the question been determined in court, the court might have taken a different view; if a court had made the decision, it would have been binding as a matter of law, unless overturned by a higher court.

The law of parliamentary immunities and powers is therefore not different from other branches of the law. Law and parliamentary practice, however, are distinct. The Senate's Privilege Resolutions, for example, which regulate the practices of the Senate in relation to privilege matters, are not part of the law and are not subject to interpretation or application by the courts.

**Executive privilege**

Another use of the word "privilege", which is indirectly related to parliamentary immunities and powers, is in the expression "Crown privilege", more recently called "executive privilege" or "public interest immunity". This term refers to a claim of the executive government to be immune from being required to present certain documents or information to the courts or to the Houses of Parliament.

The courts have determined the law of executive privilege in respect of the courts, but only the Houses of Parliament can determine whether they admit the existence of such a privilege in relation to documents or information required by the Houses, or whether they will insist upon the production of documents and information which they require. The Senate has not conceded the existence of any conclusive executive privilege in relation to its proceedings. The matter is more fully discussed in Chapter 19, Relations with the Executive Government, under public interest immunity. For a comprehensive examination of the matter, see the 2nd report of the Committee of Privileges, 7 October 1975 (PP 215/1975); the speech by Senator the Hon. R.C. Wright in the Senate on 17 February 1977 (SD, pp 175-9); and the 49th Report of the Committee of Privileges, 19 September 1994 (PP 171/1994).

## IMMUNITIES OF THE HOUSES

This chapter will now analyse the immunities of the Houses of the Parliament, the rationale of those immunities and the issues involved in the declaration of and changes to them which were made by the *Parliamentary Privileges Act 1987* (here referred to as "the 1987 Act").

### Immunity of proceedings from impeachment and question

The immunity of parliamentary proceedings from impeachment and question in the courts is the only immunity of substance possessed by the Houses and their members and committees.

There are two aspects of the immunity. First, there is the immunity from civil or criminal action and examination in legal proceedings of members of the Houses and of witnesses and others taking part in proceedings in Parliament. This immunity is usually known as the right of freedom of speech in Parliament. Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts.

This immunity is in essence a safeguard of the separation of powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature (cf *US v Johnson* 1966 383 US 169; *Hamilton v Al Fayed* 1999 3 All ER 317).

Members of the Houses and other participants in proceedings in Parliament, such as witnesses giving evidence before committees, are immune from all impeachment or question in the courts for their contributions to proceedings in Parliament. As those contributions consist mainly of speaking in debate in the Houses and speaking in committee proceedings, this immunity has the significant effect that members and witnesses cannot be prosecuted or sued for anything they say in those forums. Thus the common designation of the immunity as freedom of speech. It has long been regarded as absolutely essential if the Houses of the Parliament are to be able to debate and to inquire utterly fearlessly for the public good. The immunity has a wider scope, however, and a question of interpretation of that wider scope led to the statutory declaration and codification of the immunity which is outlined below.

The other important effect of the immunity is that the courts may not inquire into or question proceedings in Parliament as such. The courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the improper application of those procedures. Even where a statutory provision relates to parliamentary procedure, such as the provisions for the disallowance of delegated legislation in Commonwealth statutes, the courts have held that specified procedural steps are not mandatory (*Dignan v Australian Steamships Pty. Ltd.* 1931 45 CLR 188). The two Houses are thus free to regulate their internal proceedings as they think fit.

The immunity is modified in Australia by constitutional law: where the Constitution provides that certain parliamentary procedures must take place for legislation to be validly enacted, as in section 57 of the Constitution, the High Court will inquire and determine whether those

procedures have been properly carried out to determine the validity of the resulting legislation (*Victoria v Commonwealth* 1975 7 ALR 1).

The immunity of parliamentary proceedings from question in the courts is regarded as necessary for the two Houses to carry out their functions without the fear of their proceedings being restricted or regulated by actions in the courts.

In the United Kingdom the immunity was given a statutory form in the Bill of Rights of 1689, which has been interpreted and applied by the courts in a number of cases. That body of law became part of the law in Australia by virtue of section 49 of the Constitution.

The Constitution of the United States provides that "Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place" (Article I, s. 6). The immunity thus applies to members, not to proceedings, and only to speech or debate, and therefore appears at first sight to be much narrower than its United Kingdom equivalent. The provision has been interpreted, however, as conferring a wide immunity on members in respect of their participation in legislative activities (*US v Johnson* 1966 383 US 169; *US v Brewster* 1972 408 US 501; *Gravel v US* 1972 408 US 606). The immunity, because it is expressed to apply to members, does not protect congressional witnesses in respect of their evidence, which is a difference from the Australian law. Congressional witnesses are granted certain immunities by legislation, but they may be prosecuted for perjury.

Immunity of parliamentary proceedings from scrutiny in the courts was formerly supported by a parliamentary practice of not allowing reference to the records of those proceedings in the courts without the approval of the House concerned. This practice was sometimes mistakenly regarded as the full extent of the immunity which it was designed to protect. Because in recent times the courts have usually been scrupulous to observe the law and to refrain from questioning parliamentary proceedings, the practice was unnecessary, and was abolished by the Senate in 1988 (see below). As a residual safeguard, however, senators and Senate officers are required to seek the approval of the Senate before giving evidence in respect of proceedings of the Senate or a Senate committee (SO 183).

**Statutory declaration of freedom of speech: background of the 1987 Act**

The *Parliamentary Privileges Act 1987* was enacted primarily to settle a disagreement between the Senate and the Supreme Court of New South Wales over the scope of freedom of speech in Parliament as provided by article 9 of the Bill of Rights of 1689.

Article 9 is part of the law of Australia and applies to the Houses of the Commonwealth Parliament by virtue of section 49 of the Constitution. The famous article declares:

> 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. (I Will. & Mar., Sess. 2, c.2, spelling and capitalisation modernised. The commas which appear in some versions are not in the original text.)

Two judgments by the Supreme Court of New South Wales in 1985 and 1986 interpreted and applied the article in a manner unacceptable to the Parliament.

The question which gave rise to these judgments was whether witnesses who gave evidence before a parliamentary committee could subsequently be examined on that evidence in the course of a criminal trial. The case in question was *R. v Murphy* (the first judgment was not reported; the second is in 64 ALR 498), involving the prosecution of a justice of the High Court for attempting to pervert the course of justice. The principal prosecution witnesses in the two trials had given evidence before select committees of the Senate, which had conducted inquiries to ascertain whether the justice should be removed from office by parliamentary address under section 72 of the Constitution (see Chapter 20 for an account of this case). The accused justice had also given evidence, in the form of a written statement, to one of the committees.

The view taken by the Senate, which submitted its claim to the trial judges, was as follows. Evidence as to what the witnesses or the accused said before the Senate committees could be admitted for the purpose of establishing some material fact, such as the fact that a person gave evidence before a committee at a particular time, if that fact were relevant in the trials. The evidence put before the committees could not be used in the trials for the purpose of supporting the prosecution or the defence, nor particularly for attacking the evidence of the witnesses or the accused whether given before the committees or before the court.

This view of the effect of article 9 was based upon history and judicial authority. The history of the establishment of freedom of speech makes it clear that the parliamentary intention was to exclude examination by the courts of parliamentary proceedings; in the words of Blackstone, 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" (*Commentaries on the Laws of England*, 1765, pp 58-9).

The claim of Parliament to exclude the courts from examination of parliamentary proceedings was historically closely linked with another claim, namely, that the courts should have no jurisdiction over that part of the law relating to parliamentary privilege. That claim has long since been abandoned by the British Parliament, and constitutionally could not even be pretended by the Australian Houses, but it is not the same immunity as is asserted in article 9 and is not an essential foundation of the article, which establishes a very broad immunity of parliamentary proceedings from examination in the courts.

The Senate's interpretation of article 9 was supported by a number of judgments which, while not dealing explicitly with the question of the examination of witnesses on their parliamentary evidence, gave weight to the interpretation urged by the Senate. The judgments in Britain and in Australia were consistent.

In Dingle's case (*Dingle v Associated Newspapers Ltd.* 1960 2 QB 405) it was held that it was not permissible to impugn the validity of the report of a select committee in court proceedings. In the Scientology case (*Church of Scientology of California v Johnson-Smith* 1972 1 QB 522) it was held that the privilege of freedom of speech was not limited to the exclusion of any cause of action in respect of what was said or done in Parliament, but prohibited the examination of parliamentary proceedings for the purpose of supporting a cause of action arising from something outside of those proceedings. In *R. v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc* 1983 2 All ER 233 it was held that what was said in Parliament could not be used to support an application for relief in respect of something done outside Parliament.

In the Comalco case (*Comalco Ltd. v Australian Broadcasting Corporation* 1983 50 ACTR 1) it was held that, while evidence of what occurred in Parliament is not inadmissible as such, a court has a duty to ensure that the substance of what was said in Parliament is not the subject of any submission or inference.

These judgments, and others, indicated that article 9 prevents proceedings in Parliament being used to support an action or being questioned in a very wide sense. The Australian Houses were confident of the correctness of their view of article 9, not only as a matter of law, but because this wide protection is necessary for proceedings in Parliament to be genuinely free; as was stated by the Chief Justice in a judgment of the High Court, "a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences" (*Sankey v Whitlam* 1978 142 CLR 1 at 35).

There were two questions which might have been thought to be still unanswered in the interpretation of article 9. The first was whether evidence given by witnesses before a parliamentary committee receives the same protection as statements made by members in debate in Parliament. It has always been thought that evidence before a committee is as much a part of "proceedings in Parliament" as debates in the Houses, and this view was supported by older British and Australian cases. In *R. v Wainscot* 1899 1 WAR 77 it was held that a witness's evidence before a committee is not admissible against the witness in subsequent proceedings, and in *Goffin v Donnelly* 1881 6 QBD 307 it was held that an action for slander could not lie in respect of statements made in evidence before a committee. This question was not raised in the proceedings in *R. v Murphy;* the parliamentary claim that the evidence of witnesses is part of parliamentary proceedings was not questioned in the submissions or in the judgments.

The other question was whether some distinction could be drawn between evidence given by a defendant and the evidence given by witnesses. It might have been thought that a defendant, being the person in peril, civilly or criminally, in court proceedings, was perhaps more entitled to the protection of not having statements made before a committee used by the plaintiff or prosecution than those who were merely witnesses in the court proceedings. This interpretation was put forward by the defendant in both trials: it was claimed that the defence could examine prosecution witnesses on their parliamentary evidence for the purpose of attacking their court evidence, but that the parliamentary evidence could not be used against the defendant. This interpretation was rejected not only by the Houses but by the judges in both judgments, and no such distinction was drawn.

The effect of both judgments in *R. v Murphy* was that the prosecution and the defence made free use of the evidence given before the Senate committees for their respective purposes. The defendant and the prosecution witnesses were subjected to severe attacks using their committee evidence, attacks not only on their court evidence, but on the truthfulness of, and the motives underlying, their committee evidence. In this process the prosecution and the defence made use of evidence given in camera (that is, not in public) before the Senate committees, evidence which neither the committees nor the Senate had published or disclosed to them, and which, in the view of the Senate, they had no right even to possess. This use of the parliamentary evidence was allowed by both judgments.

In the first judgment Mr Justice Cantor proposed that the rationale of article 9 was to prevent harm being done to Parliament and its proceedings, and that this rationale provided a test to determine the use which could be made of evidence of parliamentary proceedings. He also appeared to consider that, in the application of this test, the importance of the evidence to the court proceedings should be weighed against the privilege of freedom of speech, so that the latter would not be an absolute prohibition but a consideration to be balanced against the requirements of the court proceedings. He also appeared to consider that this reasoning was not inconsistent with the previous judgments.

In the second judgment Mr Justice Hunt held that article 9 was restricted to preventing parliamentary proceedings being the actual cause of an action, but did not prevent evidence of those proceedings being used to support an action, either in providing primary evidence of an offence or a civil wrong, or in providing a basis for attacking the evidence of a witness or a defendant in the court proceedings. This reasoning was based upon an interpretation of the legislative purpose of article 9 and on a finding of the proper scope of parliamentary privilege as it relates to court proceedings, and explicitly declined to follow the earlier judgments cited.

The reasoning of the judges was not accepted by the Senate, and was criticised in documents laid before that House by its President. (These papers were later published: 'Parliamentary Privilege: Reasons of Mr Justice Cantor: an analysis' in *Legislative Studies*, Autumn 1986; 'Parliamentary Privilege: Reasons of Mr Justice Hunt: an analysis' in *Legislative Studies*, Autumn 1987.) It was pointed out that the second judgment would allow members of Parliament, as well as witnesses, to be called to account in court for their parliamentary speeches and actions and to be attacked and damaged for their participation in parliamentary proceedings, provided only that those proceedings were not the formal cause of the action.

The judgments, even in the absence of statutory correction, did not represent the law. It was unlikely that they would be followed by other courts, and subsequently there were contradictory judgments, including one by another judge of the Supreme Court of New South Wales.

In *R. v Jackson and others* 1987 8 NSWLR 116 a former New South Wales minister was charged with receiving bribes. Remarks made by him in the New South Wales Parliament were highly relevant to the case and the prosecution attempted to use them to assist in establishing his guilty motive and intention. The question of parliamentary privilege was argued again by the New South Wales Legislative Assembly, and the judge upheld the previously established interpretation of freedom of speech and declined to allow the admission of the statements made in Parliament. In doing so he explicitly rejected the reasons of Hunt J. which, as he said, pared article 9 down to the bare bone. In *R. v Saffron*, however, the District Court allowed in camera evidence of a select committee of the NSW Legislative Assembly to be subpoenaed and made available for the use of the defence (reasons for judgment in relation to a subpoena directed to the chairman of the National Crime Authority, 21 August 1987, not reported). In a South Australian case, *Australian Broadcasting Corporation and another v Chatterton* 1986 46 SASR 1, a judge of the Supreme Court of that state also upheld the traditional interpretation by not allowing a member's statements in Parliament to be used to support a submission on the intention of statements made outside the Parliament. The judge went so far as to suggest that the repetition outside Parliament by a member of the member's statements in Parliament was also privileged.

The erroneous New South Wales judgments were partly founded on several misconceptions about the nature of parliamentary privilege, for example, that the traditional interpretation would have it restrict any public criticism of parliamentary proceedings (for a judicial refutation of this misconception, see *Hamilton v Al Fayed* 1999 3 All ER 317).

**Effect of the 1987 Act**

The *Parliamentary Privileges Act 1987*, unprecedented in being introduced by the President of the Senate, was enacted for the express purpose of overturning the adverse court judgments. It made use of the legislative power under section 49 of the Constitution to enact the traditional interpretation of article 9.

The statutory declaration of the formerly established scope of freedom of speech was accomplished, in section 16 of the Act, in several stages. The first stage made it clear that the Australian Houses possessed the privilege of freedom of speech in the terms of the Bill of Rights:

> **(1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

These terms were used because the Parliament was not legislating to provide for its freedom of speech in the future, but declaring what its freedom of speech had always been. The Houses did not wish to give any credence to the reading down of article 9, especially as the article is part of the law of other jurisdictions, including the Australian states. The provision is thus intended to cover past proceedings in Parliament, although, as will be seen, any intention to legislate with retrospective effect for court proceedings already commenced was disclaimed.

The next stage was to define what is covered by article 9 and protected by it, in other words, to define the scope of the expression "proceedings in Parliament", which had never been authoritatively expounded. This was done in the following terms:

> **(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes —
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
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> (b) the presentation or submission of a document to a House or a committee;
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> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
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> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This provision, while in general terms, clarifies several uncertainties about the scope of "proceedings in Parliament", particularly in relation to the status of parliamentary evidence and documents presented to a House or a committee.

The most important provision defines the meaning of "impeached or questioned". The relevant provision does not explicitly declare that members or witnesses may not be prosecuted or sued for their participation in parliamentary proceedings: that was regarded as beyond doubt and clearly provided by the terms of article 9. By its terms, however, the provision effectively prevents prosecution or suit for proceedings in Parliament. The provision indicates the wider operation of the article and draws the line between the proper and improper admission of evidence of parliamentary proceedings, in accordance with the principles set out above:

> **(3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of —
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> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
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> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The explanatory memorandum accompanying the bill explains that each of the three paragraphs contains a refinement of the meaning of "impeached or questioned". Paragraph (a) expresses the principal prohibition contained in article 9. It prevents, for example, a statement in debate by a member of Parliament or the evidence of a parliamentary witness being directly attacked for the purpose of court proceedings, or the motives of the member or the witness in speaking in Parliament or giving evidence being impugned. Thus, it cannot be submitted that a member's statements in Parliament were not true, or reckless, to support a submission that the member is an untruthful, or reckless, person.

Paragraph (b) prevents the use of proceedings in Parliament to attack the credibility, motives or intentions of a person even where this does not directly call into question those proceedings. This would prevent, for example, members' speeches in debate or parliamentary witnesses' evidence being used to establish their motives or intention for the purpose of supporting a criminal or civil action against them, or against another person. Thus a member's statements outside Parliament cannot be shown to be motivated by malice by reference to a member's statements in Parliament.

Paragraph (c) is intended to prevent the indirect or circuitous use of parliamentary proceedings to support a cause of action. This would prevent, for example, a jury being invited to infer matters from speeches in debate by members of Parliament or from evidence of parliamentary witnesses in the course of a criminal or civil action against them or another person. Thus a member's speech in Parliament cannot be used to support an inference that the member's conduct outside Parliament was part of some illegal activity. It is intended that this would not prevent the proving of a material fact by reference to a record of proceedings in Parliament which establishes that

fact, for example, the tendering of the Journals of the Senate to prove that a Senator was present in the Senate on a particular day. (See Supplement)

The provision also prevents relying on parliamentary proceedings for the prohibited purposes. This was thought to follow necessarily from the principle that parliamentary proceedings cannot be used to support a cause of action.

The next provision prevents absolutely the admission in court proceedings of any evidence relating to parliamentary evidence taken in camera:

> **(4)** A court or tribunal shall not —
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> (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
>
> (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

This provision arises from the use by the prosecution and the defence in *R. v Murphy* of transcripts of evidence taken in camera before one of the Senate committees and not subsequently published by the committee or the Senate.

Subsection (5) provides that in relation to proceedings in a court or tribunal so far as they relate to a question arising under section 57 of the Constitution or the interpretation of a statute, neither the Act nor the Bill of Rights shall be taken to restrict the admission in evidence of an authorised record of proceedings in Parliament or the making of statements, submissions or comments based on that record. This provision ensures that the section does not prevent courts examining parliamentary proceedings for the purposes of ascertaining the parliamentary intention in relation to the interpretation of a statute or of determining constitutional questions arising from disagreements between the two Houses.

Subsection (6) provides that parliamentary proceedings may be examined in court proceedings in relation to an offence concerning parliamentary proceedings. The Parliamentary Privileges Act itself, and some other Commonwealth statutes, create criminal offences, which may be prosecuted through the courts, for improper activities in relation to parliamentary proceedings, offences which, in the absence of the statutory provisions, could be dealt with only by the Houses as contempts of Parliament. Penalties are provided for such offences as the unauthorised publication of in camera evidence and improper influencing of parliamentary witnesses. Because the successful prosecution of such offences may well require the examination of proceedings in Parliament, it was necessary to make another exception in respect of them.

This provision illustrates a difficulty. By enacting criminal remedies to protect its proceedings, the Parliament, in effect, and, it may be said, unwittingly, has made an inroad on the immunity of its proceedings from question in the courts. The first such inroad was made by the British Parliament with a statute of 1892 for the protection of its witnesses. Thus, in order to prosecute

successfully the offence of tampering with a witness, it may well be necessary to adduce the witness's evidence and to draw an inference from that evidence as to whether the witness was improperly influenced. As a matter of fairness, it may then be necessary to allow the defence to examine the witness's evidence and to call it into question for the purposes of the defence. This is a significant modification of the immunity as it had previously been understood.

Finally, the Houses disclaimed the intention of legislating retrospectively for proceedings on foot:

> **(7)** Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

The effect of this provision was that, if some courts had persisted in interpreting article 9 narrowly, the Act applied only to future court proceedings, but to any use of any parliamentary proceedings.

**Is the 1987 Act too restrictive?**

The bill for the 1987 Act having been presented in the terms outlined, some senators were concerned that it was too widely drafted, and might be unduly restrictive of the rights of litigants and defendants (see the speech by the then Minister for Resources and Energy, Senator Gareth Evans, QC, SD, 17/3/1987, p. 813, referring to the speech by Senator Cooney at p. 809).

The question was not whether the bill actually represented the traditional established interpretation of article 9, but whether that interpretation might itself be unduly restrictive. This concern soon focused on the question of whether litigants and defendants should be able to make limited use of evidence given before parliamentary committees for the purposes of their court proceedings. There was no thought of speeches by members in Parliament being subjected to any examination in court, but there was a concern that the particular circumstances of the Murphy trials, where the accused and the principal witnesses had given evidence before parliamentary committees on the same matters as in their court evidence, might recur. Consideration was given to including in the relevant clause of the bill an exception which would allow a person who had given evidence before a parliamentary committee to be cross-examined in court on that evidence for the purpose of showing that the person's parliamentary and court evidence was inconsistent and that the person's court evidence was therefore unreliable. Such a use of parliamentary evidence, which would not involve questioning that evidence as such but merely comparing it with evidence given in court for the purpose of making submissions as to the reliability of the court evidence, might preserve the rights of litigants to the extent necessary and prevent any injustice which could be worked by the bill. Normally a witness can be cross-examined in relation to inconsistent prior statements, and evidence of inconsistent prior statements can be tendered.

This question of whether an exception should be made in the coverage of clause 16 to allow limited examination of a person's parliamentary evidence was considered during the bill's passage, and the conclusion was reached that it would be impossible to make such an exception without undermining the whole principle of the bill. (See the remarks by Senator Evans, *ibid*.)

There are strong arguments in support of that conclusion. In the first place, such an amendment would draw a distinction between evidence given before a parliamentary committee and other proceedings in Parliament, such as speeches or questions by members. It would create an anomalous situation whereby parliamentary evidence would be subject to examination in court but other proceedings in Parliament would not.

Another difficulty with such an amendment has already been suggested. If one party in a civil or criminal action were allowed to seek to undermine the evidence of a witness by using the witness's parliamentary evidence, as a matter of fairness the other party in the proceedings would have to be allowed to try to rebut that undermining of the witness's evidence by further use of the parliamentary proceedings. For example, if the defence in a criminal case were allowed to try to demonstrate that a witness's parliamentary evidence was inconsistent with the witness's court evidence, the prosecution would have to be allowed to try to rebut that contention, perhaps by showing that the questioning of the witness before the parliamentary committee was misleading or biased, or that the witness was not given proper opportunity to respond to questions put in the committee. This would open the way to the very impeaching and questioning of parliamentary proceedings which it is the aim of article 9 and the legislation to prevent.

Whenever a witness in court proceedings has given evidence or made any statement on the same subject in another forum, it is possible for counsel to claim that the prior evidence or statement was inconsistent with the court evidence, and to attack the witness on that basis. The possibility of such an attack on a witness is often dependent on accidental circumstances, such as the witness having made comments to the press before the legal proceedings. The whole purpose of the legislation being to prevent people being attacked on the basis of their participation in proceedings in Parliament, it was considered neither just nor desirable that witnesses should be subject to attack because they had previously given evidence to a parliamentary committee, perhaps under compulsion.

Parliamentary committees are not bound by the rules of evidence. A parliamentary witness, perhaps under compulsion, may be asked to express the witness's opinions, feelings, suspicions and doubts, and to give self-incriminating evidence. It would be unfair to allow a witness subsequently to be attacked in court proceedings on the basis of this evidence, which would not otherwise be admissible in the court proceedings.

Statements made in the course of parliamentary proceedings should be considered to be in the same category as statements subject to other forms of privilege recognised by the law. An example is legal professional privilege. A person may have made an inconsistent statement in communication with the person's legal adviser, but such a statement is privileged and the person cannot be cross-examined on it. The rationale of this legal professional privilege has been stated as follows:

> The unrestricted communication between parties and their professional advisers has been considered of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained. (Lord Langdale MR in *Reece v Trye* 1846 9 Beavan 316 at 319. The High Court has adopted this rationale, e.g., in *Attorney-General v Maurice* 1986 161 CLR 475, see particularly 490.)

Similar considerations apply in relation to what used to be called Crown or executive privilege. The freedom to speak frankly and freely in the course of parliamentary proceedings and the giving of parliamentary evidence should be considered of such importance as to give it the same absolute privilege.

Any injustice which might otherwise be caused by the exclusion of evidence protected by parliamentary privilege may be remedied by the court ordering a stay of proceedings. This has been clearly indicated by courts in Australia, New Zealand and the United Kingdom (*Rann v Olsen* 2000 172 ALR 395; *Prebble v Television NZ Limited* 1994 3 NZLR 1). (For a statutory reaction to the *Prebble* judgment in the UK, see below, under "Waiver" of privilege.) A criminal prosecution may be stayed if evidence is excluded because of public interest immunity (*R. v Lappas and Dowling*, ACT Supreme Court, ruling 26/11/2003, not reported), and the same principle would apply to evidence excluded because of parliamentary privilege.

The validity of section 16 of the 1987 Act was challenged in the Federal Court in *Amann Aviation v Commonwealth* 1988 19 FCR 223, but the judge found the Act to be a valid and clear declaration of the previous law. A similar challenge was rejected by the Supreme Court of South Australia in *Rann v Olsen* 2000 172 ALR 395. The latter judgment rejected the arguments, mooted in academic circles, that parliamentary privilege as explicated in the 1987 Act is inconsistent with the separation of the legislative and judicial powers or the implied right of freedom of political communication in the Constitution. (See also *Hamsher v Swift* 1992 33 FCR 545.) The Judicial Committee of the Privy Council of the United Kingdom, in a New Zealand case, also observed that the 1987 Act is a correct codification of the law (*Prebble v Television NZ Limited* 1994 3 NZLR 1). The interpretation of the immunity contained in the 1987 Act was expounded by the UK Court of Appeal in *Hamilton v Al Fayed* 1999 3 All ER 317 (see also the reasons for judgment of the House of Lords on appeal in the same case, 2000 2 WLR 609).

Contrary to academic misconception, findings by a court, on evidence lawfully before it, which indirectly call into question parliamentary proceedings (for example, a finding that a statement outside parliamentary proceedings was false, which would mean that a similar statement in the course of parliamentary proceedings was also false), are not prevented by parliamentary privilege (*Mees v Roads Corporation* 2003 FCA 306).

In a judgment in a defamation case, *Laurance v Katter* 1996 141 ALR 447, two judges of the Queensland Court of Appeal appeared to conclude that section 16 of the 1987 Act should be either read down or found invalid in order to allow a statement in the House of Representatives to be used to support an action for defamation. Settlement of this case in 1998 prevented a pending review by the High Court. This judgment is incoherent and not authoritative.

It has already been noted that, although the relevant provision in the United States Constitution is narrower in scope, it has been interpreted as conferring a wide immunity on the legislative activities of members. This supports the contention that the broad interpretation contained in the 1987 Act is appropriate for the protection of the legislative activities of the Australian Houses.

### Activities incidental to proceedings

The 1987 Act did not explicitly extend the immunity of freedom of speech to activities of members not related to their participation in proceedings of the Houses and committees. This reflected a considered view that the extension of the immunity to such matters is not warranted. In relation to correspondence of members, it also conformed with the decision of the British House of Commons in the Strauss case, in which the House, contrary to the finding of its Privileges Committee, declared that members' correspondence with ministers is not part of proceedings in Parliament (this case was discussed in the Senate in 1958: SD, 16/9/1958, pp 322-4).

Members' activities may, however, be held to be part of proceedings in Parliament, and therefore absolutely privileged, if it can be shown that they are "for purposes of or incidental to" proceedings in a House or a committee, within the meaning of section 16 of the 1987 Act. For example, if a senator writes a letter seeking information for the purposes of a debate in the Senate, the writing of the letter could well be covered by that provision. The particular circumstances would probably determine the result. There are as yet no definitive court judgments.

It has been noted that in the United States the equivalent of parliamentary privilege has been held to cover the legislative activities of members, and this principle is followed where such activities are not actually part of proceedings in a house or a committee. Australian courts could, if the question arose, adopt similar reasoning.

In 1995 the Western Australian government appointed a royal commission to inquire into the circumstances surrounding the presentation of a petition to the Legislative Council of that state (Royal Commission into Use of Executive Power). At least some of the matters inquired into by the commission were incidental to the presentation of the petition and therefore protected by parliamentary privilege (see under Other tribunals, below). Unfortunately this aspect was not properly considered either by the commission or by the courts before which the commission's powers were challenged (see advices to the President of the Senate by the Clerk, presented to the Senate on 29/11/1995, J.4287).

### Repetition of parliamentary statements

While statements made in the course of, or for purposes of or incidental to, parliamentary proceedings are protected by parliamentary privilege, the repetition of such statements not in those contexts is not so protected. Questions have arisen about what constitutes repetition, and the extent to which reference may be made to a protected statement to establish the meaning of an unprotected statement. The latter course is clearly prohibited by the law as elucidated by the 1987 Act. In the only relevant case in the federal sphere, two state judges appeared to think that the 1987 Act had to be either read down or held invalid to allow this to occur (*Laurance v Katter* 1996 141 ALR 447; for a further reference to this case, see above, under Is the 1987 Act too restrictive?). In other jurisdictions courts have held, wrongly, that such reference to protected statements may be made (*Beitzel v Crabb* 1992 2 VR 121; *Buchanan v Jennings* 2002 3 NZLR 145; *Erglis v Buckley*, 2004 2 Qd R 599; *Toussaint v AG of St Vincent and the Grenadines* 2007 1 WLR 2825). (See Supplement)

The Senate Committee of Privileges presented a comprehensive report on this matter in June 2008, suggesting an amendment that could be made to the Parliamentary Privileges Act if the problem persisted and subject to a consideration of the issue across other jurisdictions (134th Report, PP 275/2008).

**Provision of information to members**

A question often asked is whether other persons, in providing information to members, are covered by parliamentary privilege. The answer to this question would also depend on the circumstances of the particular case and whether the provision of the information is "for purposes of or incidental to" proceedings in a House or a committee. If a person requests a senator to raise a matter in the Senate or a committee, or if a senator has in fact used information in parliamentary proceedings, such facts could determine whether the provision of the information is covered by the statutory expression.

The provision of information to members may attract a qualified privilege under the common law interest and duty doctrine (the provider and the recipient of the information each have an interest or a duty in giving or receiving the information).

It may also be held that there is a public interest immunity attaching to the provision of information to members of Parliament.

These questions have not been adjudicated, although there is at least one British judgment suggesting that the provision of information to members may attract the interest and duty principle (*R. v Rule* 1937 2 KB 375). (See also 'Protection of persons who provide information to members', paper by the Clerk of the Senate, 27th Conference of Presiding Officers and Clerks, July 1996.)

In its 67th report, presented in September 1997 (PP 141/1997), the Privileges Committee found that a contempt had been committed by the taking of action for defamation against a person for provision of information by the person to a senator for use in proceedings in the Senate. The committee found that the legal action was taken primarily to punish the person for giving information to a senator for the purpose of its use in Senate proceedings. The report identified circumstances in which the provision of information to a senator may be protected by the Senate's contempt jurisdiction. While the report provided an analysis of the relevant issues, it refrained from expressing any view about whether the provision of information to a senator, in these or other circumstances, is also protected against legal action by the law of parliamentary privilege, so that a court would dismiss such an action on the basis of that law. The committee did not recommend any penalty against the offender, but recommended that the Senate allow the legal proceedings to take their course. The Senate adopted the report on 22 September 1997 (J.2456). In April 2000 a judge of the Supreme Court of Queensland, in dismissing an application to terminate the legal proceedings on grounds of unreasonable delay and abuse of process, found that the provision of the information to the senator was not protected by parliamentary privilege, a finding unnecessary to the determination of the application. The confused reasoning of this judgment was criticised in advices provided by the Clerk of the Senate and a leading barrister which were reported to the Senate by the Privileges Committee (*Rowley v*

*Armstrong*, 12/4/2000, not reported; 92nd report of the committee, 29/6/2000, PP 150/2000). In September 2000 the Senate, on the recommendation of the Privileges Committee (94th report, PP 198/2000), authorised the President to brief counsel to assist the court in the event of the action being pursued (4/9/2000, J.3192).

In its 72nd report, presented in June 1998 (PP 117/1998), the Privileges Committee found that a university had committed a contempt in taking disciplinary action against a staff member because of his provision of information to a senator, who had laid the information before the Senate. The Senate adopted the report on 1 December 1998 (J.225).

In August 2006 the Legislative Assembly of Victoria, adopting the report of its Privileges Committee, resolved that a particular communication of information to a member by a constituent was a proceeding in Parliament, and that a contempt was committed by a firm of solicitors threatening legal action against the constituent. The offenders apologised. (Votes and Proceedings of the Assembly, 23/8/2006, pp 1148-9.)

**Subpoenas, search warrants and members**

Members have no explicit immunity as such against subpoenas or orders for discovery of documents issued by courts or tribunals or search warrants, which may be used to obtain access to documents held by members (for the service of subpoenas in the precincts, see under Matters constituting contempts, below; for the execution of search warrants in the precincts, see under Police powers in the precincts, below). The use before a court or tribunal of material obtained by subpoena, discovery or search warrant is of course restricted by the law of parliamentary privilege as has been indicated above.

There may be, however, an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings.

In *O'Chee v Rowley*, Queensland Court of Appeal, 1997 150 ALR 199, the court, influenced by an American precedent, *Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408, in effect held that documents created for purposes of or incidental to parliamentary proceedings could be immune from orders for discovery of documents, although there was some uncertainty about whether this extended to documents created by persons other than the senator concerned. This case was referred to in the 75th Report of the Committee of Privileges, PP 52/1999.

In *NTEIU v the Commonwealth* (19/4/2001, not reported) the Federal Court accepted submissions on behalf of the Senate and by the Australian Government Solicitor to the effect that certain documents were immune from production because they were matters done for purposes of and incidental to parliamentary proceedings. Similarly, in *Australian Communications Authority v Bedford*, the Federal Magistrates Court held that briefs prepared for Senate estimates hearings are immune from production in a criminal matter (28/3/2006, not reported). In *CPSU v the Commonwealth* a claim by the Commonwealth that a document prepared for Senate estimates hearings should not have been admitted into evidence in the Federal Court was not contested, and orders were made by consent to strike out references to the document in the evidence (11/7/2007, not reported). In *Niyonsaba v the Commonwealth*

the Commonwealth claimed immunity from production in the Federal Court for briefing notes for Senate question time and estimates hearings, and this claim was not contested (2007, not reported).

For a claim by the Auditor-General, uncontested, that draft Audit Office reports, prepared for the purpose of presentation to Parliament, are immune from discovery because of parliamentary privilege, see tabled letters from the Audit Office and the Clerk of the Senate, 12/11/2002, J.1026; 14/6/2005, J.656.

In *Crane v Gething* 2000 169 ALR 727, a case involving the seizure of documents under search warrant in the offices of a senator, a judge of the Federal Court found that the court did not have jurisdiction to determine whether parliamentary privilege prevented such a seizure, as the issue of search warrants is an executive act and not a judicial proceeding, and that only the House concerned and the executive may resolve such an issue. This finding was contrary to a submission made by the Senate, to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected (the submission was tabled in the Senate: 13/3/2000, J.2423-4). This aspect of the judgment was not appealed and is unlikely to be regarded as authoritative. The documents in question were forwarded to the Clerk of the Senate in accordance with the order of the court (3/10/2000, J.3267). The Senate appointed a person to examine the documents to determine whether any were protected from seizure by parliamentary privilege, to return any so protected to the senator, and to provide the remainder to the police (5/12/2000, J.3726-7; 8/8/2001, J.4617; 27/8/2001, J.4761).

In 2002 the Privileges Committee reported on the execution of a search warrant by state police in the state office of a senator. The committee found that the police had taken appropriate steps to allow the senator to claim that any of the material seized was immune from seizure by virtue of parliamentary privilege (105th report of the committee, PP 310/2002). The committee subsequently reported that, following continuing disagreement between the senator and the police about the treatment of documents for which privilege was claimed, the same arrangement had been made to settle the matter as in the 2000 case (5/2/2003, J.1457; SD, pp 8573-4). The result of the examination of the documents was that they were all returned to the senator, as none were found to be within the scope of the search warrant (114th report of the committee, 20/8/2003, PP 175/2003).

A memorandum of understanding and Australian Federal Police Guidelines agreed to by the President, the Speaker, the Attorney-General and the Minister for Justice and Customs, governing the execution of search warrants in the premises of senators and members, were tabled and debated in March 2005. The documents provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. The agreement underlying these documents was the result of several years of effort by the Senate, successive Presidents and the Privileges Committee, arising from the committee's consideration of the cases referred to above. (9/3/2005, J.451, SD, pp 91-2.) An agreement of the same kind was entered into with the Tasmanian government in 2006 (15/8/2006, J.2496). (See Supplement)

The US Court of Appeals ordered a similar arrangement for resolving claims of legislative immunity in a case involving documents seized in the office of a member of the House of Representatives under search warrant. In a subsequent judgment the court held that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, and that that claim should have been determined by the court so that immune documents would not fall into the hands of the law enforcement agencies. The court thereby came to a position identical to that argued by the Australian Senate in its submissions to the Australian Federal Court in 2000. (*US v Rayburn House Office Building, Room 2113* [Jefferson case], 28/7/2006, 3/8/2007, not reported; the Supreme Court declined to review this judgment on 1 April 2008).

Documents would not have to be in the possession of a senator to attract the immunity. For example, documents such as briefing notes provided by an adviser to a senator for the purposes of proceedings in the Senate or a committee and in the possession of the adviser would be immune from seizure from the adviser.

The "dominant purpose" test applied by the courts in respect of legal professional privilege (*Esso Australia Resources Ltd v Commissioner of Taxation* 1999 168 ALR 123) would probably also be applied to documents to determine their immunity under parliamentary privilege.

Not only may members of Congress not be compelled to produce documents within the sphere of their legislative activities, or to undertake searches of their files containing protected material, but even when it is known or conceded that an order will turn up non-protected documents, members may not be required to search their files simply on that basis (*Adams & Others v Federal Election Commission*, US District Court, 9/10/2002, not reported). In *US v Arthur Andersen*, US District Court 2002 (not reported), a subpoena directed by the defence in a criminal case to a House of Representatives committee was quashed on the same basis.

The New South Wales Legislative Council has asserted the immunity (Standing Committee on Parliamentary Privilege and Ethics, Report No. 28, 2004; Minutes of Proceedings, 4/12/2003, pp 493-5, 501; 24/2/2004, pp 520-1).

**Prosecution of members**

The words and actions of members are immune from impeachment and question by way of legal proceedings only in so far as they are part of proceedings in Parliament or are for purposes of or incidental to such proceedings. Members may be prosecuted for actions constituting criminal offences and falling outside this protected area.

This is so even where the actions concerned are clearly performed in the capacity of a member and are linked to the actions of a member in the course of proceedings in Parliament. For example, section 73A of the *Crimes Act 1914* made it an offence for a member to ask for or obtain a bribe in return for exercising the functions of a member in a particular way. If there were to be a prosecution of a member for this offence, say for receiving a bribe in return for asking certain questions in Parliament, the act prosecuted would be the receipt of the bribe; it would be

neither lawful nor necessary for the prosecution to tender evidence of what the member said or did in the course of proceedings in Parliament. This was confirmed by section 15E of the Act, which explicitly provides that parliamentary privilege is not affected by the Act. (This provision was subsumed by a provision of more general application in section 141.1 of the Criminal Code Act.) (In this connection see *US v Brewster* 1972 408 US 501; *R. v Greenway*, 1992, not reported, *Public Law*, Autumn 1998, pp 356-63.) (See Supplement)

For the unlawful admission in evidence before a court of evidence given before a parliamentary committee, leading to the setting aside of an initial judgment, see *Commonwealth and Chief of Air Force v Vance* 2005 ACTCA 35 (23/8/2005).

For the unlawful cross-examination of a member of the House of Representatives, a defendant in a criminal case, on his statements in the House, which did not, however, change the outcome of the case, see *R. v Theophanous* 2003 VSCA 78.

A member may be prosecuted for an offence which has also been dealt with as a contempt of a House (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005.)

**Circulation of petitions**

Section 16 of the Act explicitly declares that the submission of a document to a House or a committee is part of proceedings in Parliament. In 1988 the Committee of Privileges considered the question of whether the circulation of a petition before its presentation to the Senate falls within the definition of proceedings in Parliament. The committee concluded that it did not. An influential factor in this conclusion was the fact that it is open to any petitioner to present a petition signed only by the petitioner, and the circulation of a petition is not essential for its presentation (11th report, PP 46/1988).

**Freedom of speech in state parliaments**

In 1985 the Senate Standing Committee on Constitutional and Legal Affairs examined an opinion of the Commonwealth Solicitor-General which suggested that a valid Commonwealth statute, by express provision, could override the privilege of freedom of speech in state parliaments. The committee rejected this opinion, and expressed the view that freedom of speech in state parliaments is an essential part of a state constitution and cannot be overridden by a Commonwealth law (Report on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments, PP 235/1985).

## Other tribunals

The immunity of parliamentary proceedings from any impeachment or question applies in respect of other tribunals as well as the ordinary courts. This is expressly declared by the 1987 Act, which in section 16 refers to "any court or tribunal". Section 3 of the Act defines "tribunal" to include any person or body having the power to examine witnesses on oath, including a royal commission or other commission of inquiry. This reflects the terms of article 9 of the Bill of Rights of 1689, which refers to "any court or place out of Parliament".

Just as the wide definition of "impeached or questioned" does not exhaust the meaning of that phrase, the definition of "tribunal" does not exhaust the category of bodies before which parliamentary proceedings must not be impeached or questioned. This is because section 16 provides that article 9 has the effect of the provisions of the section "*in addition to any other operation*" (emphasis added). This means that it is open to a court to find that other activities, possibly not covered by the Act in itself, before other bodies, not included in the Act's definition of tribunal, are contrary to the law of parliamentary privilege as embodied in article 9. If, for example, a member's participation in parliamentary proceedings is used against the member in some sense before some body which, though not a tribunal within the statutory definition, has the power to impose some detriment on the member, a court could well hold that this is unlawful. The question would be determined by the nature of the body, of its proceedings and of the detriment imposed on the member. The court would have to distinguish between mere withdrawal of political support, which would not be unlawful, from anything in the nature of a penalty imposed on the member.

In this connection it should be noted that some procedures by which political parties impose party discipline on their members may well be unlawful when imposed because of the members' activities in Parliament, although this is generally accepted as part of the party system.

In 2002 the Privileges Committee reported on a case in which a senator's party had withdrawn his endorsement because he did not follow a party instruction on how he should cast his vote in the Senate. The senator had taken legal action against his party, and had settled this action after the party took certain steps required by him. The committee found that the actions of the party had been reckless and ill-judged, but in view of the settlement did not find a contempt of the Senate. (Case of Senator Tambling, 103rd report of the committee, PP 308/2002.)

In 1919 the Presiding Officers made statements in each House rejecting any attempt by a royal commission to inquire into the internal affairs of the Houses (for the terms of these statements, see ASP, 6th ed., at pp 1043-4). Although the matters into which it was apprehended the commission might inquire were not proceedings in the Houses as such, the case illustrates the extension of the principle to executive government-appointed commissions of inquiry. (See also documents tabled by the President, 4 May 1993, J.45, concerning an inquiry by a person appointed by the Attorney-General into matters the responsibility of a parliamentary department.)

In 1983 the Royal Commission on Australia's Security and Intelligence Agencies accepted, in the course of its proceedings, that it did not have the power to inquire into statements made in Parliament (Report of the Commission, 6 December 1983, PP 323/1983, p. 9).

The question has been raised whether the immunity operates in respect of private arbitration tribunals, which are usually established under a law of a state or territory and which operate by the parties contracting to be bound by their decisions. Most such bodies appear to fall within the definition of tribunal in the 1987 Act, in that they have the power to take evidence on oath, and therefore section 16 of the Act would apply. It would also appear not to be possible for the immunity as a matter of law to be negated by a contract.

**Parliamentary privilege and statutory secrecy provisions**

Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information.

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.

Statutory provisions of this type do not 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. They have no effect on the powers of the Houses and their committees to conduct inquiries, and 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 principle 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 clear by section 16 of the 1987 Act, 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. Section 49 of the Constitution provides that the law of parliamentary privilege 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. (Quoted in 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, PP 235/1985, p. 2.)

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* established a National Crime Authority with power to inquire into matters relating to organised crime. The Act also established 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 was a provision which limited the powers of inquiry of the committee, by providing that the committee was 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 was 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. Members of the Authority claimed 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 sought from the executive government immunities from prosecution under the section.

The committee sought advice from the Clerk of the Senate on this question. The advice was that the secrecy provision had nothing to do with the provision of information to the committee. Apart from the principles already enunciated, there were additional reasons for that advice. The general secrecy provision contained nothing to indicate that it had any application to the committee, and was not placed in the part of the act dealing with the committee. Moreover, the provision allowed the disclosure of information in accordance with the duty of officers, and it could readily be concluded that officers had a duty to cooperate with the committee which was statutorily charged with the task of overseeing the activities of the Authority.

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 asserted that the secrecy provision prevented the provision of information to the committee. The opinion did not make it clear how the secrecy provision operated in relation to the committee's inquiries. It appeared to contemplate that the secrecy provision had no application while the committee was operating within its statutory charter, but that should the committee stray outside its statutory bounds the secrecy provision operated in some way to stop the committee's inquiries.

The great weakness of this argument was revealed by the question: If an officer of the Authority gave information to the committee, could 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 not answered. 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 such provisions, worked by creating a criminal offence for the disclosure of information. If there is no offence for disclosing information to a parliamentary committee, the provision could not operate in relation to such a committee. 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 remained privileged, would this mean that the provision could not be enforced against an officer who gave such evidence voluntarily, but operated only to restrain the committee where an officer objected to giving such evidence? These difficulties with the Solicitor-General's opinion were pointed out in a further advice to the committee.

In spite of all these considerations, the government expressed an intention of adhering to the advice of the Solicitor-General. The reaction in the Senate to this was that one of the Senate members of the committee introduced a bill to amend the National Crime Authority Act to make it clear that the secrecy provision had no application to inquiries by the committee (National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990).

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. This opinion contended that another general statutory secrecy provision inhibited the provision of information to a parliamentary committee. 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 appeared to indicate 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.

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. This opinion related to another statutory secrecy provision, but 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.

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. 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 an advice to the Senate by its Clerk on this opinion, 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 find "necessary implications" 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 not necessarily be drawn by any conscientious reader of the statute.

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. This residual question has not been resolved. The various opinions given on this matter were included in the explanatory memoranda accompanying the National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990, presented on 8 November 1990, and the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, presented on 9 September 1991. (See also 36th report of Committee of Privileges, 25 June 1992, PP 194/1992.)

In 1995 the government's advisers claimed that a clause in the Auditor-General Bill 1994 which would prevent the Auditor-General releasing certain information would be an implied restriction on the powers of the Senate and would prevent the provision of such information in response to an order of the Senate. It was also claimed that it would be unconstitutional for the Parliament to enact a provision to the effect that parliamentary powers and immunities are not affected by a statute except by express words. This claim was rejected by advice provided by the Clerk of the Senate. (See the 12th and 14th reports of 1995 of the Scrutiny of Bills Committee, PP 493/1995.) A revised version of the bill introduced in 1996 overcame this issue by explicitly providing for the effect of the clause on parliamentary inquiries.

Since 1991 the government has generally adhered to the view that a generic statutory secrecy provision does not affect parliamentary inquiries, with only occasional episodes of confusion on the point. For a statement by the government of the principle, see SD, 4/12/2003, pp 19442-3, in relation to the ASIO Legislation Amendment Bill 2003. (See Supplement)

In estimates hearings in 2006 and 2007 officers of the Department of Employment and Workplace Relations attempted to suggest that a provision in the Public Service Act requiring officers to maintain confidentiality could be breached by the giving of evidence, but this position was rejected by the committee (Reports of the Employment, Workplace Relations and Education Legislation Committee, Budget Estimates 2006-07, p. 3 and Appendix A, PP 144/2006; Additional Estimates 2006-07, pp 14-15, PP 64/2007).

For an application of the principle that Parliament cannot be assumed to have indirectly surrendered by implication in a statute part of the privilege attaching to its proceedings, see *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* 2002 2 Qd R 8.

It is notable that in the United States the courts have consistently held that a statutory secrecy provision does not prevent the Houses of Congress or their committees requiring the production of the protected information (for example, *FTC v Owens-Corning Fibreglass Corp* 1980 626 F 2d 966).

**Preparation and publication of documents**

Each House of the Parliament and its committees possesses the power to prepare and publish documents, with absolute privilege attaching to the publication of the document and to the contents of the document. Paragraph 16(2)(d) of the 1987 Act provides that the formulation and publication of a document, and the document so formulated or published, by or pursuant to an order of a House or a committee is included in proceedings in Parliament and attracts the immunity declared by section 16 of the Act.

The Houses possessed this power under section 49 of the Constitution, which attracted to the Houses the provisions of the United Kingdom Parliamentary Papers Act 1840. This statute was passed in consequence of the decision of the Court of Queen's Bench in *Stockdale v Hansard* 1837 173 ER 319, 1839 112 ER 1112, which found that the British Houses did not have that power. In order to provide the machinery for the publication of documents by the Australian Houses, the *Parliamentary Papers Act 1908* provided for the privilege of documents ordered to be published by either House or a committee. That Act was superseded by the 1987 Act, which, unlike the 1908 Act, does not refer to a particular mode of publication, and which clarifies the extent of the privilege.

The prior publication by other means of a document which is subsequently published by order of a House or a committee is not protected by parliamentary privilege. Similarly the content of a document which has come into existence independently of proceedings in Parliament, for example, a report or letter which is exchanged between two or more parties and is subsequently submitted to a House or a committee, is not protected by parliamentary privilege. (For an application of this principle, see *Szwarcbord v Gallop* 2002 167 FLR 262.) (See Supplement)

For a claim by the Auditor-General, uncontested, that draft Audit Office reports, prepared for the purpose of presentation to Parliament, are immune from discovery because of parliamentary privilege, see tabled letters from the Audit Office and the Clerk of the Senate, 12/11/2002, J.1026; 14/6/2005, J.656.

The preparation and publication of a document by or pursuant to an order of a House includes such preparation or publication by a person other than a member of the House in accordance with such an order (for applications of this principle, see *R. v Parliamentary Commissioner for Standards, ex parte Al Fayed* 1998 1 All ER 93; *Hamilton v Al Fayed* 1999 3 All ER 317; *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* 2002 2 Qd R 8).

In 1992 the Attorney-General's Department provided an opinion which suggested that the reference to publication in paragraph 16(2)(d) of the 1987 Act covered only "internal" publication for the purposes of proceedings in Parliament. This opinion was contested by the Clerk of the Senate and was subsequently repudiated by an opinion of the acting Solicitor-

General. The latter opinion accepted that "publication" in the section includes publication to the public, and covers any subsequent publication of a document ordered to be published by a House or a committee.

In 2001 the government suggested that the Senate did not have power to order the publication on the Internet of a list of government contracts which it had ordered to be produced, a suggestion rejected, in effect, by the Senate and later tacitly abandoned (26/9/2001, J.4976; report of the Finance and Public Administration References Committee on accountability to the Senate in relation to government contracts, PP 212/2001; PP 367/2002; PP 610/2002; PP 23/2003; 27/9/2001, J.4994-5; 18/6/2003, J.1881-2).

**Qualified privilege**

The immunity of parliamentary proceedings from question or impeachment in the courts is absolute. This means that the immunity of a member from action for defamation in respect of what was said in parliamentary debate remains regardless of the motives in making the remarks in question.

Reports of parliamentary proceedings in newspapers and elsewhere may attract what the law knows as qualified privilege, that is, a privilege which may be lost on proof of malice or other improper motive in making the publication.

Qualified privilege is not a diluted extension of the absolute parliamentary immunity. The law relating to qualified privilege is a completely separate branch of the law, related to parliamentary immunities only because it has application in respect of reports of proceedings in Parliament. It also applies to other transactions totally unrelated to parliamentary matters, for example, relations between private societies and their members.

The law relating to qualified privilege is determined by the ordinary law of defamation of states or territories. Reports of parliamentary proceedings may also attract the implied freedom of political communication found by the High Court in the Constitution (*Lange v Australian Broadcasting Commission* 1997 189 CLR 520).

The 1987 Act, however, provides in section 10 a defence against defamation actions for all fair and accurate reports of proceedings in the Houses of the Commonwealth Parliament and their committees.

The privilege attaching to reports of parliamentary proceedings, including radio and television reports, is further discussed in Chapter 3 on the publication of proceedings.

**Minor immunities**

There are three minor immunities of members of the Houses of the Parliament and of witnesses and parliamentary officers. One of these is of virtually no significance, and the other two seldom arise. These are:

- immunity from arrest in civil causes
- exemption from service as a juror
- exemption from compulsory attendance in a court or tribunal.

The immunity from arrest in a civil cause is now of little significance. The potential for a person to be arrested and imprisoned by a civil, as distinct from a criminal, process is now extremely small, due to changes in the law and the narrow compass which the courts have given to purely civil causes by interpretation. The immunity extends to witnesses required to attend on parliamentary committees and to officers required to attend on the Houses or their committees.

In some countries the immunity extends to criminal matters, and a member may not be arrested or prosecuted without the consent of the relevant house. This may be regarded as a security against the obstruction of members by abuse of the processes of law, but in view of the general integrity of the criminal process in Australia, it would not seem to be appropriate here.

The other two minor immunities seldom arise in practice. There is good ground for retaining them, however: the principle that the Houses should have first right to the services of their members, witnesses and officers, and that those services should not be impeded by the requirements of legal proceedings before a court.

Section 14 of the 1987 Act codifies the immunities from arrest in a civil cause and from compulsory attendance before a court or tribunal. The Act restricts the immunities to five days before and five days after a meeting of a House or committee. Before the Act was passed these immunities operated for 40 days before and after a session, that is, in modern times, virtually permanently.

The immunity from being compelled to attend before a court or tribunal does not prevent a member, witness or officer attending voluntarily when requested to do so. (See Supplement)

The exemption from jury service of members and officers of the Houses is regulated by the *Jury Exemption Act 1965*.

**Detention of senators**

While the immunity from arrest in a civil cause is of little significance, the Senate has insisted upon its right to be notified of the detention of a Senator in any cause.

In 1979 the Committee of Privileges considered a case in which a senator had been arrested and detained without any notification being given to the President. The committee reported that it was the right of the Senate to receive notification of the detention of any of its members, and recommended that the Senate pass a resolution asserting this right and setting out when notification is to be given ($5^{th}$ report, PP 273/1979). The Senate passed the recommended resolution on 26 February 1980 (J.1153). The resolution requires any court, pursuant to the order of which a senator is detained in custody, to notify the President of the fact and the cause of the senator's detention.

In 1986 the committee considered a case in which a senator had been detained by police for a considerable period without being brought before a court. The committee recommended that the 1980 resolution be modified to impose an obligation upon police to notify the President of the fact and the cause of a senator's arrest where the identity of the senator is known (10th report, PP 433/1986). The Senate passed the recommended resolution on 18 March 1987 (J.1693-4).

## POWERS OF THE HOUSES

There are three distinct powers adhering to the two Houses of the Parliament by virtue of section 49 of the Constitution: the power of the Houses to determine their own constitution; the power to conduct inquiries; and the power to punish contempts.

### Power of the Houses to determine their own constitution

Each House of the Parliament has the power to determine its own constitution, in so far as it is not determined by constitutional or statutory law. In Australia, this power, though explicitly recognised in section 47 of the Constitution, is of limited significance because the Constitution and the statutory law provide for the qualification and disqualification of members of the Houses and a method whereby disputed elections may be referred to the High Court (see Chapter 4, Elections for the Senate, under Disputed returns and qualifications and Chapter 6, Senators, under Qualifications of senators).

Before 1987 each House could exercise the power of determining its own constitution by the expulsion of members who were regarded as unfit to remain members. The expulsion of a member did not of itself prevent the re-election of that member, since eligibility for election is determined by law.

The 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that the power of a House to expel its members be abolished. The rationale of this recommendation was that the disqualification of members is covered by the Constitution and by the electoral legislation, and if a member is not disqualified the question of whether the member is otherwise unfit for membership of a House should be left to the electorate. The committee was also influenced by the only instance of the expulsion of a member of a House of the Commonwealth Parliament, that of a member of the House of Representatives in 1920 for allegedly seditious words uttered outside the House. This case had long been regarded as an instance of improper use of the power (see, for example, E. Campbell, *Parliamentary Privilege in Australia*, MUP, 1966, pp 104-5).

The recommendation, and the consequent provision in section 8 of the 1987 Act, was opposed in the Senate. It was argued that there may well be circumstances in which it is legitimate for a House to expel a member even if the member is not disqualified. It is not difficult to think of possible examples. A member newly elected may, perhaps after a quarrel with the member's party, embark upon highly disruptive behaviour in the House, such that the House is forced to suspend the member for long periods, perhaps for the bulk of the member's term. This would mean that a place in the House would be effectively vacated, but the House would be powerless to fill it. Other circumstances may readily be postulated. The Houses, however, denied themselves the protection of expulsion.

**Power to conduct inquiries**

Each House of the Parliament has the power to require the attendance of persons and production of documents and to take evidence under oath. This power supports one of the major functions of the Houses: that of inquiring into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them. The power has long been regarded as essential for a legislature. The power is, in the last resort, dependent upon the power to punish contempts, in so far as that penal power is the means by which the Houses may enforce the attendance of witnesses, the answering of questions and the production of documents.

The power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents is conferred by section 49 of the Constitution.

Inquiry powers also have another possible source. In the United States it was found that these powers are inherent in the legislature (see *McGrain v Daugherty* 1927 273 US 135).

Something of this inherent powers doctrine was adopted in a state. The New South Wales Court of Appeal in *Egan v Willis and Cahill* 1996 40 NSWLR 650 found that although the New South Wales Parliament lacks an equivalent of section 49 of the Constitution, the Legislative Council possesses an inherent power to require the production of documents and to impose sanctions on a minister in the event of non-compliance. The Council had made an order for documents and suspended the Treasurer from the Council when he failed to produce the required documents. The High Court rejected an appeal against this judgment, while not indicating whether the Council possesses full inquiry powers: *Egan v Willis and Cahill* 1998 158 ALR 527. The Court of Appeal subsequently found that claims of legal professional privilege and of public interest immunity could not protect the executive government against the Council's power: *Egan v Chadwick and others* 1999 46 NSWLR 563. The Council does not possess a general power to punish contempts. The limitation of the power of the Council in respect of documents recording the deliberations of cabinet, found by the Court of Appeal, would not apply to the Commonwealth Houses in the presence of the constitutional bases of their powers.

The power to conduct inquiries is usually not exercised by the Houses themselves, but is delegated to committees by giving those committees the power to require the attendance of witnesses and the production of documents. A major concomitant of that delegation is that proceedings in parliamentary committees are proceedings in Parliament, and the immunity from impeachment or question in the courts attaches to words uttered in committee proceedings by members and witnesses and to the production of documents to committees, as declared by the 1987 Act.

It is not determined whether the Houses can delegate their power to conduct inquiries to a person other than their own members, although there are some old precedents in Britain for such a delegation (see also under Preparation and publication of documents, above; see also Chapter 20, Relations with the Judiciary, under The second Senate committee).

The power may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the

Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1912 15 CLR 182, 1913 17 CLR 644; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182-3), and, if the matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees. The United States Supreme Court so held in relation to the Congress (see *Quinn v US* 1955 349 US 155). This would not mean that an inquiry would have to be linked with any particular legislation (cf *Eastland v US Servicemen's Fund* 1975 421 US 491).

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature. Standing order 178 provides that if the attendance of a member or officer of the House of Representatives is required by the Senate or a Senate committee a message shall be sent to the House requesting that the House give leave for the member or the officer to attend. This standing order reflects a rule of courtesy and comity between the Houses, and as such it ought properly to be observed in relation to houses of state and territory parliaments. It may be that these limitations on the power to summon witnesses in relation to other houses have the force of law, and may extend to officers of state and territory governments. The basis of such a legal doctrine in relation to the states would be High Court judgments to the effect that the Commonwealth may not impede the essential functioning of the states. (For an examination by the High Court of what has come to be known as the "Melbourne Corporation doctrine", that the Commonwealth may not interfere with the governmental functions of states, see *Austin v Commonwealth* 2003 195 ALR 321.)

The Select Committee on the Australian Loan Council, in its interim report in March 1993 (PP 78/1993), accepted advice by the Clerk of the Senate that it could not summon as witnesses members of the House of Representatives and of the houses of state parliaments. The committee recommended that the Senate ask the various houses to require their members to attend and give evidence before the committee (the advice also indicated that the houses have the power so to compel their members, but that question also has not been adjudicated). The Senate passed a resolution and requests were sent to the various houses accordingly. The various houses declined to compel their members to attend. (5/10/1993, J.566; 7/10/1993, J.608; 20/10/1993, J.657; 21/10/1993, J.683; see also Chapter 17, Witnesses) Similar advice was provided to, and accepted by, the Select Committee on Unresolved Whistleblower Cases (Report, PP 344/1995, pp 138-40). For an instruction by the Senate to a committee to invite the Prime Minister and another minister to give evidence, see 9/3/1995, J.3063-4.

The Select Committee on the Victorian Casino Inquiry presented a report on 5 December 1996 indicating that it had decided not to continue its inquiry because of advice provided by the Clerk of the Senate and by Professor Dennis Pearce in relation to limitations on the Senate's powers to compel evidence from state members of parliament and other state office-holders. The committee's report provided a comprehensive analysis of this matter and copies of the advices (PP 359/1996).

(See Supplement)

In the United States the view is taken that each House of the Congress and their committees may summon members and officers of state governments, provided that this is for the purposes of

inquiries into matters within the legislative power of the Congress. The question has not been adjudicated, but there are precedents for the summoning of state officers and their responding. It must be noted, however, that differing constitutional provisions may reduce the persuasive value of the American law for Australian purposes; for example, article iv, section 4 of the US Constitution, whereby the United States guarantees to every state a republican form of government, gives the Congress a general power of supervision of state governments which the Australian Parliament does not possess.

The Supreme Court of the Province of Prince Edward Island, in Canada, held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry into a matter within the legislative power of the province. This decision was not appealed and the officers subsequently appeared before the committee. (*Attorney General (Canada) v MacPhee* 2003 661 APR 164)

The power to summon witnesses and the power to require the production of documents are one and the same; any limitations on one therefore apply equally to the other.

The immunity of other houses' proceedings from impeachment and question before other tribunals (the Bill of Rights, article 9 immunity which most Australian Houses possess) is regarded as preventing any inquiries into their proceedings by the Senate or its committees (see the 54th report of the Committee of Privileges, PP 133/1995).

The inability to compel members of other houses has been regarded as preventing findings of contempt against them, except for Commonwealth ministers in that capacity (see Chapter 19, Relations with the executive government, under Ministerial accountability and censure motions). This principle might be held to be applicable to state and territory office-holders.

Possible and mooted limitations on the Senate's power to compel evidence were summarised in 'The Senate's power to obtain evidence and parliamentary "conventions"', paper by the Clerk of the Senate published by the Finance and Public Administration References Committee, September 2003.

Subject to the observance by the courts of parliamentary immunities, there is nothing to prevent judicial proceedings involving the same facts and circumstances as have been examined in a parliamentary inquiry (cf *Hamilton v Al Fayed* 1999 3 All ER 317; a different view of the particular case, though not of the law, was taken by the House of Lords on appeal, 2000 2 WLR 609; also *Mees v Roads Corporation* 2003 FCA 306).

For the application of the sub judice convention to inquiries by the Senate, see Chapter 10, Debate, under Sub judice convention, and Chapter 16, Committees, under Privilege of proceedings.

**Rights of witnesses**

Subject to what is said above about possible constitutional limitations, there is no limitation on the power of the Houses to compel the attendance of witnesses, the giving of evidence and the production of documents.

There are, however, safeguards against any misuse of this power. The Senate has a range of practices designed to safeguard the rights of witnesses and of people who may be accused of wrongdoing in the course of committee proceedings.

These practices were codified by the Privilege Resolutions, passed by the Senate on 25 February 1988. (The resolutions are contained in appendix 2 and were explained in an explanatory memorandum tabled in the Senate and incorporated in SD, 17/3/1987, pp 796-9.) The first of those resolutions provides a code of procedures for Senate committees to follow for the protection of witnesses. These procedures are based on practices adopted by Senate committees in the past, but under the resolution Senate committees are bound to adopt those practices.

The procedures confer a number of rights on witnesses, particularly the right to object to questions put in a committee hearing and to have such objection duly considered. Witnesses are to be supplied with copies of the procedures, and may appeal to the Senate if a committee fails to observe the procedures.

Section 12 of the 1987 Act provides statutory witness protection provisions. It is a criminal offence punishable by fine or imprisonment to interfere with a parliamentary witness. Section 13 makes it a criminal offence to disclose without authorisation parliamentary evidence taken in camera. This was thought to be a logical extension of the witness protection provisions (explanatory memorandum, p. 8).

A difficulty with this sort of provision has already been noted: the successful prosecution of the offences may well require a House to some extent to waive, in effect, the immunity of its proceedings from examination in the courts.

The rights and protection of witnesses are more fully set out in Chapter 17 on Witnesses.

**Power to punish contempts**

Each House of the Parliament possesses the power to declare an act to be a contempt and to punish such act, even where there is no precedent of such an act being so judged and punished. As was pointed out above, the power does not depend on the acts judged and punished being violations of particular immunities. This power to deal with contempts of either House is the exact equivalent of the power of the courts to punish contempts of court.

The rationale of the power to punish contempts, whether contempt of court or contempt of the Houses, is that the courts and the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions.

Particular contempts are sometimes discussed as if they have been regarded as offences simply because they are affronts to the dignity of the Houses. This, however, is a misconception. Acts judged to be contempts in the extensive modern case law of both the Senate and the British House of Commons have been so judged and treated because of their tendency, directly or indirectly, to impede the performance of the functions of the Houses. Although the power to punish contempts was originally essentially discretionary, the types of acts liable to be treated as contempts were reasonably fully delineated by that case law, just as contempt of court has been delineated by the courts.

The power of the Houses to punish contempts was recognised and upheld by the courts as part of the ordinary law. This recognition lay in the refusal of the courts to release persons committed for contempt, and in the rule that the courts would not inquire into a parliamentary warrant for the committal of a person for contempt where the warrant did not specify the contempt (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157; but this law is changed by the 1987 Act: see below, under Statutory definition of contempt).

Just as the power to conduct inquiries may not extend to members and officers of other houses of Australian legislatures, or to state office-holders, the power to punish contempts may similarly be limited (see under Power to conduct inquiries, above).

That the power of a legislature to punish contempts is regarded as inherent in the legislative function is best demonstrated by an examination of the American law. In the United States it has been held that each House of the Congress and of the state legislatures possesses the power to punish acts which obstruct the performance of the duties of a legislature in spite of the absence of any express provision in the United States Constitution; it is an inherent power, springing from the legislative function. The power is not impaired by the enactment by Congress in 1857 of a statute making it a criminal offence to refuse to answer a question or produce documents before either House or a committee. (It is now also a criminal offence to give false evidence to Congress.) A person already punished by either House for such a contempt may be prosecuted and convicted under the statute. The removal of an obstruction does not deprive the Houses of the power to punish the act causing the obstruction (*Jurney v MacCracken* 1935 294 US 125). Dealing with a case in 1972 concerning the punishment by a house of a state legislature of a person for contempt, Chief Justice Burger of the United States Supreme Court observed:

> 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. (*Groppi v Leslie* 1972 404 US 496)

In referring to “general barriers”, the Chief Justice was leaving aside other explicit constitutional limitations, such as those on the power of Congress to legislate and the requirement for due process.

It is clear that in enacting a statute for the punishment by ordinary criminal process of certain contempts, the Congress did not intend to renounce its inherent power; the reason for passing the statute was to enable the imposition of penalties not restricted to the life of any session of the Congress (*Quinn v US* 1955 349 US 155 at 169). The Houses of Congress now prefer to proceed

under the statute rather than under the inherent power, while keeping the inherent power in reserve, which avoids cluttering the proceedings of the Houses with allegations of contempt. (See M. Rosenberg and T. Tatelman, *Congress's Contempt Power: Law, History, Practice and Procedure*, CRS Report for Congress, 2007.)

**Statutory definition of contempt**

The 1987 Act contains what amounts to a statutory definition of contempt of Parliament:

> **4.** 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.

Enactment of this provision means that it is no longer open to a House, as it was under the previous law, to treat any act as a contempt. The provision restricts the category of acts which may be treated as contempts, and it is subject to judicial interpretation. A person punished for a contempt of Parliament could bring an action to attempt to establish that the conduct for which the person was punished did not fall within the statutory definition. This could lead to a court overturning a punishment imposed by a House for a contempt of Parliament.

The 1984 report of the Joint Select Committee on Parliamentary Privilege had recommended a non-enforceable review by the High Court of a punishment for contempt imposed by a House. This recommendation was not adopted because such a provision would be unconstitutional, in that it would amount to conferring an advisory jurisdiction on the High Court (explanatory memorandum accompanying the bill as passed by the Senate, p. 6).

The Senate therefore chose an enforceable judicial review, but a review on a restricted ground. The provision nonetheless opens the way for a court to determine whether particular acts are improper and harmful to the Houses, their members or committees. This means that it will not be possible for the Commonwealth Houses to treat as contempts some acts traditionally so treated in the past. For example, it is doubtful whether the Houses could treat the serving of a writ or other legal process in the precincts on a sitting day as a contempt.

Section 9 of the Act provides that if a House imposes a penalty of imprisonment upon a person, the resolution of the House and the warrant shall set out particulars of the offence. Even without the definition of contempt, this has the effect that a court could determine whether the ground for imprisonment is sufficient in law to amount to a contempt (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157 at 162).

**Defamation of the Houses and their members**

The 1987 Act provides that it is not a contempt to defame or criticise the Houses, their committees or members:

> **6.** (**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**) Sub-section (1) does not apply to words spoken or acts done in the presence of a House or a committee.

Controversy in the past about the power of the Houses to punish contempts concentrated not on the question of whether the acts regarded as contempts should be treated as offences, but whether the Houses should have the power to judge and punish those offences, an issue which is addressed below. The offence of defamation of the Houses or of their members was the exception to this: there was some dispute about whether such defamation ought to be regarded as an offence at all.

The rationale of treating defamation of the Houses or of their members as a contempt was not, as was sometimes supposed, to protect the dignity and good name of Parliament and its members, but to prevent published attacks which, by undermining the respect due to Parliament as an institution and diminishing its authority, tend to obstruct or impede the Houses in the performance of their functions. To constitute a contempt a reflection upon an individual member had to relate to the member's capacity as a member and tend to obstruct the performance of the member's duties. This rationale was not always clearly observed, even by parliamentary authorities, and houses of parliaments with the power to punish contempts did not always display the discretion and judgment which ought to accompany that great power. Some defamations, however, are capable of meeting the test for them to be treated as contempts. An authoritative exposition of the parliamentary law in this area was contained in the chapter entitled 'Defamation as Contempt of Parliament', by L.A. Abraham, in *Wicked, Wicked Libels*, ed. M. Rubinstein, London, 1972. (Contrary to a common misconception, the Fitzpatrick and Browne case was not about defamation of a member but attempted intimidation of a member: see H. Evans, 'Fitzpatrick and Browne: Imprisonment by a House of Parliament', in H.P. Lee & G. Winterton, eds, *Australian Constitutional Landmarks*, 2003.)

Criticism of the treatment of defamatory statements as contempts was based on the proposition that individual members have the same civil remedies available to them as other citizens, and the powers of the Houses should not be invoked as a substitute for such civil remedies.

The 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that it be explicitly provided by statute that defamation of a member or a House may not be punished as a contempt. The select committee made its recommendation notwithstanding submissions that there may be instances in which it is legitimate for defamation or criticism of a House or a member to be treated as a contempt. In the report of the Select Committee of the British House of Commons on Parliamentary Privilege in 1967 one such instance was identified: the allegation of bias against a presiding officer of a House. A submission attached to the report quoted W.E. Gladstone to support a contention that this offence cannot be left to civil action for correction (HC 34, 1967-8, submission of Louis Abraham at p. 203). Shortly before the 1987 Act was passed, the House of Representatives had in fact punished one of its members for criticism, made outside the House, of the Speaker (HR Debates, 24 February 1987, pp 580-7). It appears that it is no longer possible to deal with such conduct, however gross the defamation.

**Matters constituting contempts**

One of the 1988 Privilege Resolutions of the Senate sets out, for the guidance of the public, acts which may be treated by the Senate as contempts.

The resolution, Resolution 6, is set out in appendix 2. As the preamble to the resolution indicates, it is not intended to be an exhaustive or all-inclusive list of contempts, but provides guidance on the types of acts which may be treated by the Senate as contempts, and does not derogate from the Senate's power to determine that particular acts constitute contempts.

The formulation covers all the traditional contempts, but as has already been noted is subject to the statutory restriction of the category of contempts provided by the 1987 Act. This is significant in relation to one provision of the resolution: paragraph (6) relating to the service of writs in the precincts. It has already been observed that this contempt may not meet the test of section 4 of the Act. The other contempts set out in the resolution clearly meet that test.

The Committee of Privileges has reported to the Senate on a number of matters giving rise to allegations that contempts may have been committed. Most of these reports have been presented since the Privilege Resolutions were adopted. The reports, and the action taken on them by the Senate, provide a body of case law showing how the power to adjudge and punish contempts is exercised.

A full list of reports of the Privileges Committee and the action taken by the Senate in relation to each report is shown in appendix 3.

It is significant that only in the following cases has the Privileges Committee reported, and the Senate determined, that contempts were committed.

1971 unauthorised publication of draft committee report (1st report of committee PP 163/1971)

1981 harassment of a senator (6th report of committee PP 137/1981)

1984 unauthorised publication of committee evidence taken in camera (7th report of committee PP 298/1984)

1989 adverse treatment of a witness in consequence of the witness's evidence (21st report of committee PP 461/1989)

1993 charges laid against a witness in consequence of the witness's evidence (42nd report of committee PP 85/1993)

1994 threats made to a witness by an unknown person (50th report of committee PP 322/1994)

1995 unauthorised disclosure of submission to a committee by an unknown person (54th report of committee PP 133/1995)

1997 legal action taken against a person to penalise the person for providing information to a senator (67th report of committee PP 141/1997) (for the significance of this case, see above under Provision of information to members)

1998 disciplinary action taken by a university against a person in consequence of the person's communication with a senator (72nd report of committee PP 117/1998) (see also above under Provision of information to members)

1998 unauthorised disclosures of committee documents (74th report of committee PP 180/1998)

2000 unauthorised disclosure of a draft committee report (84th report of committee PP 35/2000)

2000 disciplinary action taken by a local government body against an employee in consequence of his participation in proceedings of a committee (85th report of committee, PP 36/2000)

2001 unauthorised publications of documents provided to committees (99th and 100th reports of committee, PP 177/2001, 195/2001).

In only two cases, those of 1971 and 2001, were penalties imposed by the Senate, and the penalties were reprimands. In the other cases no penalty was imposed, the committee usually concluding that no further action should be taken by the Senate, usually because of apologies offered or other remedial action by the persons concerned. In some cases the person responsible could not be identified. In all other cases referred to it the committee concluded that contempts had not been committed, often because of the lack of a culpable intention on the part of persons concerned. This record reinforces what is said elsewhere in this chapter: the power to deal with contempts has been exercised with great circumspection. The record also shows that the Senate's investigation of privilege matters has been confined to serious matters potentially involving significant obstruction of the Senate, its committees or senators.

The Privileges Committee now regards a culpable intention on the part of the person concerned as essential for the establishment of a contempt. This is in contrast to contempt of court: certain contempts of court can be proved and punished without there being any culpable intention on the part of the perpetrator. (See, for example, the 64th report of the committee, PP 40/1997.) (See also report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found, against a minister (the Lord Chancellor), in the absence of a culpable intention.)

The committee has found that contempts have been committed by public officials due to ignorance of parliamentary processes, and in 1993 the Senate adopted a recommendation that officers should have training in those processes to avoid such problems (21/10/1993, J.684; resolution reaffirmed, with requirement that departments report on compliance, 1/12/1998, J.225-6; 42nd, 64th, 73rd, 89th reports of the committee, PP 85/1993, 40/1997, 118/1998, 79/2000). Officers of Telstra, then a statutory, government-controlled corporation, were also required to undertake such training (5/8/2004, J.3836-7; report by Telstra, 7/3/2005, J.398).

**Contempts and criminal offences**

Some contempts are also criminal offences, and there is nothing to prevent proceedings for contempt being undertaken before, during or after criminal proceedings for the same acts. This

has not happened, however, and is unlikely to occur in practice, because the Senate would be likely either to choose between contempt proceedings and a prosecution in the courts or to refrain from employing its contempt jurisdiction if a prosecution is in the offing or in train.

Conversely, an act which has been dealt with as a contempt could also be prosecuted as a criminal offence (cf *US v Traficant*, US Court of Appeals, 19/5/2004, not reported; Supreme Court declined to hear appeal, 10/1/2005).

In 1997 the Senate had occasion to consider whether it should investigate a possible contempt by a senator, the making of allegedly false statements to the Senate, while police were investigating the subject matter of those statements. The senator's statements could not be the subject of court proceedings because they were protected by parliamentary privilege. Nonetheless the Senate, while referring the statements to the Privileges Committee, determined that the committee's inquiry should not begin until after the conclusion of the police investigations and any consequent legal proceedings (7/5/1997, J.1855-6).

**Criticisms of the power of the Houses to deal with contempts**

The common criticisms of the power of the Houses to deal with contempts under the present law fall into four groups: the lack of specification of offences; the alleged impropriety of the Houses acting as judges in their own cause; the alleged unsuitability of the Houses to act as judicial bodies; and the effect on the rights of accused persons.

First, it is contended that offenders are given little guidance as to the acts likely to constitute contempts and to be visited with punishment. It is therefore said that the power to punish contempts should be replaced by a codification containing specific offences. The enactment of section 4 of the *Parliamentary Privileges Act 1987* and the specification by the Senate by resolution of the acts which may be treated as contempts have largely overcome this criticism.

The lack of complete codification is a feature of the law of contempt of court. So far as is known, the complete codification of the law of contempt of court has not been achieved in any common law jurisdiction. The difficulty which occurs in any attempt to enumerate contempts is that it is the effect or tendency of an act (to interfere with the course of justice or to obstruct the work of the Houses) which constitutes the offence, and it is therefore impossible to specify with precision all acts which constitute contempts. Codification has to rely on catch-all offences, that is, provisions referring to any obstructive act, as in section 4 of the 1987 Act and paragraph (1) of the Senate's resolution.

In contempt of Parliament, as in contempt of court, the case law and authoritative expositions of it do in fact provide a good guide to acts which may be held to be offences. The Senate Committee of Privileges has now established a substantial body of case law which, together with the Senate's Privilege Resolutions, provide as much guidance as is reasonably possible.

The second major criticism of the power of the Houses to punish contempts is that in exercising this power the Houses are acting as judges in their own cause, contrary to the principles of natural justice. Again, the same difficulty arises with contempt of court: no incongruity is seen in courts judging and punishing such contempts. The fact that there is a right of appeal in respect of

contempt of court does not affect the matter: the appeal is to another court. Moreover, there is just as effective an appeal in respect of a contempt of Parliament, from the Privileges Committee to the whole House. Just as the courts are the best judge of what interferes with the administration of justice, the Houses may be the best judge of acts which interfere with the performance of their functions and obstruct their members in the performance of their duties.

Thirdly, it is said that in judging and punishing contempts of Parliament, the Houses are exercising a judicial function, and as political bodies they are unfit to exercise a judicial function. It is clear that the Houses *are* political bodies and that they are by constitution not adapted to act as courts of law, but the very premise of this criticism is questionable. The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of improper obstruction of the political processes embodied in the legislature.

Fourthly, it is said that in dealing with alleged contempts, the Houses do not allow to accused persons the normal rights allowed by the processes of the ordinary law. There is validity in this criticism. The Houses were originally not bound to recognise any rights of accused persons at all.

This criticism has been largely overcome in the Senate by the adoption of procedures for privilege inquiries and proceedings before the Privileges Committee. These procedures are outlined below.

**Should the power to deal with contempts be transferred to the courts?**

The criticisms of the power of the Houses to deal contempts, though significantly met by the 1987 Act and the Privilege Resolutions of the Senate, lead to the question of whether the power to deal with contempts should be transferred to the ordinary courts. According to the most commonly expressed idea, this would be done by the enactment of a statute specifying offences which would cover acts which have been declared to be contempts of Parliament.

The question of transferring the power to deal with contempts to the courts could be discussed separately from the question of the statutory identification of offences: theoretically it would be possible to enact a statute specifying offences against the Parliament but leaving the two Houses with the power to deal with those offences, and it would also be possible to transfer the power to deal with contempts to the courts without specifying the acts which constitute contempts as specific criminal offences. For all practical purposes, however, the proposal that a statute be enacted specifying criminal offences corresponding to contempts and the proposal that the courts should be empowered to deal with contempts may be regarded as one and the same proposition, since in practice each would necessarily involve the other. Some acts which have been regarded as contempts of Parliament are already criminal offences.

It has already been observed that while the Houses of Parliament, in Britain and Australia, have been judges in their own cause, they have on the whole been lenient judges. Few people have actually been punished for contempts in modern times. If contempts were to be dealt with by a court applying statutorily specified offences and penalties, offenders who would otherwise be dismissed with a reprimand and a warning by a House of the Parliament would probably be

convicted and punished by a court. If cases were sent to the courts by the Houses, the Houses would be relieved of responsibility for conviction and punishment of offenders, and such conviction and punishment would be surrounded by the sanctity of court proceedings. The Houses might be more inclined to send cases to the courts and more convictions might result. The great advantage of the present system is that the Houses exercise their powers only in really important cases.

If the Houses were to decide whether to send cases to the courts, they would need to have some procedures for preliminary investigation of allegations to enable them to determine whether such allegations should go to the courts. Inevitably, such procedures would be viewed as committal proceedings, and would attract any criticisms levelled at the way in which the Houses deal with contempts. These criticisms would have even more force because it would be clear that the judgment and punishment of contempts would be a judicial process, and not a matter of political judgment as suggested earlier. In other words, the transfer to the courts of the power to adjudge and punish contempts could have the very effect which it seeks to avoid: that of forcing the Houses to behave as if they were judicial bodies, in the pre-trial procedures. Moreover, inevitably the argument would be raised that the preliminary proceedings in the Houses could prejudice a fair trial.

Any proposal that the Houses surrender the power to punish contempts would have to be carefully considered in relation to the power to commit persons for preventative and coercive reasons. When a disorderly person is removed from the galleries of the Houses and detained until the end of the sitting, the purpose of the detention is not to punish the offender but to prevent the continuance of the offence. When a recalcitrant witness is committed to custody, the purpose is not punishment but to compel the answering of the questions or the production of the documents which the witness has refused to answer or produce. The importance of preventative committal is obvious, and the coercive element of committal for contempt has been recognised by the courts in all common law jurisdictions, including the United States, where it is seen as vital to the ability of the Congress to legislate (*Quinn v US* 1955 349 US 155 at 161). Theoretically, the power to impose preventative or coercive committal could be retained while giving up to the courts the power actually to punish contempts. The important point is that it would be extremely difficult to transfer to the courts the power to impose preventative or coercive custody, and that it is therefore difficult to sustain the supposed principle that the Houses should not have the power to imprison offenders.

The importance of preventative action is illustrated by the destruction of documents which might constitute evidence in a parliamentary inquiry, which is regarded as a particularly dangerous offence, as it may radically obstruct an inquiry and prevent the discovery of the facts of a matter, and one particularly worthy of resolute action by the legislature. The punishment after the event of other kinds of contempts, such as interference with witnesses, may provide a sufficient remedy, and the harm done can be corrected to a certain extent, for example, by recalling a witnesses. The destruction of evidence, however, cannot be corrected after the event; the offender may be punished, but the evidence is lost. The legislature may therefore be justified in taking remedial action even in advance of complete proof of the offence. A case of destruction of documents provided an occasion on which a House of the United States Congress exercised its power to punish contempts directly rather than prosecute offenders in the courts. A statute of 1857 provides for the prosecution of witnesses who

refuse to give evidence, but this procedure is not likely to effect a remedy against destruction of documents, which requires swift preventative action. Thus in 1934, when it appeared that a witness and other persons had allowed the destruction of documents from a file relevant to an inquiry by a Senate committee into air mail contracts, the Senate ordered the arrest and detention of the offender. This action was contested in the courts. The witness conceded that the Senate had the power to punish obstructive acts as contempts, but argued that, as the destruction of the documents had already occurred before the arrest, and relevant documents had been produced, there was no obstruction of the Senate which could still be punished. The Supreme Court held that a House may punish as a contempt an act of a nature to obstruct the legislative process even though the obstruction had been removed or its removal was no longer possible, and the creation of the statutory offence punishable through the courts did not impair this power of the Houses (*Jurney v MacCracken* 1935 294 US 125 at 147-8, 151). It is well established that, in particular circumstances, a contempt may be committed by the destruction of documents even in advance of a requirement that they be produced. This is illustrated by contempt of court, which operates on the same principles as contempt of Parliament. It is a contempt to destroy documents which are relevant to legal proceedings regardless of whether the documents have been formally required to be produced. This is on the same principle applying to interference with witnesses: it is possible to interfere with a witness in advance of the witness being called to give evidence, for example, by threatening a witness in relation to evidence which the witness might give (*Registrar of Supreme Court v McPherson* 1980 1 NSWLR 688).

If statutory criminal offences were to replace completely contempts of Parliament, this would raise the difficult question of how the Houses would deal with contempts by their members. The powers of the Houses to discipline their members would seem to provide a far more effective and simple remedy for contempts by members than prosecutions under a criminal statute. It would be anomalous for a House to direct that a prosecution be instituted against one of its members for a contempt when a swifter and more flexible cure is at hand in the procedures of the House. Proceedings in a court may be protracted while the offending member continues to sit and vote in the House concerned, or, if not, an undesirable vacancy in representation may be created.

Similarly, minor contempts, particularly those committed in the sight of a House, may best be dealt with summarily under the powers presently possessed by the Houses. Thus, if a person creates a disturbance in the public galleries, it is a far more effective remedy to have the offender held in custody until the end of the sitting and excluded from the building for a period, than to go through the cumbersome mechanisms of arresting, charging, releasing on bail, and prosecuting the accused. Moreover, as is pointed out above, the present remedy is more effective in preventing repetition of the offence.

Because of the cogency of the arguments here set out, both the 1967 report of the Select Committee on Parliamentary Privilege of the House of Commons and the 1984 report of the Joint Select Committee on Parliamentary Privilege of the Commonwealth Houses recommended that the Houses retain their power to deal with contempts.

**Penalties for contempts**

Section 7 of the 1987 Act empowers either House to impose fixed terms of imprisonment and fines for contempts of Parliament. The Act provides that a fine is a debt due to the Commonwealth.

Among the powers adhering to the Houses under section 49 of the Constitution before the 1987 Act was the power to imprison offenders for contempt of Parliament.

A problem which existed until 1987 was that a House could imprison an offender only for the duration of a session, which depends upon the prorogation of the Parliament or the dissolution of the House of Representatives or of both Houses by the Governor-General.

Another difficulty which existed until 1987 in respect of penalties was the doubt about the power of the House of Commons, and therefore of the Commonwealth Houses, to impose fines. It was suggested that because the House of Commons had not imposed a fine for many years the courts might hold that the power to impose fines no longer existed. The Senate Committee of Privileges in its 1st report in 1971 did not accept this argument, and recommended that the Senate consider imposing fines for future offences (PP 163/1971. The Senate adopted this report. See also the 8th report of the Committee of Privileges, PP 239/1985). The 1967 House of Commons report accepted the claim that the power to fine had lapsed, and recommended that the power be statutorily revived, while the 1977 report recommended that the power to imprison should be abolished. These recommendations were not adopted.

The 1987 Act removed these difficulties by codifying the power to impose penalties.

As has already been noted, the Senate imposed penalties for contempts only twice, and the penalties were reprimands. In other cases the Senate found that contempts were committed, but took no further action.

There has been only one case of a penalty of imprisonment imposed by a House of the Commonwealth Parliament. In 1955 the House of Representatives imprisoned two persons for attempting to intimidate a member. The action of the House was examined and upheld by the High Court (*R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157; the law expounded in this case is changed by the 1987 Act: see above under Statutory definition of contempt). (For this case, see also H. Evans, 'Fitzpatrick and Browne: Imprisonment by a House of Parliament', in H.P. Lee & G. Winterton, eds, *Australian Constitutional Landmarks*, 2003.)

Houses of state parliaments which possess the power to punish contempts have occasionally exercised that power. On 24 June 1999 the Legislative Council of Western Australia imposed a fine of $1 500 on a public servant who failed to appear before a committee when summoned. In April 2006 the New Zealand House of Representatives imposed a substantial fine on a television company for the contempt of penalising a witness.

Resolution 8 of the Senate's Privilege resolutions, and standing order 82, require seven days' notice of any motion in the Senate to determine that a person has committed a contempt, or to impose a penalty for a contempt.

It is a fundamental principle that one House of the Parliament has no authority over the members of the other House except in the immediate conduct of its own proceedings or those of its committees (for example, if a member of one House is appearing as a witness before a committee of the other House — for such occasions see Chapter 17 on Witnesses). A House therefore cannot impose any penalty on a member of the other House. A contempt by a member can be dealt with only by the member's own House. (Rulings on matters of privilege of President Sibraa, 17/5/1988, J.711; of President Beahan, 19/9/1994, J.2151; 22/9/1994, J.2219. See also statement by Senator Chamarette, SD, 30/3/1995, pp 2490-1.)

An alleged contempt by a minister acting in the capacity as a minister, however, may be investigated by the Senate, even though the minister is a member of the other House and therefore cannot be compelled to give evidence or punished by the Senate, and the Senate cannot inquire into proceedings in the House. (See 51st report of the Committee of Privileges, PP 4/1995; in its 60th report, PP 9/1996, the committee dealt with a statement by a minister when it was not clear that the statement was an exercise of ministerial functions; see also reference to the committee 2/10/1997, J.2611-2; determination by President Reid, SD, 23/10/1997, pp 7901-2.)

## PROCEDURAL MATTERS

### Raising of matters of privilege

A senator raises a matter by writing addressed to the President. The President considers the matter and rules whether a motion relating to the matter should have precedence. In so ruling the President is required to have regard to the principle that the Senate's power to deal with contempts should be used only in cases of improper acts tending substantially to obstruct the Senate, its committees or its members, and to the availability of another remedy. (SO 81; Privilege Resolutions nos 4 and 7.)

The President gives precedence to a motion relating to a matter of privilege if the matter is capable of being regarded by the Senate as meeting the first of the prescribed criteria, and if there is no other remedy readily available. For a full list of matters of privilege raised under the procedures and the rulings of the President on those matters, see appendix 4.

The motion arising from a matter of privilege is to allow the Privileges Committee to investigate a matter. No other motion can be given precedence. That committee then investigates the matter and reports to the Senate.

This is an appropriate procedure. A committee is better fitted than the whole Senate to undertake an inquiry. It has no power to act itself, but can only make recommendations to the Senate. The system whereby a recommendation is made to the Senate by a committee provides, in effect, an appeal procedure, in that the Senate is not bound to accept the findings or recommendations of the committee.

Another of the Privilege Resolutions (no. 3) provides criteria for the Senate and the Privileges Committee to take into account when determining whether a contempt has been committed, similar to the criteria provided for the President but incorporating reference to the intention of any offender and the defence of reasonable excuse.

Standing orders 81 and 197 allow for the normal procedures for raising matters of privilege to be dispensed with and for a matter of privilege to be laid before the Senate at once if such a matter arises suddenly in relation to proceedings before the Senate.

It is a fundamental principle that a matter of privilege is a matter for the Senate, and should not be dealt with in committee of the whole. A matter of privilege arising in committee of the whole is therefore reported to the Senate.

**"Waiver" of privilege**

From time to time suggestions are made of a House or its members "waiving their privilege", for example, by allowing the examination of particular parliamentary proceedings by a court in a particular case. Such suggestions are misconceived. It is not possible for either a House or a member to waive, in whole or in part, any parliamentary immunity. The immunities of the Houses are established by law, and a House or a member cannot change that law any more than they can change any other law.

This was clearly indicated by a case in the Senate in 1985. A petition by solicitors requesting that the Senate "waive its privilege" in relation to evidence given before a Senate committee was not acceded to, principally on the ground that the Senate does not have the power to waive an immunity established by law (SD, 16/4/1985, pp 1026-30).

The enactment of the 1987 Act made it clear that privilege could not be waived (see *Hamsher v Swift* 1992 33 FCR 545).

In 1996 the British Parliament passed an amendment of the Defamation Act to provide that, in a defamation action, a person could waive the protection of parliamentary privilege in so far as it protected that person. This provision was passed without proper consideration of the inroad which it made on the law of parliamentary privilege, and under the misapprehension that the main effect of the *Prebble* judgment (see above, under Is the 1987 Act too restrictive?) was to prevent members of parliament suing journalists for defamation. This amendment of the law has no effect at the federal level in Australia. (For a judicial construction of the provision, see *Hamilton v Al Fayed* 1999 3 All ER 317, and the same case in the House of Lords on appeal, 2000 2 WLR 609.)

**Proceedings before the Privileges Committee**

Resolution 2 of the Privilege Resolutions of 1988 prescribes procedures to be followed by the Privileges Committee in inquiring into matters referred to it, and confers rights on all persons involved in those inquiries.

A witness before the Committee of Privileges is given the right to be accompanied by counsel and to cross-examine other witnesses in relation to evidence concerning the witness. The committee has to ensure, as far as practicable, that a person is informed of any allegations made against the person before the committee and is given the right to be present during the hearing of any evidence containing anything adverse to the person. Witnesses are also given the right to make submissions in relation to the committee's findings before those findings are presented to the Senate. The provisions for the protection of witnesses in ordinary committee inquiries also apply to the Privileges Committee, but the special provisions prevail to the extent of any inconsistency.

Noting that the lack of procedures for the protection of persons accused of contempts before privileges committees has always been one of the most significant grounds of criticism of the law and practice of parliamentary privilege, the 1984 report of the Joint Select Committee on Parliamentary Privilege recommended that special procedures be adopted for protection of persons in privileges committee inquiries. The committee recommended, in effect, the adoption of the criminal trial model, which would involve giving a person alleged to have committed a contempt the protections available to an accused person in criminal proceedings.

The Senate resolution did not adopt this recommendation, for the reason that in a privileges committee inquiry it is not always clear what is the charge or who is the accused. A privileges committee combines the functions of a preliminary investigative agency and a court of first hearing in a criminal matter, so that a witness may, in the course of the inquiry, become the accused.

Because of this the resolution adopts what might be called the commission of inquiry model. It gives to all persons appearing before the Privileges Committee greater rights than are possessed by persons appearing in court proceedings.

The Privileges Committee has conducted most of its inquiries under these procedures, because most of the cases referred to the committee have arisen since the resolution was passed in 1988. In its successive general reports to the Senate, the committee reviewed the procedures and found that they worked successfully.

**Abuse of parliamentary immunity: right of reply**

One of the Privilege Resolutions of 1988 (Resolution 5) provides an opportunity for a person who has been adversely referred to in the Senate to have a response incorporated in the parliamentary record. A person aggrieved by a reference to the person in the Senate may make a submission to the President requesting that a response be published. The submission is scrutinised by the Privileges Committee, which is not permitted to inquire into the truth or merits of statements in the Senate or of the submission, and provided the suggested response is not in any way offensive and meets certain other criteria, it may be incorporated in *Hansard* or ordered to be published.

The resolution refers only to responses by natural persons, and does not contemplate responses by corporations or other bodies. The Senate has, however, accepted responses from board members and staff of a corporation on the basis that they claimed to be adversely affected by

references to the corporation (80th report of the Privileges Committee, adopted 21/10/1999, J.1986). Similarly, foreigners are not precluded from exercising the right of reply (65th, 132nd reports of the committee, PP 48/1997, 173/2007, adopted 25/3/1997, J.1759; 17/9/2007, J.4389). (See Supplement)
The remedy can, in favourable circumstances, be exercised speedily. On 28 June 2001 a submission was received by the President, referred to the Privileges Committee, considered by the committee, reported on by the committee and published by the Senate, all on the same day (28/6/2001, J.4458).

The availability of this remedy does not prevent a senator presenting directly a response by persons adversely reflected upon in debate (see SD, 8/9/2003, p. 14399).

Resolution 5 was opposed in the Senate and was agreed to only after a division, with cross-party voting by senators. The main grounds of the opposition were that persons referred to in the Senate had the normal political avenues open to them to respond, the suggested procedures could be over-used and the President and the Privileges Committee could be unduly occupied by these submissions.

These criticisms have not been justified by experience so far, as many cases of such responses have been dealt with by the Privileges Committee and the Senate without the apprehended difficulties.

Another of the Privilege Resolutions (Resolution 9) enjoins senators to exercise their freedom of speech responsibly.

These resolutions were adopted after a great deal of attention had been given to the possibility that members of the Parliament may abuse the absolute immunity which attaches to their parliamentary speeches by grossly and unfairly defaming individuals who have no legal redress and who, if they are not themselves members, have no forum for making a widely-publicised rebuttal. Much of the controversy about this matter was generated by attacks in other houses by members upon other members, which, if made in the Senate, would have been ruled out of order under standing order 193, which forbids offensive references to members of the Commonwealth Parliament or of state or territory parliaments.

Unless the absolute immunity of parliamentary proceedings is to be modified, which would defeat the purpose of that immunity, the solution to this problem of the possibility of the abuse of freedom of speech lies in the way in which the Houses of Parliament regulate their proceedings through their own procedures. In any proposals for new forms of such internal regulation there is a danger of a majority using procedures designed to prevent defamation of individuals as a means of suppressing embarrassing or inconvenient debate. The remedy which has been favoured, therefore, is giving aggrieved individuals a right of reply. This is the remedy adopted by the Senate's resolution.

The Senate's procedures have, since their adoption, also been adopted by many other houses.

Persons reflected upon adversely in committee proceedings have a right to respond to such evidence (see Chapter 17, Witnesses).

### Reference to Senate proceedings in court proceedings

One of the Privilege Resolutions (no. 10) declares that the permission of the Senate is not required for reference in court proceedings to proceedings in the Senate, and abolishes the former practice of petitioning for permission, while enjoining the courts to have regard to the restrictions imposed upon them in relation to the use which may be made of evidence of parliamentary proceedings.

## PARLIAMENTARY PRECINCTS

Section 15 of the 1987 Act declares, for the avoidance of doubt, that, subject to the law relating to parliamentary powers and immunities, a law in force in the Australian Capital Territory applies in the parliamentary precincts according to its tenor.

The *Parliamentary Precincts Act 1988* defines the parliamentary precincts, provides that the Presiding Officers have management and control of the precincts, and makes other provisions for the administration of the precincts.

For many years before these two Acts were passed discussion of parliamentary privilege was bedevilled by confusion of questions relating to the immunities of the Houses, their committees and members with questions relating to the parliamentary precincts. There is no connection between the precincts of Parliament, however defined, and the ordinary law or the law relating to parliamentary immunities. Many people were confused into thinking that there was some such connection; in particular, there was a persistent idea that the ordinary law did not apply in the precincts.

There was never any ground for doubt that the ordinary criminal law applied in the parliamentary precincts, however defined, as it applies anywhere else in the jurisdiction: *Rees v McCay* 1975 26 FLR 228, and the authorities referred to in that case.

Words or acts which might otherwise constitute criminal offences are immune from prosecution if they are said or done in the course of proceedings in Parliament. This, however, has nothing to do with the parliamentary precincts. The immunity adheres to words spoken or acts done outside the precincts, for example, words spoken in the proceedings of a committee sitting anywhere in the country, or an assault committed by an officer of either House while carrying out a lawful order of that House for the arrest of a person anywhere in the country.

The issue was further confused by the fact that it is an essential element of some criminal acts that they be done in a public place; that is, such acts are offences only if they are committed in a public place. There was some doubt about whether the courts regarded any part of Parliament House as a public place. Again, this had nothing to do with the precincts, although the courts might have regard to the question of what are the precincts in determining whether a particular act was done in a public place. Most criminal offences do not depend for their status as offences upon their being done in a public place.

It was an element of some contempts of Parliament that they were done in the parliamentary precincts; that is, the acts concerned were contempts only if they were done in the precincts. For example, it was long held to be a contempt for any authority to attempt to execute any criminal or civil process in the parliamentary precincts on a sitting day. The powers of the Houses to deal with contempts do not, however, depend upon any declaration of the precincts.

Thus the declaration of what are the parliamentary precincts is an administrative matter, which has no connection with the operation of either the ordinary law or the law of parliamentary immunities.

The whole matter was therefore cleared up and placed beyond doubt by the 1987 and 1988 legislation.

**Police powers in the precincts**

Section 15 of the 1987 Act indicates that the police may exercise in the precincts the powers which they possess under the ordinary law.

By long-established practice, however, police do not conduct any investigations, make arrests, or execute any process (e.g., search warrants) in the parliamentary precincts without consultation with the Presiding Officers.

Section 8 of the Parliamentary Precincts Act provides for the Australian Federal Police to arrest and hold in custody persons required to be detained by order of either House, under general arrangements agreed to by the Presiding Officers and the minister responsible for the police.

Section 9 provides for members of the Australian Protective Service to perform functions in the precincts in accordance with general arrangements made between the Presiding Officers and the minister responsible for the service.

Section 10 provides for the functions of the Director of Public Prosecutions in relation to offences committed in the precincts to be performed in accordance with general arrangements agreed to by the Presiding Officers and the Director of Public Prosecutions.

Arrangements made under these provisions were laid before the Senate on 28 February 1989 (J.1384).

See also above, under Subpoenas, search warrants and members, for the execution of search warrants in the premises of senators.

In 1978 the Committee of Privileges examined security measures for Parliament House introduced by the Presiding Officers. The Committee considered that the measures did not affect the powers or immunities of the Senate (3rd report, PP 22/1978).