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

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

The constitutional basis

Section 49 of the Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

The case in the House

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

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

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

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

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

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

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

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

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

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

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

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

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

10 ibid., 10 June 1955, pp. 1625–7.

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

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

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

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

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

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

Confusions in the case

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

11 ibid., 10 June 1955, pp. 1627–64.

12 ibid., 31 August 1955, pp. 207–30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Green op. cit., p. 159.

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

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

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

25 ibid., pp. 157–8.

The case in the High Court

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

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

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

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

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

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

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

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

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

27 ibid., at 167.

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

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

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

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

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

Changes to the law

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

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

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

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

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

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

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

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

Section 6 of the Act clarifies section 4 by providing:

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

It is therefore not possible for the Commonwealth houses, as some other houses have done in the past, to treat a mere externally published defamation of a house or its members as a contempt. This provision, which was recommended by the joint select committee, was not recommended with Fitzpatrick and Browne in mind, but arose from cases in which defamations of members had been raised as matters of privilege.[31]

Sections 4 and 6 of the Act would not prevent a case identical to the Fitzpatrick and Browne matter being similarly dealt with again. As has been noted, it was not a case of defamation of a member but of attempted intimidation of a member in respect of his parliamentary duties. The publication of a defamatory attack on a member with the express purpose of preventing the member from speaking about certain matters in Parliament would clearly fall within the definition in section 4 and would not be excluded by section 6.

Section 7 of the Act codifies the penalties which may be imposed by the houses for contempts, setting the maximum penalties as six months imprisonment and a fine of

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31 Joint Select Committee on Parliamentary Privilege, *Final Report*, 3 October 1984, Parliamentary Paper no. 219/1984, pp. 83–7.

$5000 for a natural person and a fine of $25 000 for a corporation.[32] The doubt about the power to fine under section 49 is thereby overcome. The section provides that a fine is a debt due to the Commonwealth and may be recovered in the courts by a person appointed by a house for that purpose. An attempt to enforce a fine could thereby be brought before the courts.

In conjunction with the passage of the Act, the Senate adopted a resolution setting out procedures to be followed in cases of alleged contempts. These procedures are based on recommendations of the joint select committee, but with some significant modifications. Those recommendations were related to the Fitzpatrick and Browne case, in that they were intended to overcome some of the criticisms of the procedures followed in that case, particularly the refusal to allow the offenders to be represented by counsel.[33] For reasons which have not been explained, these procedures have not been adopted by the House of Representatives. The Senate procedures provide for the following procedural safeguards to apply to cases of alleged contempts referred to the Senate Privileges Committee:

- A person must be informed in writing as soon as practicable of any allegations made against them and of any evidence in respect of them.

- Such a person is to have all reasonable opportunity to respond to such allegations and evidence by written submission, by oral evidence and by having witnesses examined.

- All persons appearing before the committee may be accompanied by, and consult, counsel.

- A witness cannot be required to answer in public session any question which the witness has reason to believe may incriminate them.

- Evidence is generally to be heard in public.

- Counsel assisting the committee and counsel representing witnesses may examine any witnesses before the committee.

- Draft findings are to be made available to affected persons for further submissions before the findings are reported to the Senate.

- Witnesses may be reimbursed costs of representation in cases of hardship.

- Potential witnesses are to be informed of their rights.

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32 Unlike other statutory penalties, the fines specified in the Act are not updated in accordance with the formulae in the *Crimes Act 1914*, sections 4AB and 4B.

33 Senate Privilege Resolution no. 2, 25 February 1988, in *Standing Orders and Other Orders of the Senate*, February 2000, pp. 103–4.

When the Privileges Committee has reported, seven days' notice is required for any motion in the Senate to declare a person guilty of a contempt or to impose a penalty.[34]

These procedures have been followed in many cases of alleged contempts which have been referred to the Senate committee since 1988. There have been twelve cases in which persons have been found guilty of contempts of the Senate, but no penalties have been imposed, usually because of withdrawal of the offending acts and remedial action by the offenders. Most of these cases have related to interference with witnesses or unauthorised publication of committee documents, the latter also relating to the protection of witnesses.[35]

These procedures, and the nature of the cases dealt with in the Senate, have largely prevented the criticisms which arose from the Fitzpatrick and Browne case. Were a penalty to be imposed for a contempt, however, the matters at issue in that case could well arise again and come before the courts.

A High Court revisit?

If a penalty of imprisonment or fine were imposed, and were challenged in the courts, the likely basis of the challenge would be section 4 of the Parliamentary Privileges Act. The courts would have the task of determining whether the offence found fell within the terms of that section. That judicial scrutiny, and the Senate procedures for determining cases (which would probably in practice be followed by the House of Representatives in any event), would probably give rise to a public perception that such a matter had been appropriately dealt with.

There would remain, however, the underlying criticisms of the parliamentary contempt jurisdiction, that it involves politicians acting as judges in their own cause and exercising a judicial function. Would the High Court revisit the constitutional question and vary its findings of 1955?

Cases involving parliamentary privilege have come before the court in recent times. None has involved the imposition of a penalty for contempt on a person other than a member of the house concerned. The court has generally upheld the rights of the legislature. In those cases, one justice, Mr Justice Kirby, has clearly signalled that he would welcome an opportunity to revisit questions raised in Fitzpatrick and Browne, and his remarks leave little doubt as to how he would find on those questions.[36] Similarly, Justice McHugh has argued for a reconsideration of the judgement, not only on the separation of powers ground but on the implied freedom of communication, although he raised the latter on the basis that the case was one of 'punish[ing] persons for criticisms of members of Parliament'.[37] Given the recent

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34 Senate standing order 82, ibid., p. 54.

35 H. Evans (ed.), *Odgers' Australian Senate Practice.* 10th edn, Canberra, Department of the Senate, 2001, pp. 61–3, 587–613.

36 *Egan v Willis and Cahill* (1998) 158 ALR 527 at 574; *O'Chee v Rowley*, Queensland Court of Appeal (1997) 150 ALR 199: special leave to appeal to High Court refused: judgement not reported, transcript of hearing, 20 November 1998, pp. 4–5. See also *Arena v Nader* (1997) 71 ALJR 1604.

37 M. McHugh, 'Does chapter III of the Constitution protect substantive as well as procedural rights?', *Constitutional Law and Policy Review*, April 2001, p. 57 at nn. 67–70.

judgements, however, it may be predicted with reasonable confidence that the court, after a full argument, would uphold the fundamental finding in Fitzpatrick and Browne, that the power to punish contempts adheres to the houses under section 49 as part of the legislative rather than the judicial function.

A parliamentary revisit?

There is also no sign of the Parliament revisiting the contempt jurisdiction.

In December 2000 the House of Representatives agreed to a motion to release documents collected by the Privileges Committee in the Fitzpatrick and Browne case but not published by the committee, subject to an exemption for material likely to intrude upon the personal affairs of any person or which would otherwise be exempt under the Archives Act. Debate on this motion, which formally arose from a recommendation by the Privileges Committee, indicated that it was influenced partly by a lingering concern on the part of some members that Fitzpatrick and Browne were not fairly dealt with. That concern on the part of one member, however, explicitly relied on the misleading account by Mr Green in his book.[38] No further action arose from the motion. If the House were to reconsider the matter, a logical first step would be for it formally to adopt the procedures established by the Senate in 1988.

Future cases

As has been suggested, there is no guarantee that a Fitzpatrick and Browne case will not arise again. If a highly defamatory attack were to be made upon a member and the author of the attack were to state that this was done for the purpose of preventing the member raising matters in Parliament, the house concerned could well think it an appropriate occasion for the exercise of the contempt jurisdiction and the imposition of a penalty. Politics and journalism, however, may have acquired a subtlety and discretion lacking in the overheated atmosphere of 1955. Privilege cases in more recent times, particularly in the Senate, where most have occurred, have focussed on matters clearly meeting the obstruction test in section 4 of the 1987 Act. The Act seems to have had the effect of directing attention to the core rationale of parliamentary privilege, protecting the integrity of parliamentary processes and citizens involved in them. Privilege cases have been treated as occasions for educating those involved in parliamentary processes about the need to avoid any impairment of the integrity of those processes. In that context, the power to impose penalties for contempt is likely to remain an unused reserve power.

38 House of Representatives Debates, 7 December 2000, pp. 23688–93.