PARLIAMENTARY PRIVILEGE: CHANGES TO THE LAW AT FEDERAL LEVEL

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I. INTRODUCTION

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 power of the Parliament to legislate under this section had, until 1987, been little used. The powers, privileges and immunities attaching to the two Houses under the section are extensive. The principal privilege, or immunity, is the freedom of parliamentary debates and proceedings from question in the courts, which has the well-known result 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 law of parliamentary privilege has been much criticised, particularly the power of the Houses to deal with contempts of themselves without recourse to the processes of normal criminal proceedings. In 1984 a Joint Select Committee of the two Houses, after a comprehensive review of the subject, recommended a number of changes to the law and to the practices of the Houses in dealing with matters of privilege.[1]

The Parliamentary Privileges Act 1987 (Cth), which was passed in June of that year, makes the changes to the law recommended by the Select Committee, but with a number of significant modifications. In February 1988

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1 Joint Select Committee on Parliamentary Privilege, *Final Report*, Parl. Paper 219/1984.

the Senate passed resolutions making the suggested changes in its practices, again with modifications. At the time of writing the House of Representatives had not adopted the resolutions.

The occasion of the passage of the Act was not, however, principally the adoption of the Committee's recommendations. They were appended to the main provision of the legislation, which was enacted 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 1688.

II. FREEDOM OF SPEECH: THE QUESTION

Article 9 is part of the law of Australia and applies to the Federal Houses 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.[2]

Two judgments by the Supreme Court of New South Wales 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*,[3] 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 the Constitution. 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

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2 1 Will. & Mar., Sess 2, c.2 (1688), spelling and capitalization modernized. The commas which appear in some versions, and to which one of the judges attached some importance, are not in the original text.

3 The first judgment was unreported, Supreme Court of New South Wales, 5 June 1985; the second is reported at (1986) 64 ALR 498; (hereinafter *R.* v. *Murphy*).

courts of parliamentary proceedings; in the words of Blackstone "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".[4] 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* v. *Associated Newspapers Ltd*[5] it was held that it was not permissible to impugn the validity of the report of a select committee in court proceedings. In *Church of Scientology of California* v. *Johnson-Smith*[6] 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; ex parte Anderson Strathclyde PLC*[7] 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 *Comalco Ltd* v. *Australian Broadcasting Corporation*[8] 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, made it fairly clear 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 Gibbs A.C.J. (as he then was) "a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences".[9]

There were two questions which might have been thought to be still open in the interpretation of article 9. The first was whether evidence given by

4 W. Blackstone, *Commentaries on the Laws of England* (1765) 58-9.
5 [1960] 2 QB 405.
6 [1972] 1 QB 522.
7 [1983] 2 All ER 233.
8 (1983) 50 ACTR 1.
9 *Sankey* v. *Whitlam* (1978) 142 CLR 1, 35.

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*[10] 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*[11] 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 fully 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.

III. THE JUDGMENTS

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 most severe attacks on the basis of 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 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

10 (1899) 1 WALR 77.
11 (1881) 6 QBD 307.

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, in order 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 prevented 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 their Honours was not accepted by the Senate, and was criticised in documents laid before that House by its President.[12] 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.

It would be wrong to suppose that the judgments, in the absence of statutory correction, represented 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*[13] 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 House, 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 a South Australian case, *A.B.C.* v. *Chatterton*,[14] a judge of the Supreme Court of that State also upheld the traditional interpretation by not allowing a

12 These papers were later published: H. Evans, "Parliamentary Privilege: Reasons of Mr Justice Cantor — an analysis" (1986) Vol. 1 No. 1 *Legislative Studies* 24; H. Evans, "Parliamentary Privilege: Reasons of Mr Justice Hunt — an analysis" (1987) Vol. 2 No. 2 *Legislative Studies* 24.

13 *R.* v. *Jackson et al* (1987) 8 NSWLR 116. In *R.* v. *Saffron* (unreported, District Court of New South Wales, 21 August 1987), however, the District Court allowed in camera evidence of a select committee of the New South Wales Legislative Assembly to be subpoenaed and made available for the use of the defence.

14 Unreported, Supreme Court of South Australia, 12 August 1986.

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.

IV. STATUTORY PROVISION FOR FREEDOM OF SPEECH

The Parliamentary Privileges Act 1987 (Cth) (hereinafter "the Act") makes use of the legislative power under section 49 of the Constitution to enact the traditional interpretation of article 9.

The relevant provisions of the Act will be of interest to those concerned with the law relating to this matter. The statutory declaration of the parliamentary view of freedom of speech was accomplished 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:

> 16. (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.

It was necessary to use these terms 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 is 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 has never been authoritatively expounded. This was done in the following terms:

> 16. (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;
> (b) the presentation or submission of a document to a House or a committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This provision, while in general terms, is intended to clear up a number of 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 attempts to indicate what is meant by

"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, although the provision in effect prevents prosecution or suit for proceedings in Parliament. The provision attempts to indicate the wider operation of the article and to draw the line between the proper and improper admission of evidence of parliamentary proceedings, in accordance with the principles set out above:

> 16. (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of —
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

It will be noted that each of the three paragraphs contains a different refining of the meaning of "impeached or questioned".[15] Paragraph (a) expresses the most obvious 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,

15 The exposition which follows is taken from the explanatory memorandum accompanying the Bill after it was passed by the Senate, 12-14.

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

It will also be noted that the provision 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:

> 16. (4) A court or tribunal shall not —
> (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
> (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence,
> unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

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.

The interpretation of article 9 thus enacted might have the effect of preventing 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. This possibility was provided for by section 16(5) which 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 an Act, neither the Act nor the Bill of Rights shall be taken to restrict the admission in evidence of an authorised record or proceedings in Parliament or the making of statements, submissions or comments based on that record.

There was another similar problem which had to be resolved. The Act itself, and some other federal statutes create criminal offences for improper activities in relation to parliamentary proceedings which may be prosecuted through the courts; 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. Section 16(6) therefore provides that parliamentary proceedings may be examined in court proceedings in relation to an offence concerning the parliamentary proceedings.

This provision illustrates a difficulty. By enacting criminal remedies to protect its proceedings, the Parliament has in effect, unwittingly 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 the Witness (Public Inquiries) Protection Act 1892. 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.

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

> 16. (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.

In other words, if the courts persist in interpreting article 9 narrowly, the Act will apply only to future court proceedings, but will extend to any use of any parliamentary proceedings.

V. IS THE ACT TOO RESTRICTIVE?

The Bill for the Act having been presented in these terms, some Senators began to worry that it was too widely drafted, and might be unduly restrictive of the rights of litigants and defendants.[16] 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 could be 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 were 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

16 See the speech by the then Minister for Resources and Energy, Senator Gareth Evans, *Parliamentary Debates (Senate)* 17 March 1987, 813 referring to the speech by Senator Cooney at 809.

could be worked by the Bill. Normally, of course, 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.[17]

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, then 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, again 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 to be

17 Ibid.

subsequently 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 might be considered to be in no different category than statements subject to other forms of privilege which are recognised by the law. An obvious example is legal professional privilege. A person may have made an inconsistent statement in communication with the person's legal adviser, however 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:

> [t]he 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.[18]

The same considerations apply in relation to what used to be called crown privilege. It might be thought that the freedom to speak frankly and freely in the course of parliamentary proceedings and the giving of parliamentary evidence should be considered to be of such importance as to give it the same absolute privilege.

VI. OTHER PROVISIONS OF THE ACT

As has already been indicated, when the Bill to correct the unfavourable court judgments was introduced into the Senate, it was decided to incorporate into it a number of changes to the law of parliamentary privilege recommended by the Joint Select Committee on Parliamentary Privilege in 1984.[19] When the task was undertaken of putting the recommendations of the Select Committee into statutory form, difficulties with the recommendations were discovered and they were significantly modified in the Bill as introduced. The difficulties with the Committee's recommendations were overcome in ways which will now be described, and in the process the law changed rather more radically than the committee contemplated.

A. DEFINITION OF CONTEMPT

The Act contains what amounts to a statutory definition of contempt of Parliament, in the following terms:

> 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.

This provision restricts the category of acts which may be treated as contempts, and, of course, it is open to judicial interpretation. A person who is 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

18 *Reece* v. *Trye* (1846) 9 Beav 316, 319 *per* Lord Langdale MR.
19 Note 1 *supra*.

within the statutory definition. This obviously could lead to a court overturning a punishment imposed by a House for a contempt of Parliament.

The Joint Select Committee had recommended a non-enforceable review by the High Court of a punishment for contempt imposed by a House. When the Bill was drafted the conclusion was reached that such a provision would be unconstitutional, in that it would amount to conferring an advisory jurisdiction on the High Court.[20] The Houses 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 federal Houses to treat as contempts some acts traditionally so treated in the past. For example, the bringing of legal proceedings against a parliamentary witness or petitioner, on account of such a person's participation in parliamentary proceedings, in normal circumstances could not be treated as a contempt: the only remedy would be for the proceedings to be contested. Similarly, it is very 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.[21]

B. DEFAMATORY CONTEMPTS

The Select Committee recommended that it be explicitly provided by statute that defamation of a member or a House may not be punished as a contempt. The Act accomplished this in the following terms:

> 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.

The ability of the Houses to punish defamations of themselves as contempts was one of the most criticised aspects of the previous law.

The Select Committee made its recommendation notwithstanding submissions by the present author 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 Mr Gladstone to support a

20 Note 15 *supra*, 6.

21 *R.* v. *Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162.

contention that this offence cannot be left to civil action for correction.[22] Shortly before the Act was passed, the House of Representatives had in fact punished one of its members for criticism, made outside the House, of the Speaker.[23] It appears that it will not longer be possible to deal with such conduct, however gross the defamation.

C. POWER OF EXPULSION

The Select Committee 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 federal House, that of a member of the House of Representatives in 1920 for allegedly seditious words uttered outside the House. This case has long been regarded as an instance of improper use of the power.[24]

The recommendation, and the consequent provision in section 8 of the 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 federal Houses have, however, now denied themselves the protection of expulsion.

D. PROTECTION OF WITNESSES

In accordance with a recommendation of the Select Committee, section 12 of the Act provides statutory witness protection provisions. It is made a criminal offence punishable by fine or imprisonment to interfere with a parliamentary witness. Section 13 of the Act 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.[25]

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

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22 H.C. 34, 1967-8, submission of Mr Louis Abraham, 203.
23 *Parliamentary Debates (House of Representatives)* 24 February 1987, 580-587.
24 E. Campbell, *Parliamentary Privilege in Australia* (1966) 104-105.
25 Note 15 *supra*, 8.

E. OTHER PROVISIONS

Other provisions of the Act empower a House to impose fixed terms of imprisonment and fines for contempts of Parliament. The power to impose fines has been regarded as not adhering to the Australian Houses, because it had fallen into desuetude in Britain before 1901,[26] while imprisonment could not extend beyond a session of Parliament. The Act provides that a fine is a debt due to the Commonwealth.

A uniform qualified privilege for reports of parliamentary proceedings is provided by the Act. The Act also restricts the immunities from arrest in a civil cause and from compulsory attendance before a court to five days before and five days after a meeting of a House or committee. Hitherto these immunities operated for 40 days before and after a session, that is, in modern times, virtually permanently.

VII. NON-STATUTORY MEASURES: PRIVILEGE RESOLUTIONS

The Select Committee also recommended a number of changes in the practices of the Houses in relation to matters of parliamentary privilege. These changes did not require statutory enactment, but could be provided by the procedures of the Houses. Some of the recommendations reflected practices which had already been adopted in the Senate and its committees.

These measures were put into effect in relation to the Senate by a series of resolutions passed by the Senate on 25 February 1988 and known as the privilege resolutions. At the time of writing, the House of Representatives had not adopted similar resolutions. Being procedures of the Senate, the resolutions are not subject to judicial interpretation, but can be interpreted only by the Senate itself. Nevertheless, the resolutions make highly significant changes.

A. RIGHTS OF WITNESSES

The first resolution 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. Thus, although the procedures contain expressions such as "reasonable opportunity shall be afforded to witnesses", which allow committees scope for interpretation, committees cannot be careless in complying with the procedures.

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26 But the Senate had asserted its power to impose a fine by adopting a report to that effect: see J.R. Odgers, *Australian Senate Practice* (5th ed. 1976) 651. The question is also discussed in Senate Committee of Privileges, *8th Report*, Parl. Paper 239/1985.

B. PROCEEDINGS BEFORE THE PRIVILEGES COMMITTEE

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 Select Committee 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 relevant 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.[27] 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 royal commission model. 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 relating to 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.

It is clear that, under these procedures, inquiries by the Privileges Committee into alleged contempts will be much more complicated in the future. Whether the procedures will be regarded as adequately protecting accused persons remains to be seen.

C. PROTECTION OF PERSONS REFERRED TO IN THE SENATE

Another resolution, which attracted considerable publicity, provides an avenue 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.

27 The resolutions were explained in an explanatory memorandum tabled in the Senate and incorporated in *Parliamentary Debates (Senate)* 17 March 1987, 796-9.

This resolution 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. Time will tell whether these criticisms were well founded. At the time of writing, the procedures were untested.

D. MATTERS CONSTITUTING CONTEMPTS

Another resolution sets out, for the guidance of the public, in pseudo-statutory form, acts which may be treated by the Senate as contempts. This statement of acts likely to constitute contempts was largely based upon a Bill introduced into the Senate by the then Opposition in 1981 to convert all contempts of Parliament into statutory criminal offences. 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 Parliamentary Privileges Act. The prescription includes the traditional offence of serving a writ or other process in the precincts on a sitting day, but it is very doubtful whether the Act would allow such an action to be treated as a contempt. The Houses will have to look carefully at the traditional categories of contempt in the light of the Act.

E. RAISING MATTERS OF PRIVILEGE

The resolutions provide new procedures for raising matters of privilege, whereby the President is to consider a proposed matter raised by writing addressed by a Senator to the President, and rule whether a motion relating to the matter should have precedence, having regard to certain criteria. The criteria refer 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 also refer to the availability of another remedy.

These procedures were soon tested when in March 1988 a matter of privilege was raised and the President ruled that the matter could be the subject of a motion having precedence. The complaint was that a petitioner had been intimidated into not proceeding with a petition by the threat of legal proceedings. The motion to refer the matter to the Privileges Committee was not agreed to, but was the subject of an amendment to change the proposed reference from an allegation of a contempt into a question of law relating to the privilege attaching to a petition.[28] The Senate thereby avoided the question of whether the bringing of legal proceedings can now be treated as a contempt.

28 Senate Committee of Privileges, *11th Report*, 2 June 1988, Parl. Paper 46/1988.

F. REFERENCE TO SENATE PROCEEDINGS IN COURT PROCEEDINGS

Another resolution declares that the permission of the Senate is not required for reference in court proceedings to proceedings in the Senate, and abolishes the 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.

G. OTHER PROVISIONS OF THE RESOLUTIONS

One resolution provides criteria for the Senate to take into account when determining whether a contempt has been committed. The criteria are similar to the criteria provided for the President but incorporating reference to mens rea and the defence of reasonable excuse. Other resolutions provide for seven days notice of any motion to declare a person guilty of contempt or impose a penalty, and enjoin Senators to exercise their privilege of freedom of speech responsibly.

VIII. CONCLUSION

It is evident from the foregoing that the Parliamentary Privileges Act and the resolutions together have wrought great changes to the law and to the practice of parliamentary privilege at the federal level. While asserting the privilege of freedom of speech in its full vigour, the Houses have given away a great deal of their former power.

It will be interesting to see whether the statutory formulation of freedom of speech stands up to scrutiny and application in particular cases. A Federal Court judge has had occasion to examine it, and found it a valid and clear declaration of the previous law.[29]

The changes to the law will not satisfy the most zealous reformers, in that the Houses retain their power to deal with contempts. Only the conversion of contempts of Parliament into statutory criminal offences prosecuted in the courts, and, perhaps, some weakening of the privilege of freedom of speech, would quieten the determined critics. It is unlikely that any further changes, much less such drastic changes, will be made, partly because members of Parliament will resist them, and partly because the law is now much more acceptable.

To those who adhere to the classical view of Parliament, the changes may be regarded as conceding too much. If the Houses are regarded as the grand inquest of the nation and the court of last resort for the grievances and faults of the state, the pre-1987 powers do not seem too great. The retention of any immunities and powers, however, depends upon the wise exercise of them, and the respect commanded by the institution. If the gap between the theory of what Parliament should be and the perceived reality grows too wide there will be inevitably a demand for further changes.

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29 *Amann Aviation* v. *Commonwealth* (unreported, Federal Court of Australia, 12 August 1988).