

ADJUDICATION OF PARLIAMENTARY OFFENCES

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I. INTRODUCTION

In March 1999 a joint committee of the Houses of the United Kingdom Parliament, chaired by Lord Nicholls of Birkenhead (one of the lords of appeal), presented a comprehensive and detailed report on parliamentary privilege.¹ Chapter 6 of the report, entitled 'Disciplinary and Penal Powers', contains a number of recommendations which, if adopted, would make some important changes in the law and practice regarding parliamentary offences, that is conduct amounting to contempt of Parliament or breach of parliamentary privileges.

Australian laws regarding these matters have, to a greater or lesser extent, been patterned after the United Kingdom's laws. The joint committee's recommendations may therefore prompt review of the Australian laws. This article examines these recommendations and offers commentary upon them and their relevance to Australian circumstances. Before the recommendations are examined, it is, however, necessary to provide an overview of the laws which operate within the several Australian polities.

II. AUSTRALIAN LAWS

Opinions delivered by the Judicial Committee of the Privy Council during the nineteenth century made it clear that Houses of colonial legislatures did not possess any inherent penal jurisdiction akin to that possessed by the Houses of the Westminster Parliament.² Nevertheless it seems to have been accepted that colonial Houses could acquire a penal jurisdiction by statute.³ Legislation to this effect has been enacted for most of the Australian polities. At the present time the only House of an Australian legislature which has not been invested with penal powers is the Legislative Assembly of the Australian Capital Territory.⁴ The Houses of the Parliament of New South Wales have power to penalise only one form of contempt, namely failure by a parliamentary witness to answer a lawful question.⁵

The penal powers of the Houses of the Tasmanian and Western Australian Parliaments are limited to particular offences defined by statute.⁶ The legislation of these States differs slightly in respect of the offences punishable by the Houses and also in respect of the penalties the Houses may impose. In Tasmania the only penalty which a House may impose is a term of imprisonment, not exceeding the current session of the Parliament. The Houses of the Western Australian Parliament are empowered to fine offenders and offenders may be imprisoned if they fail to pay the fine immediately. Should offenders be imprisoned, they must be released from custody once the fine has been paid.

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¹ Joint Committee on Parliamentary Privilege, United Kingdom, *First Report*, Parliamentary Privilege Publications, HL 43-I, HC 214-I (9 April 1999).

² *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225; *Fenton v Hampton* (1858) 11 Moo PC 347; 14 ER 727. The Judicial Committee so held on the ground that the only powers and privileges inherent in Houses of colonial legislatures were those necessary for the performance of their functions.

³ See Enid Campbell, *Parliamentary Privilege in Australia* (1966) 20-1.

⁴ *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24.

⁵ *Parliamentary Evidence Act 1901* (NSW) s 11. The law operating in NSW was considered by the High Court in *Egan v Willis* (1998) 195 CLR 424.

⁶ *Parliamentary Privilege Act 1858* (Tas) s 3; *Parliamentary Privileges Act 1891* (WA) s 8. See also Campbell, above n 3, 112-3.

The penal jurisdiction of the Houses of the South Australian and Victorian Parliaments is, by statute, co-extensive with that of the House of Commons as of a specified date.⁷ This means that the Houses may order the imprisonment of an offender until the end of the current parliamentary session or for a shorter period. The Houses of these two Parliaments do not, however, have power to impose fines since the House of Commons has no such power.

Under Queensland's *Constitution Act 1867* the penal jurisdiction of the Legislative Assembly was limited to defined offences. But s 39 of the *Parliament of Queensland Act 2001* now gives the Assembly the same power to deal with a person for contempt of the Assembly as the House of Commons had at the establishment of the Commonwealth (ie 1 January 1901) to deal with contempt of that House. (Section 37 defines 'contempt' and provides examples of that offence.) If a person is adjudged guilty of contempt, the Assembly may fine the person, and in default of payment of the fine order that the person be imprisoned until the fine is paid or until the end of the session of the Assembly or a part of the session.

Until the enactment of the *Parliamentary Privileges Act 1987* (Cth), the penal powers of the Houses of the federal Parliament were co-extensive with those of the House of Commons as of 1 January 1901. This was by virtue of s 49 of the Commonwealth of Australia Constitution. But that section, in combination with s 51(xxxvi) of the Constitution, gave the federal Parliament power to enact legislation which modified the law transplanted from the United Kingdom. The Act of 1987 modified the law regarding the penal powers of the Houses of the Federal Parliament in several ways.

First, it defined an essential element of the offences triable by the Houses, they being breaches of parliamentary privileges or immunities, or contempt of a House or of the members or committees of a House. The essential element of offences triable and punishable by the Houses was defined in s 4 of the Act as follows:

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 a member's duties as a member.

Section 6 of the Act removed from the Houses of Parliament their former jurisdiction to punish those they found guilty of having uttered words or done acts 'defamatory or critical of the Parliament, a House, a committee or a member'. But it was also provided that the Houses would retain their jurisdiction to punish such conduct if the words were spoken or the acts were done 'in the presence of a House or a committee'.

Section 7 gave the Houses power to impose fines rather than a term of imprisonment. Maximum fines were prescribed, which depended on whether the offender was a natural person or a corporation: \$5,000 in the case of a natural person, \$25,000 in the case of a corporation. Fines were declared to be debts due to the Commonwealth which were recoverable by court action. The maximum term of imprisonment which could be imposed was prescribed. It was six months and that penalty was not to be 'affected by a prorogation of the Parliament or the dissolution or expiration of a House'.

Section 8 removed from the Houses their former power to expel members from membership of the House. This was a power which could be used for punitive purposes, as also could the power of a House to suspend members from its service.

Section 9 of the 1987 Act ensured that if a House imposed a penalty of imprisonment, courts would be able to adjudge whether the conduct adjudged to be an offence against the House was capable of being so regarded. Section 9 provides that:

⁷ *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19. These provisions reproduce sections in earlier legislation. For examples of forms of contempt punishable by the Houses of the UK Parliament see Joint Committee on Parliamentary Privilege, above n 1 [264].

Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and warrant committing the person to custody shall set out particulars of the matters determined by the House.

This provision was enacted in light of previous judicial rulings that courts cannot look behind House resolutions which state merely that a person has been adjudged guilty of contempt and shall be imprisoned.⁸

The principal source of the penal jurisdiction of the Houses of the federal Parliament remains s 49 of the Constitution. The Act of 1987 has simply modified that jurisdiction. The question whether s 49 is effective to confer a penal jurisdiction on the two Houses has not been considered by the High Court since the case of *R v Richards, Ex parte Fitzpatrick and Browne*⁹ in 1955, though Kirby J recently suggested that the ruling in that case is open to reconsideration.¹⁰ In *Fitzpatrick and Browne* the Court accepted that the power, which the House of Representatives asserted to punish two individuals for what the House had adjudged to be a parliamentary offence, was a judicial power. But in their opinion, s 49 of the Constitution had made a clear exception to the general principle, implicit in Chapter III of the Constitution, that the judicial powers of the Commonwealth are exercisable only by the High Court and the other courts mentioned in s 71.

Today the High Court might possibly take the view that s 49 of the Constitution gave the Houses of the federal Parliament a power to impose penalties only in respect of conduct which interferes, improperly, with the free exercise by the Houses of their authority or functions, or with the free performance by their members of their duties as members. Section 4 of the *Parliamentary Privileges Act 1987* (Cth) has effectively confined the penal jurisdiction of the Senate and the House of Representatives in this way. This Act, it should be added, served as the model for the Northern Territory's *Legislative Assembly (Powers and Privileges) Act 1992*. The definition of contempt in s 4 of the federal Act was also the model for s 37 of the *Parliament of Queensland Act 2001*.

III. RECOMMENDATIONS OF THE JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE

The joint committee recognised that they could not avoid consideration of whether the Houses of the United Kingdom Parliament should retain any of their penal powers. Could the retention of those powers now be justified?

The committee were mindful of the fact that in exercising their penal powers, the Houses might be seen to be acting as judges in their own cause, and in contravention of international obligations the United Kingdom had assumed, particularly under the European Convention on Human Rights.¹¹ The committee were clearly concerned that adjudication of charges of parliamentary offences should be in accordance with applicable international norms and principles of natural justice.

Chapter 6 of the committee's report began with a broad description of the forms of conduct punishable by the Houses. It was this:

Contempts comprise any conduct (including words) which improperly interferes, or is intended or likely improperly to interfere, with the performance by either House of its functions, or the performance by a member or officer of the House of his duties as a member or an officer.¹²

⁸ *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 ('*Fitzpatrick and Browne*'). See also Commonwealth, *Joint Select Committee on Parliamentary Privilege Final Report*, Parl Paper No 219 (1984) [7.71–7.78].

⁹ (1955) 92 CLR 157.

¹⁰ *Egan v Willis* (1998) 195 CLR 424 at 494. See also Anne Twomey, 'Reconciling Parliament's Contempt Power with the Constitutional Separation of Powers' (1997) 8 *Public Law Review* 88.

¹¹ Joint Committee on Parliamentary Privilege, above n 1, [283–4]. The Committee noted the decision of the European Court of Human Rights in *Demicoli v Malta* (1991) 1 EHRR 47.

¹² Joint Committee on Parliamentary Privilege, above n 1, [264], [315].

This description draws on s 4 of the *Parliamentary Privileges Act 1987* (Cth), the section which specifies an essential element of offences triable and punishable by Houses of the Australian federal Parliament.¹³

The joint committee went on to identify types of contempt of Parliament, though they emphasised that '[t]he categories of conduct constituting contempt are not closed'.¹⁴ The types of contempt listed by the committee included conduct which could be a criminal offence under general law and thus triable before the courts.¹⁵

The committee were not persuaded that the Houses should be stripped of their penal jurisdiction. They were nonetheless of the view that, in relation to persons who are not members of Parliament, that jurisdiction should be a residual one and one which should be shared by the High Court of Justice. Specifically the joint committee recommended that the High Court be invested, by statute, with a concurrent jurisdiction to hear and determine charges of contempt of Parliament levelled against non-members. But they also recommended that the concurrent jurisdiction of the High Court should not be capable of being invoked except by the Attorney-General, at the request of the Leader of the House of Lords or the Speaker of the House of Commons, both of them acting on the advice of a House committee of privileges.¹⁶

The proposed investiture in the High Court of a jurisdiction to hear and determine charges of contempt of Parliament would necessarily involve statutory definition of conduct classifiable as contempt. The joint committee did not favour detailed statutory provisions in this regard. Rather they seem to have preferred a statutory formula of the kind exemplified in s 4 of the *Parliamentary Privileges Act 1987* (Cth). That formula is, however, one which simply specifies an essential element of the offences triable and punishable by the Houses of the federal Parliament. It is not apt to describe conduct for which persons may be put on trial before the ordinary courts on criminal charges. It is far too open-ended.

Although the joint committee recognised that there is some overlap between the offences punishable by the Houses in exercise of their penal jurisdiction, and offences under the general law which is administered by the courts,¹⁷ they did not explore the extent of the overlap. They did, nonetheless suggest, that if the conduct alleged to be in contempt of Parliament is also a criminal offence under the general law, 'the criminal law should take its course'.¹⁸

One form of contempt of Parliament which the committee thought should become a statutory criminal offence was that of wilful failure to attend before a House or a House committee when a person has been summoned to attend 'or to answer questions or produce documents', or when a person has deliberately altered, suppressed or destroyed documents the production of which has been sought by a House.¹⁹

One of the most important recommendations of the joint committee was that the power to penalise persons for contempt of Parliament should be restricted as regards the penalty which may be imposed, whether by a House or by the High Court. The committee recommended that there be no power to order imprisonment of an offender, merely a power to impose a fine, though without restriction as to the amount of the fine.²⁰ On the other hand, the committee recommended that a sentence of up to three months imprisonment

¹³ Above n1.

¹⁴ Ibid [264].

¹⁵ Consider, for example, physical assaults. See also provisions in the *Crimes Act 1914* (Cth) as referred to in Joint Select Committee on Parliamentary Privilege, above n 8, [8.3–8.6].

¹⁶ Joint Committee on Parliamentary Privilege, above n 1, [309].

¹⁷ Reference was made to provisions in the *Witnesses (Public Inquiries) Protection Act 1892* (UK) 55 & 56 Vict, c 64 and the *Perjury Act 1911* (UK) c 6 — Joint Committee on Parliamentary Privilege, above n 1, [316–7].

¹⁸ Joint Committee on Parliamentary Privilege, above n 1, [310].

¹⁹ Ibid [310].

²⁰ Ibid [303], [324]. The committee noted that the House of Lords already has power to impose fines: ibid [272]. See also the Joint Select Committee on Parliamentary Privilege, above n 8 [7.14].

might be imposed by a court when the proceedings were in relation to a specific statutory offence.²¹

The joint committee seems to have envisaged that in many (perhaps most) cases, charges of contempt of Parliament would be referred to the High Court for trial. That they were of this view is indicated by their suggestions regarding the circumstances in which it would be appropriate for the Houses to exercise their residual penal jurisdiction. Those circumstances were as follows:

- (a) Search and detention 'in custody, for a short time [of] persons who misconduct themselves in the gallery of the House or elsewhere in the precincts [of Parliament] or who are suspected of having committed some other contempt of the House, including any rule or order of the House'.

These 'summary powers', the committee said, were 'needed to preserve security and good order', and were 'best exercised by the Houses themselves'.²²

- (b) A case in which the presiding officer of the House was 'of the opinion that, if the contempt were admitted, the appropriate punishment would be a reprimand by the House and not a referral to the court. The non-member would be asked to consider that opinion. If he accepted it and acknowledged that he acted in contempt of the House, the House could dispose of the matter'.²³
- (c) The exceptional case where a House wished 'to exercise the penal jurisdiction itself'.²⁴

Several observations may be made about these suggestions of the joint committee. They are as follows:

- (a) A House cannot be said to be exercising a penal jurisdiction when it, or its presiding officer, authorises detention in custody, for a short period of time, of persons who are disrupting parliamentary proceedings or are suspected of, say, bringing into parliamentary precincts, dangerous weapons. Powers of this nature are not judicial in character.
- (b) If the Leader of the House of Lords or the Speaker of the House of Commons decided that a prosecution was not warranted, but the person accused of contempt did not acknowledge that he or she had acted in contempt, a further determination would presumably have to be made on whether a prosecution should be initiated before the High Court or whether the House should deal with the case. Were it to be decided that the House should deal with the case, the House would, if it found that the accused had acted in contempt, either reprimand the offender or impose a fine.
- (c) Were a person to be convicted of contempt by the High Court, the person could presumably appeal against the judgment to a higher court. Such an appeal might ultimately come before the House of Lords.
- (d) The joint committee made no recommendations regarding the manner in which fines imposed by a House should be recoverable or on the extent to which adverse findings by a House should be subject to judicial review.

The recommendations of the joint committee regarding adjudication of parliamentary offences cannot, of course, be implemented unless the Parliament is prepared to enact the requisite legislation. Were implementing legislation to be proposed, the Houses might take the view that it is not appropriate for the High Court to be invested with jurisdiction to try the offence of contempt of Parliament, defined in the manner the joint committee has recommended. The Houses might also not accept that it is appropriate for the power to initiate prosecutions before the High Court to be reposed in any person or body other than themselves. Yet the Houses would have to recognise that some types of contempt of Parliament

²¹ Joint Committee on Parliamentary Privilege, above n 1, [310].

²² *Ibid* [312].

²³ *Ibid* [313].

²⁴ *Ibid* [314].

are already criminal offences under the general law and that prosecutions for such offences may be initiated without their approval. Such prosecutions may be initiated even if a House has declined to take any action against an alleged offender or has adjudged a person not to be guilty of a parliamentary offence.

The joint committee were certainly right when they observed that: 'The categories of conduct constituting contempt [of Parliament] are not closed'.²⁵ But they did not, in my opinion, go far enough in their consideration of what parliamentary offences should become statutory offences triable before courts in the ordinary way, and capable of being prosecuted without direction by a House. Statutes which define parliamentary offences triable before courts may include provisions which regulate the initiation of prosecutions for these offences. They may, for example, give the power to prosecute only to the Attorney-General or a Director of Public Prosecutions. They may also control the exercise of the discretion to prosecute by a requirement that the Attorney-General or Director of Public Prosecutions must prosecute if so instructed by a House.²⁶ A requirement of that kind might, however, be thought undesirable in that it compromises the independence of the relevant officer in the exercise of a prosecutorial discretion. Should it be considered desirable that Houses have power to direct prosecutions for parliamentary offences, the preferable course may be to invest the power to prosecute in the presiding officer of the House, but on the condition that the power be exercised only at the behest of the House as a whole.

In their recommendations regarding prosecution of charges of contempt of Parliament before the High Court of Justice, the joint committee were not specific as to the role of the Attorney-General. They said simply that 'Proceedings [before the High Court] would be initiated and conducted on behalf of either House by the Attorney-General'.²⁷ They did not indicate whether the proceedings would be in the name of the Attorney-General, or in the name of the presiding officer of the House. Nor did they say whether the Attorney-General would be obliged to initiate court proceedings on instruction or request. They said merely that, in the case of the House of Commons, the request for initiation of court proceedings should come from the Speaker, 'acting on the advice of the standards and privileges committee of the Commons'.²⁸ The committee did not go so far as to suggest that the Speaker's discretion to request that the Attorney-General initiate a prosecution be controlled by statute. That discretion could not be controlled in the manner suggested by the committee unless there were statutory provisions for the establishment of committees of privilege. At present these committees are established only by resolution of the Houses.

The joint committee's recommendations in relation to the initiation of prosecution for contempt seem also not to have taken sufficient account of the problems the presiding officer of a House could encounter when he or she had to decide what steps, if any, should be taken on receipt of the advice of the relevant privileges committee. For example, what should the presiding officer be expected to do in the face of a committee recommendation that no prosecution be launched, but the officer was convinced that the committee had been actuated by party political considerations? Similarly, what should the presiding officer do in the face of a committee's advice that a prosecution be initiated, but, in the officer's opinion, court proceedings against the alleged offender were bound to be unsuccessful?

There is much to be said in favour of a regime under which persons charged with parliamentary offences may be tried before courts of law rather than within a parliamentary forum. If a court has jurisdiction to try persons on charges of contempt of Parliament, those charged before the court will, subject to any statutory provisions to the contrary, be

²⁵ *Ibid* [264].

²⁶ Houses already have power to direct the Attorney-General to prosecute in cases where the alleged offence against them is also an offence under the general law: see Campbell, above n 3, 119–20.

²⁷ Joint Committee on Parliamentary Privilege, above n 1, [309].

²⁸ *Ibid*.

assured of all the rights and protections accorded to defendants in criminal cases. But when persons are tried before a House of Parliament on charges of contempt of Parliament, they have no legally enforceable procedural protections.²⁹ The House is not bound by the rules of evidence which apply in the courts. Those charged cannot rely on the privilege against self-incrimination and are not entitled to be represented by counsel. There is no standard of proof which has to be satisfied and the proceedings may be conducted in defiance of all principles of procedural fairness.

The United Kingdom Joint Committee on Parliamentary Privilege did not make any recommendations in respect of the procedures which should be followed when the Houses of Parliament chose to deal with charges of contempt of themselves. It may nevertheless be inferred from their recommendations on the trial of members of Parliament on such charges that they supported the adoption by the Houses of procedures which would satisfy principles of natural justice.

In practice Houses refer charges of contempt or breach of privilege to a committee of their members, and endow the committee with authority to send for persons, papers and records. The relevant committee will be required to report to the House as a whole on whether the accused is guilty and, if so, what penalty (if any) should be imposed. But a House will not be obliged to accept the committee's advice. If, for example, the committee has advised that the accused committed a contempt but that no penalty be imposed, the House is free to resolve that a penalty should be imposed.

Following the enactment of the *Parliamentary Privileges Act 1987* (Cth), the Australian Senate adopted a series of resolutions on matters of parliamentary privilege, among them a resolution on the procedures to be followed in cases where charges of contempt are referred to the Senate's Committee of Privileges.³⁰ The relevant resolution was designed to ensure that those accused of contempt would be accorded procedural fairness. But the resolution is not enforceable by any court. Indeed no court is able to review a parliamentary finding that a person has been guilty of a parliamentary offence, on the ground that the person has been denied natural justice. Judicial review on that ground is effectively precluded by Article 9 of the English *Bill of Rights 1689*,³¹ a provision which applies in all Australian jurisdictions.³² As judicially interpreted, Article 9 precludes courts from inquiring into proceedings within a parliament, which contempt proceedings undoubtedly are.³³

It is, no doubt, open to parliaments to enact legislation which allows those who have been convicted by a House of a parliamentary offence to appeal to a court of law against the conviction or the penalty the House has imposed. Legislation to that effect might limit the grounds on which judicial review may be sought. For example, the legislation could make it clear that a court's review jurisdiction is to be no more than a supervisory jurisdiction and does not allow for re-trial on the merits of a case.

There are precedents for legislative provisions which enable courts to exercise a supervisory jurisdiction over the exercise by Houses of a parliament of their penal jurisdiction.

²⁹ That is, apart from those which may be afforded under international instruments.

³⁰ Resolution 2 of the Resolutions agreed to on 25 February 1988. The Resolutions have been reproduced as an appendix: Harry Evans (ed), *Odgers' Australian Senate Practice* (10th ed, 2001). The procedures for dealing with complaints of contempt of Parliament were considered by the Joint Select Committee on Parliamentary Privilege: n 8 above, [7.28–7.70]. See also David Wilson, 'The Development of Natural Justice Procedures in the New Zealand House of Representatives' (1998) 13 *Legislative Studies* 95.

³¹ Article 9 provides 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.'

³² It so applies both by reason of statutory provisions or, in the absence of such provisions (as in Tasmania), on the basis that the protection conferred by Article 9 is necessary for the effective discharge of parliamentary functions: *Gipps v McElhone* (1881) 2 LR (NSW) 18; *R v Turnbull* [1958] Tas SR 80; *Chenard and Co v Arissol* [1949] AC 127.

³³ See Enid Campbell, 'Parliamentary Privilege and the Admissibility of Evidence' (1999) 27 *Federal Law Review* 367; *Rann v Olsen* [2000] SASC 83.

Section 9 of the *Parliamentary Privileges Act 1987* (Cth) is one such precedent.³⁴ This provision was enacted in response to the ruling of the High Court in the case of *Fitzpatrick and Browne*³⁵ that the Court could not look beyond a House resolution or warrant which simply recited that a House of the federal Parliament had adjudged a person guilty of contempt of Parliament. In so ruling, the High Court followed English judicial authority.³⁶ But it also acknowledged that if the parliamentary resolution or warrant had specified particulars of the offence, it would be open to a court to determine whether the offence was capable of being regarded as one punishable by the House.³⁷

To date there has been no occasion on which an Australian court has had to consider precisely what s 9 of the *Parliamentary Privileges Act 1987* (Cth) requires in relation to the particulars which must be provided, or the extent to which the section enables judicial review of House determinations. A question which could arise for judicial determination is whether it is sufficient for a House to identify the offence of which a person has been found guilty, but without reference to the evidence relied upon or without reasons for the House's determination. The question for judicial decision might be, for example, whether it was a sufficient answer to an application for *habeas corpus* for the defendant/respondent to produce a document recording merely that the House had adjudged a person guilty of having refused, without reasonable excuse, to answer a question or provide information or produce papers required by the House or a committee of the House. A court might recognise that conduct of this kind is punishable by the relevant House. But would it necessarily have to accept a House's judgment that this offence had been committed?

The United Kingdom Joint Committee on Parliamentary Privilege considered that the Houses of the Parliament should retain their exclusive jurisdiction to deal with charges of contempt against their own members. The committee recommended that the power of the Houses to impose penalties on members by way of suspension, or expulsion be retained; that the Houses' power to order imprisonment of members be removed; but that the House of Commons be empowered to impose fines on its members.³⁸ The committee's view was that it was not appropriate that courts should have jurisdiction to adjudicate charges of contempt levelled against members of the Parliament, even when those charges are in respect of conduct outside the course of parliamentary proceedings. 'It is', the committee said, 'inconceivable that power to suspend or expel a member of either House should be exercisable by the courts or some other outside body.'³⁹

The power of a House to suspend or expel any of its members may, undoubtedly, be exercised as a means of punishment.⁴⁰ Nevertheless courts have held that Houses which do not possess punitive powers may suspend or expel their members for self protective purposes or to coerce compliance with their lawful orders, such as an order that a member table certain documents.⁴¹

The recommendations of the joint committee regarding the exercise of the Houses' exclusive jurisdiction to adjudicate charges of contempt against members of those Houses included recommendations regarding the procedures which should be followed in the course of an adjudication by the House. These recommendations were designed to ensure that principles of procedural fairness were observed.⁴²

³⁴ Campbell, above n 33. See also *Parliamentary Privilege Act 1858* (Tas) ss 7, 10; *Parliamentary Privileges Act 1891* (WA) s 11.

³⁵ (1955) 92 CLR 157.

³⁶ Notably *Sheriff of Middlesex* (1840) 11 Ad & E 273; 113 ER 419.

³⁷ (1955) 92 CLR 157 at 162.

³⁸ Joint Committee on Parliamentary Privilege, above n 1, [279].

³⁹ *Ibid* [275].

⁴⁰ The expulsion of Hugh Mahon from the House of Representatives in 1920 could be regarded as a punitive measure. Mahon was expelled following remarks made at a public gathering. The case is described in Joint Select Committee on Parliamentary Privilege, above n 8, [7.91–7.92]; Campbell, above n 3, 104–5; Gavin Souter, *Acts of Parliament* (1988) 182–4.

⁴¹ *Egan v Willis* (1998) 195 CLR 424.

⁴² Joint Committee on Parliamentary Privilege, above n 1, [281–2], [291–2], [299].

One question the committee did not consider was how far, if at all, the Houses may involve persons who are not members of the House in adjudication of charges of contempt. Such charges may be referred to a committee of members for investigation and report. Such a committee will usually be given power to send for persons and papers. The committee may be assisted by persons who are not members of the Parliament, for example by counsel or by retired judges;⁴³ but the committee's powers and functions cannot be sub-delegated to such persons. A House cannot even delegate to its own committees its power to determine whether a contempt has been committed and, if so, what penalty (if any) should be imposed.⁴⁴ On these matters a parliamentary committee merely gives advice.

In a case in which it was thought appropriate for an allegation of contempt of Parliament to be referred to an external tribunal, legislation could be enacted to authorise that inquiry.⁴⁵ However, Australia's federal Constitution would seem to require that if the federal Parliament were to enact such legislation, the ad hoc external tribunal should be empowered to do no more than investigate and report. If, as the High Court held in the case of *Fitzpatrick and Browne*,⁴⁶ the penal jurisdiction of the Houses of the federal Parliament involves the exercise of judicial power, that power cannot be exercised by any bodies other than the Houses themselves and s 71 courts.

IV. REVIEW OF AUSTRALIAN LAW

The report of the United Kingdom Parliament's Joint Committee on Parliamentary Privilege may prompt some of the Australian legislatures to undertake reviews of the laws of parliamentary privilege that apply to their Houses and members. The Members' Ethics and Parliamentary Privileges committee of Queensland's Legislative Assembly has recently undertaken a general review of the laws concerning the powers, rights and immunities of the Assembly, its committees and members. A first report on that subject was presented in 1999 and some of its recommendations have been implemented in the *Parliament of Queensland Act 2001*. The provisions of this Act regarding the penal jurisdiction of the Legislative Assembly cannot, however, be regarded as ones which, if enacted by the United Kingdom Parliament, would implement all of the recommendations of the Joint Committee on Parliamentary Privilege.

An agenda for a comprehensive review of the laws relating to contempt of parliament would undoubtedly have to include the following questions:

- (a) Is it necessary for Houses of Parliament to have power to impose penalties on those they adjudge guilty of breach of their privileges or contempt of Parliament? If so should a court of law be invested with a concurrent jurisdiction?
- (b) Should parliamentary offences be defined by statute?
- (c) What are appropriate penalties for parliamentary offences?
- (d) To what extent should the determinations made by Houses in exercise of their penal jurisdiction be reviewable by courts?
- (e) Should legislation be enacted to ensure that persons charged with parliamentary offences are accorded natural justice?

⁴³ In 1985 two retired judges were appointed to assist the Committee: Commonwealth, *Senate Select Committee on Allegations Concerning a Judge — Report to Senate*, Parl Paper No 271 (1984).

⁴⁴ On the non-delegability of judicial powers see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 257.

⁴⁵ Examples of legislation for the establishment of extra-parliamentary tribunals of inquiry are the *Parliamentary Commission of Inquiry Act 1986* (Cth) and the *Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld). The commissions so established were appointed to assist Houses in the performance of their functions.

⁴⁶ (1955) 92 CLR 157.

A. Penal powers

In the nineteenth century, the Judicial Committee of the Privy Council was not persuaded that Houses of colonial legislatures needed to have penal powers in order to carry out their constitutional functions effectively.⁴⁷ The Committee were apparently of the view that parliamentary institutions were or could be adequately protected under the general laws administered by the courts. But, except in New South Wales, the Houses of the Australian colonial legislatures were later to be granted a penal jurisdiction by statute. In 1985 the New South Wales Joint Select Committee on Parliamentary Privilege recommended that the State's *Constitution Act 1902* be amended to give to the two Houses of Parliament the same penal powers as were possessed by the House of Commons in 1856, but with the addition of a power to impose fines.⁴⁸ This recommendation has not been implemented.

The question of whether the Houses of the federal Parliament should retain the penal jurisdiction given to them by s 49 of the Constitution was considered by the Joint Select Committee on Parliamentary Privilege (the Spender Committee).⁴⁹ The Committee recommended that the jurisdiction be preserved but that the power to punish contempt by defamation should be removed. The Committee's reasons for retention of the Houses' penal jurisdiction were several. That jurisdiction, it was suggested, 'exists as the ultimate guarantee of Parliament's independence and its free and effective working'.⁵⁰ The Committee also doubted whether courts were suited to decide issues such as whether conduct was 'such as to obstruct or impede Parliament or its members in the discharge of their functions', or 'to decide the question of penalty'.⁵¹ The courts, they pointed out, 'are separate from Parliament and aloof from parliamentary life'.⁵² Members of Parliament, they suggested, 'are uniquely well placed to understand how actions taken by others may obstruct or impede the workings of Parliament and of its members'.⁵³ In addition the courts would not possess the same flexibility in relation to the imposition of penalties as was possessed by the Houses.⁵⁴ Further arguments were that the transfer of the Houses' penal jurisdiction to courts would create 'a real potential . . . for clashes between the views expressed in Parliament and those expressed in the courts',⁵⁵ and a risk that the courts would incur 'the odium that Parliament sometimes attracts when' Houses exercise their penal jurisdiction.⁵⁶

The Spender Committee assumed that if the penal jurisdiction of the Houses were to be transferred to a court, it should not be exercisable except on a reference by a House. It seemed to the Committee —

impossible to take away from Parliament the preliminary decision, namely, whether a complaint should be referred to the courts. We do not think it would be right to transfer the burden of this decision to the Presiding Officer, nor would it be proper to transfer it to anyone else. It is, fundamentally, a decision for the House concerned since it is the House that complains that its functions or its members are being obstructed or impeded. No one else can make the complaint on its behalf.⁵⁷

The Committee appears not to have considered the pros and cons of a scheme such as that recommended by the United Kingdom's Joint Committee on Parliamentary Privilege under which the Houses' penal jurisdiction in respect of non-members would be shared with the High Court of Justice. Houses of Australian legislatures may today be more

⁴⁷ Cf s 7(b) of the *Parliamentary Privileges Act 1987* (Cth).

⁴⁸ Recommendations 2 and 25.

⁴⁹ Joint Select Committee on Parliamentary Privilege, above n 8.

⁵⁰ *Ibid* [9.7].

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Ibid* [7.8].

⁵⁵ *Ibid* [7.9].

⁵⁶ *Ibid* [7.10].

⁵⁷ *Ibid* [7.9].

receptive to the idea that a superior court be invested with a concurrent jurisdiction to try parliamentary offences than they once might have been. Houses might nevertheless insist that prosecutions before a court should not be commenced except by their direction.

The *Parliament of Queensland Act 2001* reflects an unwillingness on the part of the Legislative Assembly to relinquish its penal jurisdiction, or to share it with courts of law. The Act does, however, recognise that some acts which may be adjudged in contempt of the Assembly may also be ones which are criminal offences under the general law. For example, the acts may be offences of the kind created by Part II of Chapter VII of the *Criminal Code*. Section 47 of the Act deals with the overlap between the general criminal law and the offences punishable by the Assembly in the following way:

- (1) If a person's conduct is both a contempt of the Assembly and an offence against another Act, the person may be proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct.
- (2) The Assembly may, by resolution, direct the Attorney-General to prosecute the person for the offence against the other Act.

Section 47(1) would appear not to preclude prosecution of a person for a statutory offence, notwithstanding that the Assembly had adjudged the person guilty of contempt, but had decided not to impose any punishment. Equally s 47(1) would appear not to preclude parliamentary inquiry into conduct alleged to be in contempt of the Assembly, notwithstanding that the accused person had already been tried before a court of law on a charge of a statutory offence. The criminal trial might have resulted in an acquittal of the defendant. The Assembly might nonetheless take the view that the acquittal was not a satisfactory conclusion of the case and that it would be appropriate for it to deal anew with the conduct which was the subject of the criminal charge, though not to the point of imposing anything which could be described as a punishment.

Provisions of kind typified in s 47(1) of the *Parliament of Queensland Act of 2001* may present problems concerning what conduct is punishable by both a House, in exercise of its penal jurisdiction, and in proceeding before a court of law. The elements of the relevant offences may be different. There are also likely to be differences between curial rules governing reception of evidence in proof of criminal charges and rules governing reception and use of evidence before Houses of a parliament and their committees. Curial rules may have precluded admission of certain evidence or compulsion of the giving of evidence in relation to certain matters. For example, curial rules may enable persons to rely on the privilege against self-incrimination, whereas parliamentary powers of inquiry may not be subject to the same limitation.

B. Definition of parliamentary offences

There will probably continue to be debate about the desirability of legislation which defines with precision the elements of the offences which are to be treated as parliamentary offences. As has been mentioned,⁵⁸ the offences triable by the Houses of the Tasmanian and Western Australian Parliaments have been defined by statute. The offences triable by the Houses of the federal Parliament, the Parliaments of Queensland, South Australia and Victoria, and the Legislative Assembly of the Northern Territory are not precisely defined.

The Spender Committee were obviously concerned about the open-endedness of the concept of contempt of Parliament. Although they did not favour adoption of legislation which declares with specificity the offences triable and punishable by the Houses, they thought it desirable that the Houses should 'go as far as possible in informing Members of Parliament, and the community, of the more important matters that may be punishable as

⁵⁸ Above n 1.

contempts'.⁵⁹ The Committee recommended that the Houses adopt guidelines which pointed out what matters might be treated as contempts.⁶⁰ To date only the Senate has adopted such guidelines, but with the proviso that they do not derogate from the Senate's 'power to determine that particular acts constitute contempts . . .'⁶¹

The Senate's guidelines are, no doubt, helpful to its Committee of Privileges and to Senators generally. But the means by which they have been published cannot be regarded as sufficient to alert members of the public to forms of conduct which they should avoid lest they risk being charged with contempt.⁶² Nor, it should be added, do the guidelines bind courts in cases in which they have to decide whether conduct is capable of being regarded as in contempt of Parliament.

As pointed out earlier, s 37 of the *Parliament of Queensland Act 2001* provides a definition of the concept of contempt of the Legislative Assembly which is modelled on s 4 of the *Parliamentary Privileges Act 1987* (Cth). But it differs from s 4 of the federal Act in that it includes examples of contempt. By force of s 7 of the Act the notes by way of examples are part of the text of the Act. The ten examples listed in s 37 do not include defamation of the Legislative Assembly, or its members, in contrast with s 6 of the *Parliamentary Privileges Act 1987* (Cth). The omission from the Queensland Act of a provision such as s 6 in the federal Act could be construed as an indication that the Legislative Assembly has reserved to itself a power to impose penalties on persons it adjudges to be guilty of contempt within the meaning of s 37.

The question of whether parliamentary offences should be defined, with precision, by statute is linked with the question of which such offences should become statutory offences which are triable before courts in the ordinary way and without need for a House's leave to initiate a prosecution. That question does, I suggest, require further attention.

C. Penalties

Typically the penalties which may be imposed on persons adjudged guilty of criminal offences are a term of imprisonment and/or a monetary fine. But nowadays courts administering the criminal laws have other options. They may, for example, suspend sentences on certain conditions. They may make what are known as community service orders. Some courts may even have authority to make orders which restrict the movements of offenders outside their place of residence.

The only penalty which the House of Commons of the United Kingdom Parliament can presently impose on those it adjudges guilty of a parliamentary offence is imprisonment. That House cannot impose fines.⁶³ Nor can the Houses of the South Australian and Victorian Parliaments.

The United Kingdom Parliament's Joint Committee on Parliamentary Privilege has recommended that parliamentary offences be no longer punishable by imprisonment.⁶⁴ The only penalty for such an offence should, the committee recommended, be a fine, unlimited as to amount. If Houses of Parliament are to retain a penal jurisdiction it is clearly desirable that they be authorised to fine those they have adjudged guilty of a parliamentary offence. Without such a power they have no effective means of penalising corporate offenders save by ordering imprisonment of individuals who are agents or employees of the corporation.⁶⁵

⁵⁹ Joint Select Committee on Parliamentary Privilege, above n 8, [8.10].

⁶⁰ Ibid Recommendations 27–33.

⁶¹ Resolution 6: above n 30.

⁶² The resolutions are reproduced in post-1988 editions of *Odgers' Australian Senate Practice*, such as in Harry Evans (ed) *Odgers' Australian Senate Practice* (10th ed, 2001).

⁶³ Above n 2.

⁶⁴ Ibid 2.

⁶⁵ For example, journalists and editors of newspapers.

Houses of Parliament which possess a penal jurisdiction may adjudge a person or body guilty of a parliamentary offence, but nonetheless decide not to impose a penalty for the offence. A House may decide to do no more than record a conviction of an offence, reprimand the offender and admonish him or her or it not to re-offend. Reprimand and admonition may in many cases be regarded as a sufficient sanction.

D. Judicial review

It is now generally accepted that in cases properly before them, courts may rule on the existence and ambit of parliamentary powers and privileges.⁶⁶ It has also been accepted that if a House has sentenced a person to imprisonment, the person may seek judicial remedy on an application for *habeas corpus* or by action for trespass to the person.⁶⁷ If the House has, in its resolution or by its warrant, chosen to give particulars of the offence of which the person has been found guilty, the court may decide whether conduct of the kind particularised is capable of being regarded as a parliamentary offence.⁶⁸ There may even be a statutory requirement that the House provide particulars. But in the absence of such a requirement, a House which has been endowed with the same penal powers as the House of Commons is at liberty to say no more than that it has adjudged a person guilty of contempt and is to be imprisoned. Should a House have so resolved, a court can do no more than inquire whether the person has been detained beyond the allowable term of imprisonment.⁶⁹

If a House has imposed a fine, a court may determine whether the House had power to impose such a penalty. If the House does have power to fine, a court may determine whether a House has exceeded its power by imposing a fine in excess of that allowed by statute. What is not clear is whether in court proceedings to recover a fine,⁷⁰ the courts may consider whether the conduct of which the defendant was found guilty was capable of being regarded as a parliamentary offence.⁷¹

The *Parliament of Queensland Act 2001* does not make provision whereby fines imposed by the Legislative Assembly may be recovered in court proceedings, though under s 46 of the Act the Treasurer may subtract from the salary ordinarily payable to a member of the Assembly the amount of a fine which the Assembly has imposed upon the member. The Treasurer cannot, however, take such action unless he or she has received a certificate signed by the Speaker, and countersigned by the Clerk to the Treasurer, 'notifying the Treasurer that the amount has not been paid as required by the Assembly'. Under s 39 of the Act the Assembly may impose imprisonment on a person in default of the payment of a fine. If the Assembly resolves that the defaulter be imprisoned, the Speaker is authorised by s 41 to issue a warrant for the apprehension and imprisonment of the person. Section 43 provides that —

A warrant issued under section 41 need not be in any particular form, but it must state in effect that the person has been found by the Assembly to have committed a contempt of the Assembly.

There is no requirement that the warrant specify particulars of the contempt of which a person has been adjudged by the Assembly to be guilty. In the absence of such a requirement, a person adjudged guilty of contempt of the Assembly, and fined for the offence, would encounter considerable difficulties in seeking judicial review of an Assembly resolution that he/she be imprisoned in default of the payment of the fine

⁶⁶ The assertion by the English Court of Queen's Bench in 1839 of such a jurisdiction is now not disputed. That jurisdiction was asserted in the leading case of *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112.

⁶⁷ Judicial remedy may also be sought in a suit for a declaration: see *Egan v Willis* (1998) 195 CLR 424.

⁶⁸ Above n 14.

⁶⁹ Above n 8.

⁷⁰ For example proceedings under s 7(6) of the *Parliamentary Privileges Act 1987* (Cth).

⁷¹ The Joint Select Committee on Parliamentary Privilege did not consider this question. They did, however, envisage that legislation might provide for imprisonment of an offender on non-payment of a fine: above n 8, [7.77–7.78].

imposed by the Assembly. A bare recital in the warrant issued under s 41 that the person had been adjudged guilty of contempt, without specification of particulars of the conduct of which the offender had been found guilty, would probably be regarded by a court as precluding inquiry into whether the Legislative Assembly had exceeded the penal jurisdiction invested in it by the *Parliament of Queensland Act 2001*. This Act, it should be noted, imposes no limit on the amounts of money which may be imposed by the Assembly as fines for contempt, though under s 40(2) of the Act, the Assembly may, by standing rules and orders, limit the amount of money which an offender may be ordered to pay. That delegated legislative power conferred on the Assembly, if exercised, might possibly provide a basis for judicial review of a determination by the Assembly that a person be penalised to an amount in excess of the limit imposed by controlling provision in standing rules and orders of the Assembly.

Any body charged with review of the laws of parliamentary privilege cannot avoid consideration of the role of the courts in the administration and enforcement of those laws. And particular attention would need to be given to the role of courts when, in proceedings properly brought before them, it is contended that a House has exceeded its penal powers (if any).⁷² One question which surely has to be addressed is whether judicial review of parliamentary determinations, made in purported exercise of penal powers, should be any less searching than judicial review of actions of the administrative/executive arms of government.⁷³

Courts themselves may not be prepared to extend their review functions when the review they are asked to undertake would involve inquiry into proceedings within a Parliament.⁷⁴ But it is not inconceivable that the High Court of Australia may someday be presented with an argument along the following lines. The penal jurisdiction of the Houses of the federal Parliament involves the exercise of judicial power. Under the federal Constitution those invested with any of the judicial powers of the Commonwealth are required to exercise those powers in accordance with principles of natural justice.⁷⁵ Courts may therefore inquire into proceedings within the federal Parliament for the purposes of determining whether the constitutional obligation to accord natural justice has been fulfilled. It might even be contended that the judicial powers of the Houses of the federal Parliament are conditional upon a requirement that no one shall be convicted of a parliamentary offence except on the basis of logically probative evidence.⁷⁶ One can do no more than speculate on how the Justices of the High Court might respond to such submissions.

A final point to be made about the role of courts in superintending the exercise of the penal powers invested in Houses of a Parliament is this: If it considered inappropriate for courts to be invested with a jurisdiction to decide, at first instance, whether a person has been guilty of conduct in contempt of Parliament, why should it be thought appropriate for courts to have a jurisdiction to decide whether conduct adjudged by a House to be in contempt is capable of being so regarded? That question was not squarely addressed by the Spender Committee, nor has it been clearly answered in the provisions of the *Parliamentary Privileges Act 1987* (Cth) or in the recommendations of the United Kingdom Parliament's Joint Committee on Parliamentary Privilege.

⁷² The question of when proceedings have properly brought before a court when it is alleged that the House has exceeded its powers was considered in *Egan v Willis* (1998) 195 CLR 424.

⁷³ The most comprehensive text on Australian law on judicial review of actions of the non-legislative branches of government is Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000).

⁷⁴ Above n 13.

⁷⁵ See cases referred to in Christine Parker, 'Protection of Judicial Processes as an Implied Constitutional Principle' (1944) 16 *Adelaide Law Review* 357. See also the observations of Gaudron J in *Nicholas v The Queen* (1998) 193 CLR 173, 208–9.

⁷⁶ There have been differences of judicial opinion on whether a duty to decide on the basis of logically probative evidence is but part of a duty to accord natural justice, or is a free-standing duty: see Aronson and Dyer, above n 73, 301–4.

The differences between a court's original jurisdiction to determine charges of contempt of Parliament and a court's jurisdiction to decide, in a supervisory capacity, whether conduct is capable of being regarded as in contempt of Parliament may be very slight. In the exercise of an original jurisdiction to try charges of contempt of Parliament, a court may be required to rule on the preliminary question whether the conduct alleged to constitute a parliamentary offence is capable of being so regarded. That issue is substantially the same as that which a court has to decide after a House has adjudged a person to be guilty of contempt, and it is contended that the conduct in question was not a parliamentary offence.

E. Natural justice

As mentioned earlier, following the enactment of the *Parliamentary Privileges Act 1987* (Cth), the Senate passed a series of resolutions. One of the resolutions was designed to ensure that persons charged with contempt would be accorded procedural fairness.⁷⁷ Part 1 of Chapter 3 of the *Parliament of Queensland Act 2001* goes a little way towards requiring that principles of procedural fairness be observed when the Legislative Assembly or one of its committees orders persons to attend before them or produce documents. Charges of contempt will normally be investigated by the Members' Ethics and Parliamentary Privileges Committee. Under s 26(2), a summons to attend

must state —

- (a) a reasonable time and place for the attendance; and
- (b) if a document or other thing is ordered to be produced — reasonable particulars of the document or other thing.

Sections 32, 33 and 34 permit persons to make objections to answering questions or to production of documents or other things, though neither the Assembly nor a committee is obliged to accept such objections.

Australian Houses of Parliament may not consider it desirable that the procedures to be followed in adjudication of charges of contempt be prescribed by statute. On the other hand they must now be attentive to Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR), and, in particular, the requirements of article 14 of the Covenant. Article 14(1) provides that in the determination of criminal charges 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. Article 14(5) provides that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal.'

A charge of contempt of parliament is undoubtedly a criminal charge. Parliamentary proceedings for contempt may conform with requirements of procedural fairness, but can they be said to be proceedings before an 'independent and impartial tribunal'? In such proceedings Houses may be seen to be judges in their own cause. Article 14(1) of the ICCPR would seem to require, at the very least, that members of parliament who have made accusations of contempt not participate in investigation or adjudication of the accusations.⁷⁸

⁷⁷ Above n 13.

⁷⁸ See Enid Campbell, *Parliamentary Privileges* (Commonwealth, Department of the Parliamentary Library, Information and Research Services, Research Paper 1, 2000–01). It is there noted that in *Demicoli v Malta* (1991) 1 EHRR 47, the European Court of Human Rights ruled that art 6 of the *European Convention on Human Rights* (which is similar to art 14(1) of the *International Covenant on Civil and Political Rights*) had been infringed when Malta's House of Representatives had adjudged a journalist guilty of contempt and imposed a penalty on him. The Court so ruled mainly because the two members of the House who had been defamed had participated in the proceedings for contempt.