Members of Parliament: law and ethics

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Part II

Parliamentary privilege
Parliamentary privilege

Introduction

The foundations of parliamentary privilege lie in the rich chronicles of English constitutional history; in particular, that of the House of Commons. For centuries, jurisdictional conflicts were waged in England as the institutions of state evolved into their modern form of parliament, the executive and the courts. The reconciliation of those conflicts bore some fruit, significant among which was parliamentary privilege. In adopting the Westminster system, the Australian legislatures also embraced this privilege. Generally speaking, the privileges of each House of an Australian legislature are based on or derived from those of the UK House of Commons. Hence, any discussion of the nature and extent of these privileges draws substantially on the English position which is to be gathered ‘out of the ancient rolls of Parliament and other records, and by precedents and continual experience’. Erskine May defines parliamentary privilege as:

[i]the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

These ‘rights’ or privileges are either collective (possessed by each House) or individual (enjoyed by each member). They are essentially either powers or immunities. Those collective in nature are generally powers, while those enjoyed

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1 Except in NSW and, to a lesser extent, Tasmania.
by individual members are generally immunities. Although an extensive list of
privileges (compiled originally by Quick and Garran) is provided in Appendix 4,
those privileges can be categorised into the following powers and immunities.

Powers

Each House possesses the power to:

- determine qualifications of its members;
- regulate and discipline members;
- control its own proceedings;
- conduct inquiries; and
- punish contempts.

Immunities

The most important of the immunities, the freedom of speech, debates and
proceedings in Parliament, is both a collective and individual privilege formally
recognised in art 9 of the Bill of Rights 1689:

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.

This immunity is enjoyed by the members and officers of each House as well as by
any person who becomes involved in parliamentary proceedings, such as a witness.
They enjoy immunity from the law in respect of anything they say or do within the
scope of the proceedings of Parliament.

Three further individual immunities are enjoyed by the members and officers of a
House and those called to appear before it or its committees:

- immunity from arrest in civil causes;
- exemption from jury service; and
- exemption from compulsory attendance in a court or tribunal.

These are discussed below under the general rubric of ‘immunity from legal
proceedings’.

One other privilege listed by Quick and Garran is ‘[t]he right of each House as a
body to freedom of access to the sovereign for the purpose of presenting and
defending its views’. This collective right of each House is usually exercised by
presenting an Address to the Sovereign, the Governor-General or Governor, or
members of the Royal Family. Addresses have been made on significant events in the

5 Quick and Garran, The Annotated Constitution of the Australian Commonwealth Angus &
Robertson Sydney 1901, pp 501-502. Their lists are rearranged in L M Barlin (ed), House of
life of the Sovereign, although few have been made since the 1970s. Apart from
Addresses, resolutions may also be presented and even messages when the House is
not sitting. No right of access is conferred, however, on individual members.6

Essentially, the purpose of these powers and immunities is to enable each House
to perform its legislative role. In particular, they:

- allow a House to determine the procedures for the conduct of its business;
- facilitate investigations by a House to assist in the formulation of an appropriate
  legislative response;
- protect each House from conduct which disrupts its proceedings or prevents its
  members from attending or participating fully in those proceedings, or which
  otherwise impedes the performance of its functions; and
- assist each House to scrutinise the executive.

The last of these benefits points to the main reason for the development of
parliamentary privilege as described by Blackstone:

Privilege of Parliament was principally established, in order to protect its members
not only from being molested by their fellow-subjects, but also more especially
from being oppressed by the power of the crown.7

Their classification as ‘privileges’ indicates that these powers and immunities are
enjoyed only by a House, its members, its officers and those called upon to appear
before it or its committees. It also serves to emphasise the role they perform in
defining the legal relationship between parliament and the executive, as well as
between parliament and the judiciary. Surprisingly, these relationships are still not
entirely clarified, especially in relation to the scope of judicial review of
parliamentary privilege which is considered further below. Finally, it should be
noted that as privileges ‘they exist not for the benefit of the members of Parliament
but for the protection of the public interest’.8

Before examining each of these privileges, it is necessary to begin with an outline
of the historical development of parliamentary privilege in England and
subsequently in Australia.

Historical origins of parliamentary privilege

The powers, rights and immunities known as parliamentary privileges took
centuries to evolve and were won incrementally by the English Parliament, in

6 See House of Representatives SO 393-398, Barlin, above note 5, pp 328-331; Senate SO 171-
172; H Evans (ed), Odgers’ Australian Senate Practice (9th ed) Department of Senate Canberra
1999, pp 454-455. See also D Limon and W R McKay, above note 3, p 78.
8 Arena v Nader (unreported, High Court, Brennan CJ, 13 October 1997 at 12), extending an
injunction until the application for special leave was determined.
particular by the House of Commons, after numerous power struggles with the Crown and the courts. Their purpose was then and still is the protection of Parliament from outside interference by the Crown and the courts. And, given the intense struggles from which these privileges emerged, they have been jealously guarded ever since.

It was interference by the Crown at the end of the 14th century which first aroused the concern of Parliament to protect itself.\(^9\) The House of Commons struggled against the Crown to assert its right to debate any matter, to initiate legislation even if contrary to the interests of the Crown, and to control its own elections. It also asserted the right to determine exclusively the exercise of its privileges which were derived from the common law and custom of Parliament, in particular, the freedom of speech in Parliament. According to Erskine May,\(^10\) the Members of the House of Commons enjoyed a traditional right of freedom of speech within the House by the end of the 15th century.\(^11\) That freedom was, however, a matter of contention throughout the reigns of Elizabeth I and James I, culminating in the Protestation of 1621 when the House of Commons declared, inter alia, the freedom of speech of its members.\(^12\) But it was not until the House of Lords decision in Eliot's Case\(^13\) in 1629 that freedom of speech was recognised as a legal right. In that case, Sir John Eliot and two other members of the House of Commons were arrested at the instigation of the Crown for uttering allegedly seditious language during debate in the House, and for assaulting the Speaker. The House of Lords declared their arrest for the seditious statements to be invalid as against the law and privilege of Parliament. It has been said that the actions of the Crown in this case helped ignite the Civil War.\(^14\) Further problems arose after the Restoration in Jay v Topham\(^15\) in 1682 and Williams' Case in

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\(^9\) M L Gwyer (ed), Anson's Law and Custom of the Constitution: Vol 1 Parliament (5th ed) Oxford University Press London 1922, pp 166-167 cites Haxey's Case in 1397 where Haxey had been condemned as a traitor for introducing certain Bills in Parliament. This judgment was later reversed by Henry IV and the House of Lords. According to F W Maitland, The Constitutional History of England (originally published 1909, 1963 reprint edited by H A L Fisher) Cambridge University Press Cambridge, p 241, Haxey may not have been a member of the House of Commons but a clerical proctor. In 1512 in Strode's Case, the Court of Star Chamber fined Richard Strode for introducing legislation to control the tin mines in Cornwall. An Act (4 Hen VIII, c 8) was later passed declaring void the proceedings taken against Strode and having a general operation.

\(^10\) D Limon and W R McKay, above note 3, p 69.

\(^11\) This accords with the view in G R Elton (ed), The Tudor Constitution — Documents and Commentary Cambridge University Press Cambridge 1960, p 254 that freedom of speech within Parliament appears not to have been raised as a privilege before the reign of Henry VIII. F W Maitland, above note 9, p 242 states that the first time the freedom was claimed of the King by the Speaker at the beginning of a session was in 1541.

\(^12\) F W Maitland, above note 9, pp 242-243.

\(^13\) CJ (1667-87) 29, 25; LJ (1666-75) 166, 223.

\(^14\) F W Maitland, above note 9, pp 322.

\(^15\) (1682) 12 St Tr 822.
1684, in both of which the proceedings of Parliament were questioned. These decisions provided the immediate reason for the inclusion of the privilege of freedom of speech as art 9 of the Bill of Rights 1689 in relation to the speeches, debates and proceedings of Parliament.

In the end, the power struggle between the Parliament and the Crown was resolved by the subjection of the royal prerogative to parliamentary control. The Bill of Rights 1689 confirmed the paramountcy of Parliament over the Crown, yet measures were still required to curtail Crown attempts to influence the House of Commons through its members. Accordingly, at around this time, the first limitations were introduced on the holding of public office while a member of Parliament. This measure — along with s 31 of the Act of Settlement 1701, which secured the tenure of judges from Crown dismissal — were designed to curtail the influence of the Crown and thereby promote the independence of the Parliament and the judiciary.

On the other hand, the power struggle between Parliament, particularly the House of Commons, and the courts was prolonged into the 19th century. Essential to an understanding of this conflict is the notion of Parliament as a judicial body, often described as the 'High Court of Parliament'. This character derives from its earliest origins as a court of justice in the 13th century, hearing private petitions for the redress of grievances in special judicial decisions of the Curia Regis. Only at the end of the 14th century did those who attended Parliament, originally at the invitation of the sovereign, attain the right to do so. The greater barons and churchmen became the Lords in Parliament, while the representatives of the counties and boroughs formed the Commons. The former continued to exercise judicial power, but the Commons became increasingly concerned with political matters.

In order to assert its dominance over the Crown and the other courts, Parliament asserted and relied upon its judicial character as the High Court of Parliament, although it appears not to have acted as a court as such since the 16th century. Nevertheless, Parliament developed certain powers, rights and immunities similar to those acquired by other courts.

First, there evolved the law of Parliament, lex et consuetudo parlamenti, comprising the privileges of Parliament. Secondly, the need to ensure the independence of Parliament free from outside interference resulted in the

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17 F W Maitland, above note 9, pp 321 asserts that no member of the House of Commons since the Restoration has been punished for words spoken in the House.

18 The first such measure was prescribed by the Act of Settlement 1701 but this was repealed before it took effect and was replaced in 1707 by s 24 of the Statute 6 of Anne, c 7.


21 E Campbell, above note 20, p 3.

22 G R Elton, above note 11, p 225.
adoption of privileges enjoyed by the other courts: immunity from prosecution for what is said in Parliament, and power to punish for contempt. Thirdly, during that period of history when different courts possessed different jurisdictions so that the administration of the law was marked by different bodies and different bodies of law, Parliament claimed immunity from the other courts, relying upon its status as the highest Court of the land. Hence, it refused to subject itself to the common law. Finally, this immunity from the common law eventually was claimed by the House of Commons alone in order to ensure its independence from the House of Lords, all of whose members were eligible to participate when it convened as the highest Common Law Court.

Professor Campbell suggests that the Commons might have been prepared to allow the courts during the Tudor and Stuart periods to review the exercise of parliamentary privilege had they been independent of the Crown. 23 (This independence was only achieved later through s III of the Act of Settlement 1701.) Meanwhile, Eliot’s Case in 1629 convinced the Commons to continue to assert its exclusive role in reviewing the exercise of parliamentary privilege. Judges who transgressed into the area of privilege were liable to be brought before the House for contempt. 24 Nevertheless, the securing of judicial independence by the Act of Settlement 1701 brought no change in the Commons’ view. The courts did not challenge this, aware no doubt that their fate lay now with Parliament’s power to address the Crown for their removal. Indeed, if parliamentary privilege were raised in court proceedings by way of defence, the court’s ability to determine whether such a claim could be made was not recognised until the 19th century in Stockdale v Hansard. 25

The struggle which ensued between the House of Commons and the courts gradually resolved itself in a similar manner to the resolution of the struggle between the Crown and the courts over the royal prerogative. The courts assumed the jurisdiction to decide only whether a particular parliamentary privilege existed at common law, and judicial review of the manner of its exercise was denied: Stockdale v Hansard 26 and the Case of the Sheriff of Middlesex. 27 Moreover, no new privileges could be asserted by one House — only Parliament could alter their privileges by legislation. 28

The factors which contributed to this negotiated settlement were summed up by Carl Wittke:

23 E Campbell, above note 20, p 4-5.
24 See E Campbell, above note 20, p 5 where in fn 6 there is cited the case when Sir Francis Pemberton and Sir Thomas Jones as judges of the Court of King’s Bench were held in contempt of the House of Commons in 1689 for their judgment in Jay v Topham (1684) 12 St Tr 822, See E Campbell, ‘Judges at the Bar of Parliament’ (1999) 18 Aust Bar Review 131.
25 (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.
26 (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.
27 (1840) 11 Ad & E 273; 113 ER 419.
28 Declared in 1704: ‘neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament’ CJ (1702-1704) 555, 560.
... this settlement of the relation between privilege and the law, could be brought about only after the idea of separate codes of law had disappeared, and the notion that les parliaments, like the rest, was part of the common law, had been evolved; after the nature of the English Supreme Court had been radically altered; and after the democratization of the lower house had made substantial progress.  

Hence, the establishment of the separate body of Law Lords to the House of Lords as a legislative chamber substantially removed the cause of rivalry between the two Houses of Parliament, while the electoral reforms of the 1830s made the House of Commons more representative of the people and somewhat more secure from outside interference by the Crown and the courts.

It is evident from this short history that parliamentary privileges were Parliament's response to threats posed by the Crown and the courts, often at the instigation of the Crown, to the capacity of Parliament to function as the sovereign legislature. Parliament used its privileges to secure this independence, and the dignity due its sovereignty. Although Maitland was of the view at the beginning of the 20th century that '[t]heir importance in the past has been great; their importance in the present we are apt, I think, to overrate',  their justification today rests on the same basis on which they originally evolved: namely, the capacity of parliament to perform its various functions free from unnecessary interference. The dominance of the executive today demands the maintenance of parliamentary privilege to preserve in some measure the capacity of parliament to protect its members from executive assault and to ensure that responsible government is not petrified. The role of parliament as a check on the performance of the executive is as important, if not more so, in this age than in the past.

While the history of parliamentary privilege may portray at times a petulant obsession on the part of parliament with its dignity, this was the lesson of bitter experience at the hands of the Crown. Those lessons ought not to be forgotten or regarded as irrelevant. Fajgenbaum and Hanks rightly point out that the justification of parliamentary privilege must be found now in parliament's political supremacy rather than in its judicial origins.  This fact necessitates a closer examination of the role of parliamentary privilege today and whether its present nature and scope can be justified in a political environment different to that from which it emerged. What were not directly considered in these historical power struggles between parliament, the Crown and the courts were the interests of the people. Since this is the overriding concern of modern systems of government, it should be an important factor in assessing the justification of parliamentary privilege today.

30 F W Maitland, above note 9, p 374.
Parliamentary privilege in Australia

Colonial and State position

Reliance on parliamentary privilege in the American colonies during the 18th century resulted in the development of principles which came to affect the position in colonial Australia. Indeed, there were constant battles between legislators who claimed privileges as of right and Governors who recognised only those privileges conferred by grace and favour. This latter view was also the view held in England, until an opinion was given in 1815 by British law officers on the privileges of the House of Assembly in Lower Canada. Their view was that the grant of legislative power conferred only 'such privileges as are incidental to, and necessary to enable them to perform their functions in deliberating and advising upon, and consenting to laws for the peace, welfare and good government of the Province'.

Accordingly, by virtue of this principle of necessity, colonial legislatures were not immediately possessed of all the privileges of the House of Commons. The Judicial Committee of the Privy Council in *Kielly v Carson* endorsed this view by according a colonial legislature 'such [privileges] as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute'. In that case it was held that it was not necessary for the exercise of the functions of the House of Assembly of Newfoundland as a local legislature to punish persons for contempt committed outside the Assembly. The power of the House of Commons to so commit was distinguished as one derived 'by virtue of ancient usage and prescription'. Professor Campbell suggests that this decision, two years after the House of Commons had found the Sheriff of Middlesex guilty of contempt, may have been decided on the basis that the power of contempt 'was unnecessary and too dangerous to be entrusted to inexperienced colonial politicians'.

The Judicial Committee of the Privy Council in *Doyle v Falconer* took *Kielly v Carson* one step further in holding that the Legislative Assembly of Dominica did not possess the power to punish for contempt committed within the House. It is important to note that while *Kielly v Carson* refused to acknowledge the power to punish for contempt, the Court accepted that a colonial legislature had the power to defend its functions by suspending or expelling a member for unworthy conduct.

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33 (1842) 4 Moo P C 63. Compare *Beaumont v Barrett* (1836) 1 Moo P C 59 where the Judicial Committee of the Privy Council previously upheld the privilege of the Legislative Assembly of Jamaica to commit for contempt at the Assembly.

34 (1842) 4 Moo P C 63 at 88.

35 F I Fajgenbaum and P J Hanks, above note 31, dispute this view: pp 169 and following.

36 (1840) 11 Ad & E 273.

37 E Campbell, above note 20, p 20.

38 (1866) 1 LR 1 FC 328.
without inflicting further punishment for contempt.\(^{39}\) Expulsion of a member for disorderly conduct or dishonest conduct, whether inside or outside the House, was upheld in *Armstrong v Budd\(^{40}\) as defensive rather than punitive on the basis that it protected the standing of Parliament, the capacity to perform its functions, and public confidence in relation to these matters.

Apart from denying the power to impose punitive measures, the principle of necessity also does not confer the immunity from arrest in civil causes\(^{41}\) nor the immunity from being subpoenaed during parliamentary sittings.\(^{42}\) However, other privileges have been recognised as conferred, namely, the immunity of freedom of speech\(^{43}\) and the power to order the production of documents.\(^{44}\)

Given the evident uncertainty experienced by colonial legislatures as to the scope of their powers, it became accepted during the 19th century that legislation enacted pursuant to the power to make laws for the peace, order and good government of the colony could confer the privileges of the House of Commons on each House.\(^{45}\) Hence the prescription of the power to punish for contempt was made by legislation and, as shown below, generally within fairly confined limits.\(^{46}\)

Accordingly, there were two sources of parliamentary privileges for the Australian colonies: those privileges which by the principle of necessity at common law were necessary for the exercise of their functions and for their self-protection and those conferred by local legislation. A third source has been cited, at least in relation to art 9 of the *Bill of Rights 1689*: that of inherited law pursuant to s 24 of the *Australian Courts Act 1828 (Imp).*\(^{47}\) However, that Act only confirmed the application of imperial laws if they

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\(^{39}\) See *Doyle v Falconer* (1866) LR 1 PC 328 at 340; followed in *Barton v Taylor* (1886) 11 App Cas 197 at 204 which confined the power to suspend for the period of the current sitting; *Hamett v Crick* [1908] AC 470; *Willis v Perry* (1912) 13 CLR 593 at 597; *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241 where Wallace P at 402 applied the doctrine of necessity to the conditions in 1969. Necessity is determined at the date of the exercise of the power: *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 7 per Mahoney P and at 5 per Priestley JA.

\(^{40}\) (1969) 89 WN (Pt 2) (NSW) 241 at 249-250 per Herron CJ; at 255 per Wallace F; at 260-261 per Sugarman JA.

\(^{41}\) *Norton v Crick* (1894) 15 NSW 172.

\(^{42}\) See the view expressed by Gibbi J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the National Hotel, Petrie Bight, Brisbane (10 April 1964) at 185.

\(^{43}\) See *Gipps v McElhone* (1881) 2 LR (NSWR) 18; *R v Turnbull* [1958] Tas SR 80; *Chenard and Co v joachim Arissol* [1949] AC 127.

\(^{44}\) *Egan v Willis* (1998) 195 CLR 424 dismissing the appeal from the NSW Court of Appeal (1996) 40 NSWLE 650.

\(^{45}\) *Doyle v Falconer* (1866) LR 1 PC 328 at 341.

\(^{46}\) For example, ss 41-46 *Constitution Act 1867* (Qld).

\(^{47}\) For example, the Report of the Senate Standing Committee on Constitutional and Legal Affairs in 1985 on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments (PP235/1985) at paras 2.8 to 2.12, citing Isaacs J in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (Wooltops case) (1922) 31 CLR 421 at 463 and various law reform commission reports.
were able to be applied to the conditions in NSW on 25 July 1828. 48 As there was, at that date, only a Council of five persons to advise the Governor on the making of laws, 49 it is unlikely that art 9 freedom of speech was capable of applying at that time. 50 In any event, art 9 is accepted as applying under the common law principle of necessity 51 and by virtue of specific adoption of the Bill of Rights 1689 (Imp) by State legislation. 52

The only certain basis for the incorporation of all the privileges of the House of Commons in colonial legislatures was by their wholesale adoption by statute. Apart from NSW 53 and to a limited extent in Tasmania, 54 this has been provided for in different ways in the other States of Queensland, 55 South Australia, 56 Victoria 57 and Western Australia. 58 In the ACT, the privileges and immunities of the House of Representatives are adopted until altered by ACT law. 59 Similarly, in the Northern Territory, the powers, privileges and immunities of the House of Representatives apply except to the extent that the Legislative Assembly (Powers and Privileges) Act 1992 (NT) has altered them. 60

Notably, the House of Commons privileges are adopted either on an ambulatory basis or as they exist at a particular date. The former position, which now only remains in Western Australia 61 and in Queensland, 62 ties the development of parliamentary privileges to those changes occurring in relation to the House of Commons by statute. A similar approach is found in the ACT 63 and the Northern Territory 64 in so far as they

48 Quan Yick v Hinds (1905) 2 CLR 345, 356, 367, 378; Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583, 590.
49 See Quick and Garran, above note 5, pp 36-37.
50 The first representative legislature was established by Act 5 and 6 Vic, c 76 (1842). Compare the view of E Campbell, above note 20, p 29 that the relevant statutes were not inherited as they were of purely local operation in England. This precludes application by paramountcy, not by inheritance.
52 Section 60 Imperial Acts Application Act 1969 (NSW); s 5 Imperial Acts Application Act 1984 (Qld); s 3 Imperial Acts Application Act 1980 (Vic) s 6 Imperial Acts Application Act 1856 (ACT).
53 See Egan v Willis & Cahill (1996) 40 NSWLR 650 at 19 per Gleeson CJ.
54 See s 12 Parliamentary Privilege Act 1858 (Tas). Kirby J in Egan v Willis (1998) 195 CLR 424 at 484, [121], footnote 308 noted adoption 'to a lesser extent in Tasmania'.
55 Section 40A Constitution Act 1867 (Qld).
56 Sections 9 and 38 Constitution Act 1934 (SA); as at 24 October 1856.
57 Section 19(1) Constitution Act 1975 (Vic); as at 21 July 1855. See Dill v Murphy (1864) 1 Moo PCC(NS) 487.
58 Section 1 Parliamentary Privileges Act 1891 (WA): 'for the time being'.
59 Section 24 Australian Capital Territory (Self-Government) Act 1988 (Cth).
60 Section 4 Legislative Assembly (Powers and Privileges) Act 1992 (Cth).
61 Section 1 Parliamentary Privileges Act 1891 (WA).
62 Section 40A Constitution Act 1867 (Qld).
63 Section 24(3) Australian Capital Territory (Self-Government) Act 1988 (Cth).
64 Section 4 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
adopt the privileges of the House of Representatives. The other approach of confining the adoption of the House of Commons privileges as at a particular date operates at the Commonwealth level (as 'at the establishment of the Commonwealth') and in South Australia (as at 24 October 1856), Victoria (as at 21 July 1855) and proposed for Queensland (as at 1 January 1901). This approach ensures local control of the privileges while avoiding the automatic adoption of changes introduced for the House of Commons which are not necessarily appropriate for an Australian parliament.

As noted earlier, there has been no wholesale adoption of the privileges of the House of Commons in Tasmania and NSW. In Tasmania, the Parliamentary Privilege Act 1858 (Tas) confers on both Houses powers to summon witnesses and to punish specified contempts. No adoption occurs by s 12 of that Act, which merely affirms any pre-existing privileges. In NSW, the privileges of both Houses depend essentially on the principle of necessity. The most significant limitation is their inability to punish for contempt. However, statutory provision has been made for punishing witnesses who fail to comply with the obligations imposed by the Parliamentary Evidence Act 1901 (NSW). That Act makes provision for summoning and examining witnesses before a House or committee.

Commonwealth position

The source of parliamentary privileges for the Commonwealth Parliament is s 49 of the Constitution:

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 privileges of the House of Commons as at 1901 continue to apply at the Commonwealth level, since Parliament has not yet declared comprehensively its privileges pursuant to s 49. However, to the extent it has declared certain privileges, any corresponding privileges of the House of Commons no longer

65 Section 49 Commonwealth Constitution.
66 Sections 9 and 38 Constitution Act 1934 (SA).
67 Section 19(1) Constitution Act 1975 (Vic).
68 Proposed amendment to s 40A Constitution Act 1867 (Qld) by the Constitution Amendment Bill 1999 (Qld).
69 Three other Parliamentary Privilege Acts of 1885, 1898 and 1957 respectively deal with the summoning of prisoners, the appointment of officers of Parliament and the powers of joint committees.
70 Barton v Taylor (1886) 11 App Cas 197.
71 These are the powers and immunities referred to in the introduction to this chapter. The inclusion of 'privileges' in s 49 was unnecessary: G S Reid and M Forrest, Australia's Commonwealth Parliament 1901-1988 Melbourne University Press Melbourne 1989, p 254.
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apply. Such declarations have been made pursuant to s 51(xxxix) of the Commonwealth Constitution in the Parliamentary Papers Act 1908 (Cth) and the Parliamentary Proceedings Broadcasting Act 1946 (Cth) which extend immunity to the publication and broadcasting of parliamentary proceedings. The most important declaration occurs in the Parliamentary Privileges Act 1987 (Cth) which, inter alia, regulates the power to commit for contempt, abrogates the power to expel a member and removes doubts as to the scope of the freedom of speech in art 9 of the Bill of Rights.

By s 49 of the Constitution, parliamentary privileges are part of the ordinary law and therefore may only be altered by legislation. Neither House alone may alter its privileges, although by s 50 each may regulate the mode of their exercise by standing orders.

Judicial review of parliamentary privilege

The most difficult aspect of parliamentary privilege is defining the role of the courts in reviewing the activities of a House whether in exercise of its privileges or in performance of its legislative function. It was noted earlier that these privileges evolved through centuries of conflict between Parliament, the Crown and the courts. From the seminal cases of Stockdale v Hansard and the Case of the Sheriff of Middlesex, there emerged the principle that the courts have jurisdiction to decide only whether a particular parliamentary privilege exists at common law and its scope; they will not question or review the exercise of a privilege provided it occurred within its scope. While this principle appears simple enough, its application has proved to be otherwise. Further complicating the position is the fact that at times it has been seemingly overlooked or ignored by litigants and judges.

In Stockdale v Hansard, the plaintiff, a book publisher, sued Messrs Hansard for defamation in publishing a report from the Inspectors of Prisons which imputed that he had published an obscene libel. Hansard defended the action on the basis that the House of Commons had ordered the report to be published under the protection of art 9. Not only had the House resolved that the publication of ‘Reports, Votes and Proceedings’ were protected, but that it had ‘the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges’. The Court of Queen’s Bench firmly rejected both these assertions of the House, holding the publication not privileged and assuming the jurisdiction to determine the existence and scope of its privileges.

The House of Commons response was to issue a warrant for the arrest of the Sheriff of Middlesex (a position held by two men) for executing the Stockdale judgment against Messrs Hansard. Because the warrant merely cited that the House had found

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72 Other legislation has been enacted in relation to various parliamentary committees for example the Public Accounts and Audit Committee Act 1951 (Cth).
73 (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.
74 (1840) 11 Ad & E 273; 113 ER 419.
them guilty of contempt of the House, the Court of Queen's Bench on this occasion held in the *Case of the Sheriff of Middlesex* that judicial review was effectively prevented and a writ of habeas corpus was denied. Once the Court was satisfied that the arrest was within the power to commit for contempt, the *Stockdale v Hansard* principle prevented any further inquiry as to the nature of the contempt or the facts of the case. Had the warrant cited the basis for the finding of contempt, the court would have had jurisdiction to decide whether it was sufficient to constitute contempt.

In Australia, the same position was adopted by the High Court in relation to the House of Representatives in *R v Richards; Ex parte Fitzpatrick and Browne*. The Chief Justice, Sir Owen Dixon, expressed the position established in those English decisions thus: 'it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.'

Article 9 of the *Bill of Rights 1689* is often overlooked in this context, in so far as it prohibits the impeachment or questioning of the ‘proceedings of parliament’ in any court or place outside Parliament. The principle developed in *Stockdale v Hansard* is implicit in art 9. However, ‘proceedings of parliament’ in art 9 encompasses a wider spectrum than the exercise of parliamentary privileges, covering most of the activities performed by a House as well as the activities of non-members closely linked to parliamentary proceedings. Yet the immunity enjoyed by a House under art 9 is itself a privilege, the scope of which is determined according to the *Stockdale v Hansard* principle. So in the end, the courts decide the extent of parliamentary privilege and the limits to their powers of judicial review.

It ought not to be forgotten that lurking behind this principle was the concern of the House of Commons to prevent its internal affairs being reviewed by the House of Lords, lest it become the ‘overlord’ of the House of Commons. Obviously, this concern is absent in Australia.

It is not possible to explore at this point the precise limits to the scope of judicial review in relation to parliamentary privilege. While this is more easily attempted in the context of each of the privileges, certain general propositions can be suggested at this stage.

Most cases in which judicial review has been sought involve a House making an order in relation to one of its members. By virtue of the *Stockdale v Hansard* principle, a court may only decide whether the House possesses the power to make that order, not the desirability or merits of it being given. The order might be to produce certain documents to the House, to apologise to the House, or to suspend the member from the

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76 (1840) 11 Ad & E 273; 113 ER 419.
77 (1955) 92 CLR 157. For recent criticism of this case for failing to comply with the doctrine of separation of powers, see A Twomey, 'Reconciling Parliament's Contempt Power with the Constitutional Separation of Powers' (1997) 8 PLR 88. Kirby J in Egan v Willis (1998) 158 ALR 527 at para 136 indicated the decision needed reconsideration on this ground.
78 (1955) 92 CLR 157 at 162.
79 Bradlaugh v Gossett (1884) 12 QBD 271 at 286-7 per Stephen J.
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House. Provided these orders fall within the privileges or powers of the House, a court may not inquire further.

This may mean that a House becomes the exclusive interpreter of legislation in so far as it applies to events occurring within parliamentary proceedings. But where those events have consequences outside those proceedings, the courts will have jurisdiction to consider the extra-parliamentary effect of that legislation. These propositions are illustrated by Bradlaugh v Gossett\(^80\) in relation to the Parliamentary Oaths Act 1866 (UK) which conferred a right to take an oath as a newly elected member.\(^81\) The plaintiff, who had just been elected to the House of Commons, sought a declaration that a resolution of the House of Commons requiring the Sergeant-at-Arms to exclude him from the House was beyond the power and jurisdiction of the House. On a demurrer, the Court of Queen’s Bench held it lacked any jurisdiction to intervene in the internal processes of the Parliament. Lord Coleridge CJ declared in accordance with the Stockdale v Hansard principle:

> What is said and done within the walls of Parliament cannot be inquired into in a court of law ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.\(^82\)

The plaintiff relied, however, on the Parliamentary Oaths Act 1866 (UK) as affording him a statutory right to take an oath as a member, which right was denied by the resolution of the House. While the Court accepted that Stockdale v Hansard established that a resolution of a House cannot change the law, it recognised even if the resolution were illegal the Court lacked jurisdiction to intervene in this case. The position was summed up by Stephen J, who was the only judge to give detailed consideration to this issue,\(^83\) as follows:

> The legal question which this statement of the case appears to me to raise for our decision is this: Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think the House of Commons is not subject to the control of Her Majesty’s Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force

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\(^80\) Bradlaugh v Gossett (1884) 12 QBD 271.

\(^81\) For an account of the extraordinary history of Mr Bradlaugh MP, see E Campbell, ‘Oaths and Affirmations of Public Office’ (1999) 25 Mon LR 132 at 137-139.

\(^82\) E Campbell, above note 81 at 275.

\(^83\) Lord Coleridge CJ agreed that the Court had no jurisdiction to decide whether the resolution violated the Act and even if it did there was no remedy which a Court could give.
as may be necessary to carry into effect such a resolution as the one before us is justifiable.\textsuperscript{84}

It followed, according to his Honour, that the House had the exclusive power to interpret the \textit{Parliamentary Oaths Act 1866} (UK) in so far as it affects the proceedings of the House:

\textit{It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.}\textsuperscript{85}

But this exclusive power to interpret the legislation extended only in relation to rights exercised within its proceedings. A Court would have jurisdiction in relation to ‘rights to be exercised independently of the House’, namely, rights arising outside parliamentary proceedings:

\textit{We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.}\textsuperscript{86}

In addition, jurisdiction was accorded to the Courts over ordinary crimes committed in the House:

\textit{I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.}\textsuperscript{87}

This distinction between the House having exclusive power over its own proceedings and the courts assuming jurisdiction as soon as matters outside the House are affected by the House’s actions was clearly recognised by the Queensland Full Court in \textit{Barnes v Purcell}\textsuperscript{88} where E A Douglas J accepted jurisdiction to review any punishment inflicted on a member by a House even when pursuant to its standing orders.\textsuperscript{89}

In confining judicial review to the issue of whether action taken by a House falls within the scope of its privileges or powers, an assumption is made that there is an

\begin{itemize}
\item \textsuperscript{84} (1884) 12 QBD 271 at 278.
\item \textsuperscript{85} At 280-1.
\item \textsuperscript{86} At 282.
\item \textsuperscript{87} At 283; see also \textit{CJC v Nationwide News Pty Ltd} (1994) 74 A Crim R 569 at 579.
\item \textsuperscript{88} [1946] St R Qd 87.
\item \textsuperscript{89} At 103 per E A Douglas J.
\end{itemize}
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authoritative list of privileges or powers against which the conduct may be judged. The difficulty, however, is that these privileges and powers can be defined with varying degrees of precision or generality. The more specific their definition, the more intrusive judicial review becomes. This is well illustrated by the different approaches adopted by the High Court in *Egan v Willis*. 90

In that case, the Legislative Council of NSW ordered one of its members, Mr Egan, to produce executive documents in his possession as the State Treasurer. On refusing to comply, the House resolved that this constituted contempt and that he be suspended from the House for the remainder of that day’s sittings. The plaintiff sought declarations that these orders and resolutions were invalid and that his subsequent removal from the House onto the footpath constituted a trespass. McHugh J in dissent confined the scope of judicial review narrowly, in accordance with *Bradlaugh v Gossett*, to the issue whether the Legislative Council had the power to suspend a member for obstructing the business of the House. Since on clear authority it had that power, the resolution to suspend was therefore beyond further judicial review, being simply an exercise of that power. 91

However, the majority in *Egan v Willis* (Gaudron, Gummow and Hayne JJ in a joint judgment; Kirby and Callinan JJ in separate judgments) went further by deciding that the House had the power to order from one of its members the production of those executive documents in his possession. On that basis, it was concluded that the member was liable to be suspended from the House for non-compliance with the order to produce. McHugh J in dissent regarded as impermissible this inquiry as to the power to require the production of the executive papers, for it questioned not the existence of the power to suspend but the propriety of its exercise. 92

These divergent approaches stem from describing the power to suspend differently. The power is defined more narrowly by the majority as the power to suspend for failure to comply with an order to produce state papers. On the other hand, McHugh J defined it broadly as the power to suspend for obstructing the business of the House. Consequently, the more narrowly the power is defined, the wider the potential scope of judicial review.

Nonetheless, the joint majority of Gaudron, Gummow and Hayne JJ acknowledged restrictions on the court’s role and were prepared to review the validity of the resolutions only on the basis that they were elements in the issue of whether the plaintiff had suffered a trespass. Without that issue, they would have declined in the exercise of their discretion to make any declaration:

The Court of Appeal, in dismissing the claim for a declaration of the invalidity of paras 2 and 3 of the resolution, dealt with the merits of the matter rather than on the footing that a bare declaration with respect to the validity of proceedings in the Legislative Council should not be made. The Court of Appeal appears to have dealt

91 At 466 [78] and see at 479 [109].
92 At 467 [80]. This was even acknowledged in the joint judgment of Gaudron, Gummow and Hayne JJ at 44: [13]: 'the argument focused upon the occasion for suspension'.
with the merits on the footing that the questions respecting the privileges of the Council required an answer as a necessary step to a determination of the private rights of the appellant for which he sought vindication through the tort of trespass to the person.

We emphasise that, even if an application for a bare declaration of the nature we have described would have been justiciable (as to which we express no concluded opinion), at least as a matter of discretion, a suit constituted solely to obtain such relief ordinarily ought not be entertained. Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from a justiciable controversy. 93

This accords with the approach taken by Stephen J in Bradlaugh v Gossett. 94 Even though there was a justiciable issue of trespass in this case, the majority nevertheless ought to have confined their inquiry to the existence of the power to suspend for contempt. It was the exercise of that power which provided the defence to the action in trespass, and it is a well established power which is available whenever a member undermines the capacity of the House to perform its functions. With all due respect to the majority of the Court, the approach of McHugh J seems the preferable one.

Certainly, the narrow approach of McHugh J renders members more vulnerable at the hands of the House. All the protections of the common law are absent. Those called before a House or a committee to give evidence or produce documents would be similarly vulnerable to the punitive powers of the House (except in NSW). On the other hand, the consequence of the majority approach is to erode the privilege of the House to control its own proceedings, in particular, the power to suspend a member. However, it might be argued that the more intrusive approach of the majority is confined to NSW by virtue of the principle of necessity; that is, the Court was entitled to consider all the surrounding circumstances to ensure the suspension was non-punitive. This argument loses its appeal, though, in the light of the joint majority judgment's scepticism as to this distinction between punitive and non-punitive measures.

Significantly, Kirby J noted that the justiciability of the issues was never contested by the parties in the Court of Appeal. 95 However, the issue was raised in the High Court by the submission of Mr Brad Selway QC, the Attorney-General for South Australia (Intervening for that State), that the Court could only decide on the power of suspension. 96

Consideration also needs to be given to whether the availability of judicial review may depend on the extent to which the House cites grounds or reasons for

93 At 438-9 [4]-[5].
94 (1884) 12 QBD 271.
95 At 485-6 [12][4].
96 At 487-8 [24].
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its action. It has already been noted that when a writ of committal is issued, a
court can review the grounds upon which the person was adjudged to be in
contempt if those grounds are included in the writ.\textsuperscript{97} The same position might be
taken in relation to a resolution which suspends or expels a member for certain
conduct which renders the member unfit for office.\textsuperscript{98}

Finally, it should be noted that actions of a House which fall outside its
'proceedings' remain liable to judicial review. Hence, they must comply with the
law. Similarly, events which occur within the precincts of Parliament are usually
not beyond judicial review unless they occur in the course of parliamentary
proceedings. While the preparation of draft bills or other documentation for
tabling in a House may fall within that exception, the same cannot be said of the
sale of liquor in the members' refreshment bar,\textsuperscript{99} nor even the assault of a
member by another member either inside or outside the chamber.

General propositions

Although the scope of judicial review is further considered in relation to the
freedom of speech in Chapter 6, corruption and bribery of members in Chapter 8,
and the duty of confidentiality in Chapter 9, an attempt is made here to formulate
some general propositions as to the scope of judicial review. It is important to
remember that any restrictions on judicial review need to be justified on the ground
that they allow the Houses to perform their various functions unhindered by outside
interference from the executive and the courts.

1. A court can decide whether an event occurs within the scope of 'parliamentary
proceedings' or the other privileges of a House — but in the event it does, it
cannot question or impeach what occurred.\textsuperscript{100}

2. No legal proceedings can be instituted in relation to what occurs within the
scope of parliamentary proceedings, nor can any legal action rely for support,
either in its initiation or defence, on what occurs within those proceedings.\textsuperscript{101}

3. Any order or other action of a House may only be questioned for the purpose of
ascertaining whether it falls within the privileges of the House.\textsuperscript{102}

4. A House is the exclusive interpreter of its standing orders and any statutory

\textsuperscript{97} See \textit{Case of the Sheriff of Middlesex} (1840) 11 Ad & E 273; 113 ER 419.

\textsuperscript{98} See \textit{Armstrong v Budd} (1969) 89 WN (Pt 2) NSW 241; E Campbell, above note 20, pp 103-5.

\textsuperscript{99} See \textit{R v Graham-Campbell; Ex parte Herbert} [1935] 1 KB 694 which is criticised by Professor
Campbell, above note 20, p 78 for failing to decide that the sale of liquor occurred outside
the proceedings of parliament. The 1999 UK Report of the Joint Committee on
Parliamentary Privilege recommends overcoming this decision by statutory application of
general laws to parliamentary precincts.

\textsuperscript{100} \textit{Stockdale v Hansard} (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112; \textit{Case of the Sheriff of
Middlesex} (1840) 11 Ad & E 273; 113 ER 419.

\textsuperscript{101} \textit{Prebble v Television New Zealand Ltd} [1993] AC 593.

\textsuperscript{102} \textit{Stockdale v Hansard} (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112; \textit{Case of the Sheriff of
Middlesex} (1840) 11 Ad & E 273; 113 ER 419.
provisions in so far as they regulate its proceedings, unless jurisdiction is conferred on the courts by statute. 103
5. No executive inquiry is permitted to question or impeach parliamentary proceedings except with statutory authorisation.
6. A court is unlikely to hear a matter which merely seeks a declaration in relation to the effect of any action on the part of a House. 104
7. Only in exceptional circumstances105 will a court intervene in legislative proceedings where a Bill has failed to comply with a mandatory manner and form procedure. 106 Once enacted, a court will declare legislation invalid for non-compliance with that procedure. 107
8. Despite the previous propositions, reference to parliamentary proceedings is permissible:
   • to establish merely as a fact that a speech was made or another event occurred in the course of those proceedings, 108 and
   • for the purpose of ascertaining the intention of Parliament from the second reading speech to aid in the interpretation of legislation. 109

Powers and immunities

Each of the powers and immunities listed in the introduction to this chapter is now outlined (except for the privilege of freedom of speech, which is the topic of the next chapter). Reference is often made to the scope of the relevant privileges of the UK House of Commons since these have been generally adopted in Australia, with or without modification.

Power to determine qualifications of its members

The House of Commons originally possessed the exclusive power to determine the qualifications and disqualifications of members. 110 This power is, however, no

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103 Bradlaugh v Gossett (1884) 12 QBD 271.
105 Rediffusion (Hong Kong) Ltd v Attorney-General (HK) [1970] AC 1136 (PC); Trethowan v Pedler (1930) 31 SR(NSW) 183.
107 Victoria v The Commonwealth (PMA Case) (1975) 134 CLR 81.
108 This occurs, for example, to establish whether the requirements of a manner and form provision have been satisfied; whether delegated legislation has been laid before each House or been vetoed or not; in common informer actions where a member has sat when disqualified. See Church of Scientology of California v Johnson-Smith [1972] 1 QB 522 at 527; Sankey v Whitlam (1978) 142 CLR 1 at 35-37; Munday v Askin [1982] 2 NSWLR 369 at 373 (CA); Rost v Edwards (1990) 2 WLR 1280; Prebble v New Zealand Television Ltd [1995] 1 AC 321 at 337.
109 See, for example, Pepper v Hart [1993] AC 593 (HL); s 14B Acts Interpretation Act 1954 (Qld) and comparable legislation in other jurisdictions.
110 See D Lireron and W R McKay, above note 3, p 79.
longer exclusive to the House, as it now shares its role with the courts by virtue of statute. Similarly in Australia, the qualifications and disqualifications of members are regulated by statute. Generally, the Australian Houses possess the power to apply those statutory provisions or to refer their application to the courts. This shared jurisdiction of the Houses and the courts was considered earlier (in Chapter 4).

**Power to regulate and discipline members**

Each Australian House, apart from those in NSW, possesses the power of the House of Commons to regulate and discipline their members in relation to the performance of their parliamentary duties. Members of most Houses are liable to be disciplined by reprimand (admonition or censure), suspension or expulsion. Only non-punitive measures can be imposed in NSW.

Suspension and expulsion are imposed for serious breaches of privilege or contempt. A member is likely to be suspended for a breach of the standing orders and rules, for misleading the House, for disobeying an order of the House, or for abusing the freedom of speech under art 9. Expulsion is reserved for those members whose conduct renders them unfit to remain a member of parliament.

A number of expulsions have occurred at the State level. A recent example is that of Mr Armstrong, who was expelled from the NSW Legislative Council, having been adjudged 'guilty of conduct unworthy of a Member of the Legislative Council'. This finding was based on judicial comments in a case that he had been party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge. His expulsion was upheld by the NSW Court of Appeal in *Armstrong v Budd* as a defensive measure within the principle of necessity, being to secure public confidence in the standing of the House and its capacity to function. The Court accepted that conduct unworthy of a member extended to dishonest conduct occurring both inside and outside the House. Wallace P noted that, in addition to physical incapacity to perform official duties, it was accepted that other grounds for expulsion of a member included 'lunacy, habitual drunkenness and persistent and sustained obstruction of the business of the Council'.

This power was very rarely exercised at the Commonwealth level — for instance, the only member to have been expelled from the House of Representatives was Mr Hugh Mahon (Labor member for Kalgoorlie, WA) in 1920 for uttering seditious and disloyal utterances in support of the Irish republican cause. Since 1987, both Commonwealth

111 See the discussion of this shared jurisdiction in the dissenting judgment of McHugh J in *Sue v Hill* (1999) 163 ALR 648 at [272] and following.

112 Three early expulsions in NSW are mentioned in *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241 at 250.

113 (1969) 89 WN (Pt 2) (NSW) 241 at 249-250 per Herron CJ; at 255 per Wallace P; at 260-261 per Sugerman JA.

114 See especially Herron J at 249-250.

115 At 255.
Houses have lost the power to expel a member. This followed the recommendation of the Final Report of the Joint Select Committee on Parliamentary Privilege which considered the circumstances warranting expulsion were adequately covered by the grounds of disqualification of members in ss 44 and 45 of the Constitution. Furthermore, the Committee was influenced by the Mahon expulsion in 1920 which had been regarded as improper. Since their privileges are essentially tied to those of the House of Representatives, the power to expel a member has similarly been lost in the ACT and the Northern Territory.

As for disciplining members by fine, it appears that no House possesses such a power unless conferred by statute. A circumscribed power to fine has been conferred on the Houses of the Commonwealth Parliament, as well as on those of Queensland, Western Australia and the Northern Territory. Further consideration of the power to fine occurs in relation to the power of contempt.

In NSW, although the Houses have no power to punish members, they may suspend or expel a member for non-punitive purposes.

The NSW Court of Appeal in *Egan v Willis* upheld the power of the NSW Legislative Council to order the suspension and removal of a member from the House — although not from the precincts of Parliament. The Court distinguished between measures which were merely enforcing in nature and those which were punitive. As the suspension of the member to enforce the order to produce documents was necessary in that case for the functioning of the House, it was within the inherent power of the House. On the other hand, suspension of a member solely as punishment for non-compliance was beyond that inherent power. On appeal, this distinction was not embraced by a majority of the High Court. While upholding the power to suspend the minister for non-compliance with its order, the joint judgment of Gaudron, Gummow and Hayne JJ acknowledged that there may be limits to the power of the House to enforce its orders, but considered that ‘to distinguish between punishing and merely inducing compliance may very well be difficult’. In any event, the House had acted within its powers by suspending the member ‘for a limited time’.

It is evident from *Egan v Willis* that suspension and presumably expulsion of a member is subject to judicial review. The difficulty in this area is how specific the

116 Section 8 Parliamentary Privileges Act 1987 (Cth).
117 PP 219/1984 at 126, rec 25.
118 H Evans, above note 6, p 53 notes how this view was 'opposed in the Senate'.
119 See E Campbell, above note 20, p 104-5.
120 *Barton v Taylor* (1886) 11 App Cas 197; *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241.
121 (1996) 40 NSWLR 650.
122 (1996) 40 NSWLR 650 at 664-667 per Gleeson CJ; at 677-678 and 683 per Mahoney P; at 692-693 per Priestley JA.
125 At 455 [54]. See also Kirby J at 505 [159] and Callinan J at 514 [194] who both accepted the suspension as not punitive.
court will be in defining the power of suspension or expulsion. As noted earlier, the more specific approach of the majority in *Egan v Willis*, compared with the less specific approach of McHugh J, illustrates how critical the process of definition is to the scope of judicial review.

**Power to control own proceedings**

The power of each House to control its own proceedings is implicit in art 9 of the *Bill of Rights* in so far as it prohibits the impeachment or questioning of the 'proceedings of parliament' in any court or place outside Parliament. The exclusive nature of the power to control its own proceedings means that action taken by a House in the course of its 'proceedings' is generally beyond the scope of judicial review.

The following matters fall within the power of each House to control its own proceedings:

- regulating the conduct of the business of the House including the passage of Bills;
- the adoption of standing rules and orders;
- maintaining order in the House; and
- controlling publication of the proceedings of the House.

All of these matters are regulated by standing rules and orders.

**Standing rules and orders**

In Australia, there is a statutory basis to the power of each House to prescribe standing rules and orders in relation to its proceedings. Both Houses of the Commonwealth Parliament are invested with this power by s 50 of the Constitution:

50. Each House of the Parliament may make rules and orders with respect to —

(i) The mode in which its powers, privileges, and Immunities may be exercised and upheld;

(ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

At the State level, respective State constitutions empower each House to prescribe 'standing rules and orders' for the 'orderly conduct' of each House as well as for other specific matters, such as the absence of a presiding officer, communications between the Houses, publication of the business of the House, the form of Bills and presentation for royal assent. In NSW, Queensland, South Australia and Tasmania, standing orders must receive the Governor's approval before coming into force. The Legislative Assemblies of both the ACT and the Northern Territory are also empowered to make standing rules.

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126 Section 15 Constitution Act 1902 (NSW); s 8 Constitution Act 1867 (Qld); s 43 Constitution Act 1975 (Vic); s 55 Constitution Act 1934 (SA); s 17 Constitution Act 1934 (Tas); s 34 Constitution Act 1889 (WA).
and orders ‘with respect to the order and conduct of its business or proceedings’ (ACT)\textsuperscript{127} and ‘with respect to the conduct of business’ (NT).\textsuperscript{128}

The statutory prescription that the standing rules and orders be for the ‘orderly conduct’ of each House means they are liable to judicial review to ensure they fall within the power of the House to prescribe. In \textit{Harnett v Crick}, the Judicial Committee of the Privy Council considered:

Two things seem to be clear: (1) that the House itself is the sole judge whether an ‘occasion’ has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a standing order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all the circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.\textsuperscript{129}

As to the interpretation of standing orders, this is a matter within the exclusive authority of each House. Professor Campbell suggests, however, that judicial review may be available in relation to any punitive action taken by a House, at least where the privileges of the House depend on the principle of necessity.\textsuperscript{130} This arises from the view that the power to make standing orders for the orderly conduct of the House may not confer wide punitive powers to impose fines or expel members, although the power to suspend appears to be within power.\textsuperscript{131}

**Power to conduct inquiries**

Parliamentary investigations have always played a significant role in Australian political affairs.\textsuperscript{132} Indeed, that role has increased in recent times with the expansion in executive activity and government bureaucracy. Consequently, a range of other review mechanisms, such as freedom of information and administrative review, have been introduced in response to the perceived inadequacy of parliamentary review. Nonetheless, parliamentary review has been enhanced principally by the development of a more sophisticated committee structure and a greater appreciation of the scrutiny capacity of upper Houses.

Parliamentary inquiries may be conducted by a House itself or by one of its committees. Lord Denman CJ in \textit{Stockdale v Hansard} described the House of

\begin{itemize}
  \item \textsuperscript{127} Section 21 \textit{Australian Capital Territory (Self-Government) Act} 1988 (Cth).
  \item \textsuperscript{128} Section 30 \textit{Northern Territory (Self-Government) Act} 1978 (Cth).
  \item \textsuperscript{129} See \textit{Harnett v Crick} [1908] AC 470 at 475-6.
  \item \textsuperscript{130} E Campbell, above note 20, pp 84-85.
  \item \textsuperscript{131} See \textit{Barton v Taylor} (1886) 11 App Cas 197. In \textit{Barnes v Purcell} [1946] St R Qld 87 at 103-104, E A Douglas J also adopted this position.
  \item \textsuperscript{132} A detailed analysis of the nature and scope of parliamentary investigations is provided in an LLM dissertation by Neil Laurie, \textit{Parliamentary Investigations}, submitted to QUT Law School in 1998.
\end{itemize}
Commons as ‘the grand inquest of the nation’. While a House may interrogate a member for information, as in Egan v Willis, committees are usually appointed to conduct formal investigations and to report to the House on their findings and recommendations. Whether a House can appoint someone who is not a member of the House to conduct an inquiry on its behalf or even appoint that person to one of its committees is unclear.

A glance at any parliamentary committee structure reveals a myriad of committees: standing committees, select committees, statutory committees, joint committees and so on. Many are appointed with scrutiny or investigatory functions and powers.

Both the House of Commons and the House of Lords possess the power to inquire into any matter, whether as a House or by establishing a committee. While each House possesses the coercive powers to summon witnesses, to call for the production of documents and to punish for non-compliance, their committees must be specifically conferred these powers by resolution of the House or by statute.

The Australian Houses also possess the power to conduct inquiries, whether by virtue of the adoption of the privileges of the House of Commons or by the principle of necessity. However, the federal division of powers has cast doubt on whether the Australian Houses possess the capacity to inquire into any matter. It has been suggested that their inquiries are confined to matters which pertain to the exercise of their respective legislative powers. In other words, the division of powers between the Commonwealth, States and Territories restricts the scope of inquiry of their respective Houses. Also, it has been suggested that an inquiry may only relate to the exercise of legislative power, on the basis that the Australian Houses never inherited the ‘Grand Inquest’ role of the House of Commons. The first of these grounds for a limited power of inquiry appears dubious, given the High Court's recognition that any political matter is necessarily a federal matter, nor is there any sound basis for concluding that the Australian Houses have not inherited an investigative role given the importance of that role in the principles of responsible

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133 (1839) 9 AD & E 1 at 115; 112 ER 1112 at 1156 — quoted by McHugh J in Egan v Willis (1998) 195 CLR 424 at 475 [102].

134 See H Evans, above note 6, pp 54, where the existence of old English precedents are noted.

135 See Fenton v Hampton (1858) 11 Moo PC 347; 14 ER 727 for an early example of a select committee being established by the Legislative Council of Van Dieman’s Land in 1855 to inquire into alleged abuses in the Convict Department.

136 H Evans, above note 6, pp 54 notes that this is the position in relation to the US Congress: Quinn v United States (1955) 349 US 155.

137 See Attorney-General for the Commonwealth v MacFarlane (1971) 18 FLR 150 per Forbes J (Supreme Court of the NT) at 157; the paper prepared by the Attorney-General, Senator J Greenwood QC and the Solicitor-General, Mr R J Elliott QC, Parliamentary Committees: Powers Over and Protection Afforded to Witnesses PP 168/1972 para 24.

government and ministerial responsibility. 139

Another suggested restriction is that the coercive powers are confined, like those of a royal commission, to the legislative capacity of their parliaments. 140 However, this may prove to be an elusive limitation, especially in relation to the Commonwealth Parliament, given the ease with which any public matter can become a matter of Commonwealth concern. 141 The only difference occurs in NSW, where the Houses lack the inherent power to punish for non-compliance with their orders, by virtue of the principle of necessity. 142

As in the United Kingdom, Australian parliamentary committees only possess those coercive powers which are delegated to them by their House or Houses or conferred by statute. Indeed, most of the coercive powers have been conferred on Australian parliaments. 143 They generally provide that the House and its duly authorised committees possess the power to summon persons to appear before them or to produce documents. The summons must specify the date, time and place for compliance. Witnesses are usually entitled to their reasonable expenses for appearing before the House or committee. 144 As for members, a House or committee may order them to appear without a summons. 145

Protection is often afforded witnesses appearing before a House or a committee from intimidation or other threats or force. 146 Evidence given or documents produced in camera may not be disclosed or published without the consent of the House or committee. 147 The first of the Privilege Resolutions, adopted by the Senate


140 See Attorney-General for the Commonwealth v Colonial Sugar Refining Co Ltd [1914] AC 237, 17 CLR 644; High Court in (1913) 15 CLR 182; Lockwood v The Commonwealth (1954) 90 CLR 177 at 182 per Fullagar J. However, L M Barlin (ed), above note 5, p 584 regards this point as not without doubt in the light of a view expressed by Professor Dennis Pearce in his article, 'Inquiries by Senate Committees' (1971) 45 ALJ 652 at 659. Also see E Campbell, 'Commonwealth Powers and the Privileges of State Parliaments' (1999) 20 UQLJ 201 at 212-221 on a range of possible restrictions on the investigatory powers of Australian Houses.


142 See Fenton v Hampton (1858) 11 Moo PC 347: 14 ER 727 in relation to the Legislative Council of Van Dieman's Land.

143 Parliamentary Evidence Act 1901 (NSW); ss 41-42 Constitution Act 1867 (Qld); ss 1-2 Parliamentary Privilege Act 1885 (Tas); ss 4-5 Parliamentary Privileges Act 1891 (WA).

144 See for example s 6 Parliamentary Evidence Act 1901 (NSW).

145 Section 43 Constitution Act 1867 (Qld); s 6 Parliamentary Privileges Act 1891 (WA); s 5 Parliamentary Evidence Act 1901 (NSW).

146 Section 12 Parliamentary Privileges Act 1987 (Cth); s 20 Legislative Assembly (Powers and Privileges) Act 1992 (NT).

147 Section 13 Parliamentary Privileges Act 1987 (Cth); s 22 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
in 1988, prescribes various procedures for the protection of witnesses appearing before Senate committees. The second of the Resolutions provides additional protection for witnesses appearing before the Privileges Committee.

Despite being conferred power to summon persons, papers and records, witnesses are usually simply invited to co-operate with the committee. If summoned, witnesses are obliged to answer all questions and requests for documentation put by the committee unless they fall outside the committee's terms of reference or the constitutional authority of the House. Failure to appear as a witness or to answer a relevant question or produce relevant documents constitutes contempt of the House under the general law\(^{148}\) and statute.\(^{149}\) Concern has been expressed at the vulnerability of witnesses appearing before parliamentary inquiries.\(^{150}\)

In Queensland\(^{151}\) and Western Australia,\(^{152}\) where a person objects to answering a question or producing a document on the ground that it is 'of a private nature and does not affect the subject inquiry', the House may excuse compliance as the case may require. In NSW, the only justification for refusing to answer a lawful question is where the information sought was given in a religious confession according to the rites of a Church.\(^{153}\) Also, a warrant for the arrest of a witness who fails to appear can be obtained from a Supreme Court judge.\(^{154}\)

These coercive powers of the House apply equally to the members of that House, even when ministers. This was recognised by the High Court in *Egan v Willis*\(^{155}\) which, as noted earlier, upheld the inherent power of the NSW Legislative Council to order one of its members, who was also the State Treasurer, to produce certain 'state papers'. These papers related to the Government's consideration of a report of a Royal Commission into the Lake Cowal goldmine. The power to order their production was accepted as necessary to enable the House to review the conduct of the Executive Government. The joint judgment of Gaudron, Gummow and Hayne JJ referred to 'the immediate interrelation between that superintendence and the law-making function in which the Legislative Council participates, together with the Legislative Assembly and the Crown'.\(^{156}\)

Although McHugh J disagreed with the majority on the scope of judicial review, his Honour nevertheless agreed that the House had, by virtue of the principle of responsible government, the power to order documents from its members who were

\(^{149}\) Section 11 *Parliamentary Evidence Act 1901* (NSW); s 21 *Legislative Assembly (Powers and Privileges) Act 1992* (NT).
\(^{151}\) Section 44 *Constitution Act 1867* (Qld); cl 30-32 LCARC's draft Parliament of Queensland BILL.
\(^{152}\) Section 7 *Parliamentary Privileges Act 1891* (WA).
\(^{153}\) Section 127 of the *Evidence Act 1995* (NSW).
\(^{154}\) Sections 7-8 *Parliamentary Evidence Act 1901* (NSW).
\(^{155}\) (1998) 195 CLR 424 dismissing the appeal from the NSW Court of Appeal (1996) 40 NSWLR 650.
\(^{156}\) At 453 [47].
ministers. Surprisingly, he described the principle of necessity in stricter terms by asking whether "it would be impossible, in the absence of the power asserted, to carry out the relevant function".

The next issue which arose in this matter was whether the Legislative Council had to observe the privileges which provided a lawful excuse for non-disclosure under the general law. Neither the NSW Court of Appeal nor the High Court in Egan v Willis were asked to rule on that issue. However, the issue was later decided by the NSW Court of Appeal in Egan v Chadwick which held that neither public interest immunity nor legal professional privilege could be relied on by a member of the Legislative Council in refusing to produce certain state papers. Presumably, the same position applies in relation to the privilege against self-incrimination.

Although the decision in Egan v Chadwick concerned the inherent powers of the NSW Legislative Council, the reasoning of the Court is equally applicable to the other Australian parliaments which have adopted the privileges of the House of Commons. The Court unanimously held that it was reasonably necessary for the performance of the function of the Legislative Council to hold the Executive to account that it possess the capacity to call for the production of all executive documents. However, the Court split on whether exceptions might arise to such claims. The majority of Spigelman CJ and Meagher JA held that the production of executive documents would be precluded if this were inconsistent with the principle of responsible government. The only instance of such inconsistency they mentioned was in the case of documents recording the deliberations of Cabinet under public interest immunity. Priestley JA dissented on this point, holding that 'no legal right to absolute secrecy is given to any group of men and women in government'. This view recognises the important role of parliament to scrutinise the executive.

This decision is of particular importance to upper Houses as chambers of review. In the latter half of 1999, there was an unprecedented number of public interest immunity claims by ministers in the Senate which attracted, apart from a censure motion, the novel response of an order extending question time for the remainder of the year.

If a House or committee wishes to question a member of the other House of a bicameral parliament or of another parliament, courtesy dictates that a request be sent to the presiding officer of the other House to ask the member to appear. The Standing Orders of the Senate require this when seeking the attendance of a member or officer of the House of Representatives. Usually the member is not asked. In the

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157 At 472 [55] and 475-476 [102]. But his Honour regarded the power as not extending to citizens.
158 At 467 [8].
159 [1999] NSWCA 176.
161 [1999] NSWCA 176 at [69-71] per Spigelman CJ; [154] per Meagher JA.
162 At [143].
164 Senate SO 178. Standing Order 179 allows the Senate to concede a similar request from the House of Representatives.
light of this practice, it appears that a House could not summon such a member to appear.\textsuperscript{165} The power of a House to order the production of documents held by a non-government member might be viewed as a different situation.\textsuperscript{166}

Where a House seeks to examine a government official, guidelines have been formulated at least at the federal level to assist those officials. The general approach is to require the official to act on the instructions of the minister in responding to questions from a parliamentary committee.\textsuperscript{167}

**Power to punish contempt**

A ‘contempt of parliament’ is defined by *Erskine May* in these terms:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence.\textsuperscript{168}

It should be noted, however, that a contempt of parliament is to be distinguished from a ‘breach of privilege’. The latter refers to an infringement of the powers or immunities of a House or of its members, such as when legal proceedings call into question parliamentary proceedings. While all breaches of privilege usually constitute contempts, not all contempts are a breach of privilege.\textsuperscript{169}

\textsuperscript{165} See H Evans, above note 6, pp 55-56 which refers to the 1996 Report of the Senate Select Committee on the Victorian Casino Inquiry which concluded that it lacked the power to summon members of a State Parliament and other officials: PP359/1996. G Lindell refers to the probable immunity of members in this case: ‘Parliamentary Inquiries and Government Witnesses’ (1995) 20 MULR 383 at 395. Whether a House or committee can summon an officer of another House or an official of the executive government is unclear.

\textsuperscript{166} See Hon D Kerr MP, above note 159 at 87 who refers to an incident in the House of Representatives, where an order of the House was sought by a minister to require a non-government member to produce a document, as an unprecedented use of the power of the House to hold a member accountable to the executive.

\textsuperscript{167} The Commonwealth Government’s policy on its officers appearing before parliamentary committees is found in two documents: *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters 1989* (DPMC) and the Legal Practice Briefing No 29, ‘Appearing Before Parliamentary Committees’ 21 December 1996, prepared by the Attorney-General’s Department.

\textsuperscript{168} D Limon and W R McKay, above note 3, p 108.

\textsuperscript{169} See D Limon and W R McKay, above note 3, p 65, which cites HC 34 (1967-68) 171. Contrast the warrant: issued against Fitzpatrick and Browne in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 which cited a breach of privilege rather than contempt. H Evans, above note 6, notes at 30-31 that the power to punish for contempt is a power to punish for offences against the House and it is not an offshoot of the immunities nor is it intended to protect those immunities — that role is for the courts. At
An added dimension to the definition of contempt given by Erskine May is that it encompasses 'offences against its ... dignity'. These offences include libels on parliament — statements which undermine public confidence and respect for the institution of parliament.

These tests apply also in Australia although they have been modified at the Commonwealth level. Section 4 of the Parliamentary Privileges Act 1987 (Cth) essentially adopts the first of the definitions in Erskine May by prescribing:

[c]onduct (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.

However, s 6 abolishes as contempts, libels on parliament not committed in the presence of the House or committee:

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

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

This exclusion of libels on parliament was designed to put an end to the practice of members raising press criticisms as matters of contempt. The most infamous instance of this resulted in the only occasion when the House of Representatives committed to prison those found in contempt: R v Richards; Ex parte Fitzpatrick and Browne. Raymond Fitzpatrick and Frank Browne were respectively the owner and editor of the Bankstown Observer which published various articles claiming that Mr Charles Morgan, a member of the House of Representatives, had been involved in an immigration racket before entering Parliament. They were committed to prison for the duration of the parliamentary term by resolution of the House on the issue of a warrant which merely cited that they had been found guilty of 'a serious breach of privilege'. As previously noted, the High Court denied writs of habeas corpus by following the House of Lords decision in the Case of the Sheriff of Middlesex and the later decision of the Judicial Committee of the Privy Council in Speaker of the Times it was erroneously considered necessary to find a corresponding immunity to establish a contempt of the House. This led to the fabrication of immunities.

170 D Limon and W R McKay, above note 3, p 65.
171 The same provision is made in s 5 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
172 See for example the report of the House of Representatives Committee of Privileges (PP 202/1981) into criticism by journalist Laurie Oakes on 2 September 1981 of the working and drinking habits of backbenchers.
174 (1840) 11 Ad & E 273; 113 ER 419.
Legislative Assembly of Victoria v Glass.\(^{175}\) Section 6 of the Parliamentary Privileges Act 1987 (Cth) was enacted in response to this case.

In certain States, categories of contempt are prescribed in order to limit the punitive powers of the House.\(^{176}\) However, these provisions do not necessarily preclude other conduct being found to constitute contempt to be dealt with in a non-punitive way. It is clear from the definition given in Erskine May that it is not possible to list all conduct which constitutes contempt. Nonetheless, Erskine May\(^{177}\) has compiled the following list of contempts adjudged so over the centuries. One needs to be careful not to assume that all these instances satisfy the test of contempt today; standards and perceptions clearly change over time. Note that for contempt, at least in the Senate, a culpable or wilful intent is required.\(^{178}\)

*Erskine May’s* categories of contempt are:

- misconduct in the presence of a House or committee;
- disobedience to the rules or orders of a House or committee;
- abuse of the right of petition;
- misconduct of members or officers —
  - members deliberately misleading the House;
  - corruption in the execution of a member’s duty;
  - providing professional services in parliamentary proceedings;
  - advocacy by members of matters for which they are professionally engaged;
- constructive contempts —
  - reflections on a House;\(^{179}\)
  - publication of false or perverted reports of debates;
  - premature publication or disclosure of committee proceedings;
- obstructing members in the discharge of their duties —
  - arrest;
  - molestation and intimidation;
  - improper influence;
  - wilful misrepresentation of members’ proceedings;
- obstructing officers of a House;
- obstructing witnesses; and
- obstructing petitioners.

Lists have been compiled of matters of privilege raised in the House of

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175 (1871) LR 3 PC App 560.
176 Queensland, Tasmania and Western Australia.
178 H Evans, above note 6, p 61.
179 See the guidelines recommended by the Queensland Members’ Ethics and Parliamentary Privileges Committee Report No 25 at para 7 on the use of the crest and other official emblems by members of the Queensland Legislative Assembly.
Representatives from 1905 to 1996\textsuperscript{180} and in both Houses from 1901 to 1987.\textsuperscript{181} The latter includes, in addition to those matters listed by Erskine May, the use of parliamentary proceedings in court and allegations of bribery of members. As well, the actual or threatened initiation of legal proceedings against a member for something said under privilege is contempt. Similar action taken against someone who has provided information to a member may also constitute contempt.\textsuperscript{182}

In recent times the number of contempts adjudged by a House has declined.\textsuperscript{183} This is probably due to the improved robustness of politicians and the need to confine contempts to conduct which clearly obstructs the functioning of parliament. This has been recognised by various parliamentary reports which have cautioned restraint.\textsuperscript{184} The sixth of the Senate's Privileges Resolutions lists by way of guidance a range of conduct which may constitute contempts. The third of those Resolutions requires the Senate to take into account several factors before referring a matter to the Committee of Privileges, in particular, not to exercise the power in trivial or unworthy cases. The 1984 Final Report of the Commonwealth Joint Select Committee on Parliamentary Privilege\textsuperscript{185} recommended the following policy of restraint which it adopted from a resolution of the House of Commons:

That the House should exercise its penal jurisdiction in any event as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members, its Committees or its officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the

\textsuperscript{180} L M Barlin, above note 5, Appendix 25 pp 819 and following. See also the list of contempts in rec 1 in the Final Report of the Joint Select Committee on Parliamentary Privilege (Cth PP 219/1984) at 1-5.


\textsuperscript{182} See 67th Report of the Senate Committee of Privileges (PP141/1997), 'Possible threats of legal proceedings against a Senator and other persons' which concerned threats of legal proceedings made against Senator O'Chee and certain informants.

\textsuperscript{183} A recent case, however, is that of Mr Easton who was held in custody for seven days pursuant to a warrant issued by the Western Australian Legislative Council for failing to comply with an order of the House to apologise for misleading particulars in his petition to the House; see E Campbell, 'Royal Commissions, Parliamentary Privilege and Cabinet Confidentiality' (1999) 28 WALR 239 at 242.


\textsuperscript{185} Recommendation 14 in PP 219/1984 at 83.
Consequences of contempt

A House faced with a contempt may respond in a punitive or non-punitive manner. A punitive response will be a fine or imprisonment and additionally, in the case of members, expulsion. On the other hand, a non-punitive response may be any of the following:
(i) the House ordering the offender to be removed from the House, or in the case of a member, suspension for a definite period; 187
(ii) issuing a reprimand in the absence of the offender; or
(iii) issuing a censure or admonition to the offender who has been summoned to appear at the bar of the House.

The House of Commons has the power to impose all these forms of punitive and non-punitive measures except, it would seem, that of a fine. As no fine has been imposed since 1666, 188 the view is that the power has been abandoned. 189 Committal to prison is confined to the remainder of the current session of the House. However, the 1999 UK Report of the Joint Committee on Parliamentary Privilege has recommended statutory reform, including conferment of a power to fine members where suspension is inadequate or undesirable and the abrogation of the power to imprison. Alleged contempts by non-members would be decided by the courts at the instigation of the Attorney-General, with the power to impose an unlimited fine. This would also be the case with any wilful failure by members or non-members to comply with the requirements of any committee — otherwise the House could admonish non-members for contempt and order their removal for disturbing the proceedings of the House. The House would also be unable to increase any penalty recommended by a privileges committee. 190 The Report also recommended the prescription of minimal requirements of procedural fairness, whereby members are given:

• a prompt and clear statement of the precise allegations against the member;
• adequate opportunity to take legal advice and have legal assistance throughout;
• the opportunity to be heard in person;
• the opportunity to call relevant witnesses at the appropriate time;
• the opportunity to examine other witnesses; and

186 As above.
187 Suspension from the House of Commons may include suspension of pay; SO 45A (adopted 4 June 1998).
188 See D Limon and W R McKay, above note 3, p 138; note R v Pitt and R v Mead (1762) 3 Burr 1335 at 1336; 97 ER 861 at 861 where Lord Mansfield observed that a fine could not have been imposed by the House of Commons for contempt but by the Star Chamber.
190 See the list of recommendations in relation to penal powers in the Report of the Joint Committee on Parliamentary Privilege (UK, 1999) at para 324.
• the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.191

In Australia, only South Australia and Victoria possess all the powers of the House of Commons in relation to contempt. The punitive powers have been modified and restricted by statute for the Commonwealth Parliament, Queensland, Tasmania, Western Australia and both Territories. Significantly, the power to fine has been conferred on both Commonwealth Houses and the Northern Territory, as well as in limited circumstances in Queensland and Western Australia. All Houses possess, however, the power to impose a range of non-punitive sentences: reprimand,192 admonition and suspension. And, as noted earlier, each House, other than those of the Commonwealth193 and possibly NSW,194 also possesses the power to expel a member who is adjudged unfit to remain a member. Pursuant to the Parliamentary Privileges Act 1987, the Commonwealth Houses may impose either a fine or imprisonment for ‘an offence against the House’.195 The period of imprisonment cannot exceed six months and the fine cannot exceed $5000 (or $25,000 for a corporation). A fine cannot be imposed in addition to imprisonment,196 although failure to pay a fine could be adjudged as another offence against the House for which imprisonment might be imposed. Further, the power to expel a member from a House is abolished.197 The committal of Fitzpatrick and Browne to three months’ imprisonment was the only time that power was exercised by the House of Representatives.198 Despite the High Court finding in that case that the contempt power was an exception to the doctrine of separation of powers under the Commonwealth Constitution, arguments are still raised that this finding was erroneous.199

In Queensland200 and Western Australia,201 each House can only punish prescribed contempts, first by a fine payable immediately and, if unpaid, by imprisonment until the fine is paid or for the remainder of the parliamentary session or a portion thereof. In Tasmania, only imprisonment (not a fine) can be imposed by each House for the

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191 As above at para 281.
192 Note in L M Barlin above note 5, pp 712-3 the reprimand given by the Senate in the BMC case in 1966 (J 1970-72/612).
193 Power to expel members abrogated by s 8 Parliamentary Privileges Act 1987 (Cth).
194 Contrast Armstrong v Budd (1969) 89 WN (Pt 2) NSW 241. See A Twomey, above note 77.
195 Section 7 Parliamentary Privileges Act 1987 (Cth).
196 Section 7(7).
197 Section 8.
198 L M Barlin, above note 5, pp 711.
199 See A Twomey, above note 77.
200 Section 45 Constitution Act 1867 (Qld). See Barnes v Parcell [1946] St R Qd 87 at 108-110 per Philip J.
same prescribed contempts.202 The Legislative Assembly of the Northern Territory is subject to the same restrictions as those of the Commonwealth Houses.203 In contrast, the Legislative Assembly of the ACT is denied the powers to fine and imprison.204

The prescription of specific contempts and the restrictions imposed on their punishment in Queensland, Western Australia and Tasmania raise the issue of whether this regime exhaustively defines the contempt power of those Houses. Do they retain the capacity to respond in a non-punitive way to other conduct which on general principles constitutes contempt? It can be argued that the regime is exhaustive only in relation to the punishment of contempts by fine and imprisonment.205 The Houses retain their power to respond in non-punitive ways to any conduct which they adjudge to be in contempt. The fact that Queensland adopted the privileges of the House of Commons after the enactment of this regime should not alter this conclusion.206

The position is, of course, different in NSW where the principle of necessity confers no power to punish contempts.207 Hence, the classification of measures as punitive and non-punitive is important. The principal non-punitive measures available in NSW are removal from the House and, in the case of members, suspension, at least for a definite period.208 An admonition or reprimand may also be imposed. Expulsion may also be available, as in Armstrong v Budd,209 where it was held to be defensive and not punitive. Not only are fines and imprisonment precluded but a member's exclusion from parliamentary accommodation210 or the withdrawal of other financial benefits211 have also been precluded as punitive measures.212

Procedure for contempt

The procedure of the House of Commons is to formally resolve that a person is adjudged guilty of contempt and to impose either a sanction or sentence. For committal, the resolution will order the Speaker to issue a warrant to the Sergeant-

202 Section 3 Parliamentary Privilege Act 1858 (Tas).
203 Section 25 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
204 Section 24(4) Australian Capital Territory (Self-Government) Act 1988 (Cth).
205 Contrast the Easton Affair where the WA Legislative Council relied on its general power under s 1 Parliamentary Privileges Act 1891 to imprison Mr Easton for failing to apologise to the House even though this contempt is not included in s 8.
206 Section 40A Constitution Act 1867 (Qld) (enacted in 1978). Only those privileges not inconsistent with the existing privileges of the Parliament were adopted.
207 See Kielley v Carson (1842) 4 Moo P C 63.
208 See Browne v Cowler (1893) 6 QLJ 235. An indefinite suspension of a member is regarded as punitive: Barton v Taylor (1886) 11 App Cas 197.
209 (1969) 89 WN (Pt 2) NSW 241.
210 See Barnes v Purcell (1946) St R Qd 87.
211 For example, loss of parliamentary salary: R v Dickson; Ex parte Barnes [1947] St R Qd 133 at 136-137, 141.
212 One of the characteristics of a punitive measure is that it acts as a deterrent: R v Dickson; Ex parte Barnes [1947] St R Qd 133 at 136-137 per Macrossan CJ.
at-Arms to take that person into custody and deliver them to a prison. The warrant may cite only that the person has been found guilty of contempt of the House, without specifying the nature of that contempt — otherwise the details of the contempt will be reviewable by a court as to whether they constitute contempt at law. Even in such a case, it appears that any findings of fact are not reviewable.

This process has been regulated by statute at the Commonwealth level and in Queensland, Tasmania and Western Australia. The Commonwealth Houses are required to cite in both their resolution and warrant the particulars of the conduct which they have adjudged to constitute an offence against their House. Whether or not those particulars constitute contempt can therefore be reviewed by a court. Where a fine is imposed the availability of judicial review is not so clear, although it has been argued that it may still be available. However, in either case, it is unlikely that judicial review can be brought in relation to the findings of fact made by a House. While the same requirements apply in the Northern Territory, the jurisdiction of the Full Court of the Supreme Court is expressly confined to the determination of whether the particulars cited are capable of constituting a breach of privilege or contempt.

In Queensland and Western Australia, it would seem that the House must first give notice of the alleged contempt to the person accused who has a right to be heard by the House. The House may then pass a resolution first imposing a fine according to the standing orders and then directing that in default of immediate payment the Speaker issue a warrant for the arrest and detention of the person concerned. The other significant change is that the warrant must specify of which of the prescribed contempts the House has found the person guilty. Similar requirements apply in Tasmania for committal for contempt (the only punitive measure available). There is also the option for the House to direct the Attorney-General to prosecute contempt in the courts where it is also punishable under the general law. Such a direction may be given whether or not the House takes punitive or non-punitive action itself. Although specific statutory provision is made for this direction in

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213 See Burdett v Abbot (1811) 14 East 1 at 128 per Lord Ellenborough; Stockdale v Hanard (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112; 3 St Tr NS at 856 per Lord Deadmin; Case of the Sheriff of Middlesex (1840) 11 A & E 273; 113 ER 419.
214 See E Campbell, above note 20, p 118.
215 Section 9 Parliamentary Privileges Act 1987 (Cth).
216 See E Campbell, above note 139 at 219.
217 Section 26(2) Legislative Assembly (Powers and Privileges) Act 1992 (NT).
218 Sections 46 and 48 Constitution Act 1867 (Qld).
219 Sections 9 and 11 Parliamentary Privileges Act 1891 (WA).
220 Standing Orders 317-318 Queensland Legislative Assembly; SO 122 WA Legislative Council.
221 Clause 43 LCARC’s draft Parliament of Queensland Bill unfortunately dispenses with the requirement to specify the nature of the contempt.
222 Sections 5 and 6 Parliamentary Privilege Act 1858 (Tas).
223 See for example the offences in ss 55-60 Criminal Code (Qld).
Queensland, Tasmania and Western Australia, it is clearly able to be given by all Houses which enjoy the privileges of the House of Commons and even in NSW, where it derives from the principle of necessity.224

Only in South Australia, Victoria and the Northern Territory do the Houses retain the power to punish libels on Parliament without specific restrictions. However, consideration is given below to the extent this power, as part of the general power of contempt, is restricted by the implied freedom of political communication.225

**Reform**

The power to cite persons for contempt is necessary for the functioning of Parliament. The same cannot be said of the power of committal. A House must possess the capacity to protect itself but this can generally be achieved without a power of committal. This is clearly borne out by its non-exercise in recent times.226 A power to fine is more easily justified, at least as a threat to discourage contempt behaviour. Given political partisanship, there is a case for prosecuting in the courts all serious conduct warranting punitive measures. Historically, as the House of Commons distrusted the courts, it sought to retain exclusive control of contempt. Since that struggle has now largely ended, there can be little objection to an expanded judicial role assuming the penal jurisdiction of the Houses.227 Although their jurisdiction has been justified228 on the ground that it allows for speedy resolution of a contempt, this is a more appropriate observation in relation to the non-punitive measures, such as removing persons who create a disturbance in the House or suspending a member in appropriate circumstances. Serious cases of contempt are usually incapable of being resolved satisfactorily, so that resort to the judicial process should not disadvantage the proceedings of the House.229

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224 See L M Barlin, above note 5, p 710; E Campbell, above note 20, p 120 saw this as assumed by *Kielley v Carson* (1842) 4 Moo P C 63.

225 See E Campbell, ‘Contempt of Parliament and the Implied Freedom of Political Communication’ (1999) 10 PLR 196 at 201. In Queensland, the repeal of s 51 of the *Constitution Act 1867* (Qld) means that no direction may be possible in the case of false or scandalous libels given that s 52 only refers to a direction for ‘other contempts’.

226 It has been exercised only once in the Commonwealth Parliament — by the House of Representatives committing to prison Messrs Fitzpatrick and Browne: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

227 See E Campbell, above note 20, p 123.

228 See D Limon and W R McKay, above note 3, p 131 fn 2. See also Harry Evans, above note 6 pp 63-65.

229 At the Commonwealth level, the power to punish for contempt is recognised as an exception to the doctrine of separation of powers: *R v Richards, Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. It has been suggested that the contempt power be confined to what is necessary for the legislative function of the Houses: A Twomey, above note 77 at 95-101. E Campbell, above note 224 at 193 considers it arguable that s 4 of the *Parliamentary Privileges Act 1987* (Cth) has that effect.
Transferring the penal jurisdiction of a House to the courts would also avoid a challenge to any punishment imposed by a House on the ground that it infringed Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR). In such cases, it has been suggested that art 14 of the ICCPR is breached because, as a criminal charge, the alleged contempt must be heard by an independent and impartial tribunal.  

Immunity from legal proceedings

There are three immunities or exemptions in relation to legal proceedings enjoyed by members, as well as by parliamentary officers and witnesses appearing before a House or a committee:
- immunity from arrest in civil causes;
- exemption from service as a juror; and
- exemption from compulsory attendance in a court or tribunal.

It is important to note that these immunities are not enjoyed for the term of membership of a House. They only arise during the period the House is actually sitting or a committee is meeting, and for a short period before and after that time to enable the various services to be performed. This reflects their rationale, which is to ensure that parliamentary proceedings are not hindered by the absence of its members, its officers and those ordered to attend a House or a committee. The further period was, for members of the House of Commons, a period of 40 days to allow sufficient time for them to travel to Westminster and to return to their homes.

Most importantly, the immunity from arrest is confined and has always been confined to civil proceedings. No immunity has ever been recognised in relation to criminal proceedings. Determining whether particular proceedings are civil or criminal can be difficult at times. In any event, the circumstances in which one is liable to arrest or detention in civil proceedings are very limited, arising mainly in relation to a failure to comply with court orders or statutory obligations. However, problems have arisen in matrimonial proceedings and in the failure to pay costs awarded against a member in a civil case.

One test which has been suggested is to decide whether the arrest is to coerce the defendant (civil) or to inflict punishment on the defendant (criminal).

230 See A Twomey, above note 77 at 102-103.
231 The House of Commons declared so in 1429 in Lark’s Case 4 Rot Parl 357, cited in E Campbell, above note 20, p 60 ff. See L M Barlin, above note 5, p 694.
232 This usually constitutes contempt of court for which the individual is liable to be detained.
233 See for example Sturton v Sturton [1963] 3 All ER 606.
235 E Campbell, above note 20, p 63.
This difficult distinction was relied on by Lord Brougham in *Wellesley v The Duke of Beaufort* in contrasting the situation where a member is held in contempt of court for failing to comply with an award which is 'in substance not criminal but civil' and where a member disrupts court proceedings which is conduct of a criminal nature.

As noted above, the exemption from appearing before a court or tribunal only operates when the House is sitting or a committee is meeting. To serve a subpoena on a member during this time constitutes contempt of the House. The proper approach is to seek the leave of the House to serve the subpoena but even if leave is granted, it appears that the member is still entitled to refuse to appear so long as the House is sitting or the committee is meeting. Even when the House is not sitting, courtesy dictates that the presiding officer of the House be notified of an intention to serve a subpoena on a member within the precincts of the Parliament.

**Commonwealth**

These immunities are codified in s 14 of the *Parliamentary Privileges Act 1987* (Cth). A member of a House is not required to attend before a court or a tribunal and shall not be arrested or detained in a civil cause on any day the House or a committee (on which the member sits) meets. These immunities also extend to a further period of five days each side of that period. The same immunities are enjoyed by the officers of each House to the extent that they are required to attend those meetings of the House or of its committees. Other persons required to attend a House or a committee also enjoy those immunities but only for the days they are required to so attend.

Although these immunities are confined to 'civil causes', whenever a senator is detained, even in criminal proceedings, the Senate expects to be notified of that detention and the reasons for it, either by the court which made the order or by the police. A similar requirement appears to apply in relation to the detention of members of the House of Representatives.

**States and Territories**

By virtue of the adoption of the privileges of the House of Commons, the members of the Queensland, Victorian and Western Australian Parliaments enjoy the same immunities as the members of the House of Commons. In South Australia, despite these immunities being abrogated, members are not liable to any penalty for non-attendance.

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236 (1831) 2 Russ & M 639 at 665-666; 39 ER 538 at 548-9.
237 This is expressly prescribed in South Australia: s 39 *Constitution Act 1934* (SA).
238 E Campbell, above note 20, p 70.
239 E Campbell, above note 20, p 70.
240 See Resolutions of 26 February 1980 (J 1153) and of 18 March 1987 (J 1693-4).
241 L M Barlin, above note 5, p 695.
242 Section 40A *Constitution Act 1867* (Qld); s 19(1) *Constitution Act 1975* (Vic); s 1 *Parliamentary Privileges Act 1891* (WA).
as a witness in court where this occurs because of their attendance in Parliament. Moreover, a specific immunity is conferred to prevent a member from being arrested or imprisoned under a writ of capias ad satisfaciendum (a writ to enforce a judgment debt) while Parliament is in session or for 10 days before it meets.\footnote{243 Section 39 Constitution Act 1934 (SA).}

In NSW, to what extent the principle of necessity appears to confer on members similar immunities is unclear due to the lack of authority. However, in \textit{Norton v Crick}\footnote{244 (1894) 15 LR (NSW) 172.} the Court easily found that no immunity arose from being served with a writ of capias ad satisfaciendum which is granted only if the defendant is about to leave or abscond to a remote part of the colony without satisfying a judgment debt. Establishment of that ground clearly precluded any view that the immunity was necessary for the member to give service to the House.

Members of both Territory legislatures enjoy the same immunities as those of the Commonwealth Parliament.\footnote{245 Section 24 Australian Capital Territory (Self-Government) Act 1988 (Cth); s 7 Legislative Assembly (Powers and Privileges) Act 1992 (NT).}

Finally, it should be noted that the position becomes more complicated where a member of one parliament is required to give evidence in a court or even a House of another Australian jurisdiction. For example, is a member of a State Parliament entitled to rely on this immunity from appearing in a federal court or even before a federal parliamentary committee?\footnote{246 Section 15(2) of the \textit{Evidence Act 1995} (Cth) addresses this issue in relation to attendance before federal and ACT courts by providing that a member of any Australian House cannot be compelled to give evidence in those courts if sitting in the House or on a committee. Comparable legislation is provided in NSW.\footnote{247 Sections 10 and 15(2) \textit{Evidence Act 1995} (NSW).}

\section*{Impact of the implied freedom of political communication}


Whether the implied freedom also restricts the scope and exercise of parliamentary privilege is unclear. In determining this issue, it may be necessary to distinguish between those privileges derived from the principle of necessity or adopted from the House of Commons and those which are now statutorily based. Only the latter has been the subject of judicial scrutiny.
In *Laurence v Katter*, a majority of the Queensland Court of Appeal (Pincus and Davies JJA) construed s 16 of the *Parliamentary Privileges Act 1987* (Cth) so as to avoid any infringement of the implied freedom. However, Fitzgerald P in dissent rejected the assumption of the majority that a declaration of privileges made by the Commonwealth Parliament pursuant to s 49 and s 51(xxxvi) of the Constitution was restricted by the implied freedom. His Honour pondered how s 49 could be subject to such an implied freedom when the unqualified adoption of the privileges of the House of Commons as at 1901 could not have been intended to be subject to that freedom. He relied on the fact that as s 49 is not subject to the implied doctrine of the separation of judicial power, it is similarly immune from the implied freedom of political discussion.

However, in deciding whether parliamentary privilege is subject to the implied freedom of political discussion, the inquiry is likely to be of a different nature depending on whether one focuses on the existence and scope of a privilege or on its exercise. Fitzgerald P is correct in concluding that the incorporation of the House of Commons privileges by s 49 is not affected by the implied freedom. The express intention in s 49 in this regard cannot be cut down by reference to such an implication. However, the position is different when there is an exercise of a privilege (obviously this arises only with those privileges which are powers as distinct from immunities), for there is no reason why such an exercise of power should not be subject to the implied freedom in the same way that any exercise of Commonwealth and State power is also subject to that restriction. For instance, it could not be argued that the Commonwealth Houses no longer enjoy those powers of the House of Commons, such as the power to punish for contempt, because they are inconsistent with the implied freedom. However, an exercise of this power would be reviewable on that ground. In other words, each exercise of a power by a House will need to be assessed on an ad hoc basis to determine whether it complies with the implied freedom.

The implied freedom will also need to be accommodated where Parliament expands the scope of these privileges by an exercise of the power conferred by s 49. These is no reason for suggesting that such an exercise of power is not restricted. The difficulty which arises is where the statutory provisions incorporate the House of Commons privileges as well as extensions to those privileges: to what extent are these statutory provisions subject to the implied freedom?

At the State level, the only case so far to have raised the applicability of the implied freedom to State parliamentary privilege is the decision of the NSW Court of Appeal in *Arena v Nader*. However, as the Court saw no impairment in that case even if the freedom applied, the issue was left open as to whether the implied freedom operated as a restriction on the power of the NSW Parliament to enact laws with respect to parliamentary privilege. The unsuccessful challenge in that case to the *Special Commissions of Inquiry Amendment Act 1997* (NSW) is considered in Chapter 6 (under freedom of speech).

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251 At 486 and 490.
252 At 453.
254 At 434.
There seems no basis to argue that the Houses of the NSW Parliament are not subject to the implied freedom of political discussion in the exercise of their powers derived from the principle of necessity — nor is the position any different in the other states which have adopted the privileges of the House of Commons.

It is important to remember that in deciding whether a violation of the implied freedom has occurred, it is necessary to determine whether the exercise of a privilege has burdened the freedom of political communication and whether this can be justified as a proportionate response to protect some other public interest. Hence, punishment inflicted by a House for contempt may well be justified in order to protect the capacity of the House to perform its functions, but the punishment must be proportionate to the likely impact on the House. As for the availability of judicial review, this may prove not to be a significant obstacle given that a court may review whether conduct punished by a House is contempt at law and whether the nature of the punishment imposed is within the scope of the privilege.

A significant benefit which flows from the implied freedom is that it probably prevents any statutory erosion of the freedom of speech, debates or proceedings in art 9 of the Bill of Rights 1689 unless this can be justified as a proportionate measure in furtherance of another legitimate public interest.

Abrogation of parliamentary privilege

Despite the sanctity which surrounds parliamentary privilege, especially the freedom of speech in art 9 of the Bill of Rights 1689, it is vulnerable to abrogation or amendment by statute.

A recent example of statutory abrogation occurred when an inquiry was held into allegations made under privilege by a member of the NSW Legislative Council, the Hon Mrs Franca Arena MLC, that the Premier, the Leader of the Opposition and a judge appointed as a royal commissioner had conspired to suppress the names of alleged paedophiles. To facilitate this inquiry, the NSW Parliament enacted legislation which empowered each House by resolution to authorise the Governor to establish a commission of inquiry into any ‘matter relating to [its] parliamentary proceedings’. Each House was also empowered by the legislation to waive parliamentary privilege except for that enjoyed by the member individually. Mrs Arena challenged the constitutional validity of the relevant legislation on several grounds, none of which was successful. Special leave to appeal to the High Court

255 Special Commissions of Inquiry Amendment Act 1997 (NSW).
256 Arena v Nader (1997) 42 NSWLR 427. The first ground, drawing an analogy from Table v Director of Public Prosecution (1997) 189 CLR 51, was that it undermined the institutional integrity of each House. The NSW Court of Appeal, while doubting the analogy, saw no such impairment. Nor did the Court accept the other arguments based on the implied freedom of political discussion, an incapacity to enact retrospective laws, and the manner and form requirement in s 7A of the Constitution Act 1902 (NSW). See E Campbell, ‘Investigating the Truth of Statements made in Parliament’ [1998] Public Law 125; G Griffith, ‘The Power and Privileges of the New South Wales Legislative Council: Arena v Nader’ (1998) 3 PLR 227.
was denied on the basis that it is well established that the plenary legislative power of the NSW Parliament extends to laws which affect the privileges of its Houses and that the legislation did not exceed any limits which may apply to that power.\textsuperscript{257} It should be noted that the Court of Appeal\textsuperscript{258} and, it would appear, also the High Court\textsuperscript{259} rejected the argument that any alteration to the privileges of the Legislative Council required a referendum pursuant to s 7A of the \textit{Constitution Act 1902} (NSW) as an alteration of its 'powers'. Both judgments confined this manner and form provision to an alteration of the \textit{legislative powers} of the House as distinct from its privileges.\textsuperscript{260}

An issue of particular importance is the extent to which parliamentary privilege can be abrogated by statute without an express declaration to that effect. It has been said at times that any statutory abrogation or amendment of parliamentary privilege must be done expressly, not impliedly.\textsuperscript{261} This view appears inconsistent with the general principle that rights may be amended by statute expressly or by 'necessary implication'. It has also been said that such an express declaration is required at the Commonwealth level by virtue of s 49 of the Constitution.

The principal authority relied on at general law for parliament to use express words when abrogating parliamentary privilege is the decision of the House of Lords in \textit{The Duke of Newcastle v Morris}.\textsuperscript{262} An argument was put in that case that new bankruptcy legislation which applied to all debtors whether traders or non-traders did not apply to non-traders who were members of Parliament because, unlike earlier legislation, no reservation had been inserted in respect of their privileges — in particular, the immunity from arrest. The House of Lords rejected this interpretation, holding that all members were subject to the legislation as debtors, but in the course of doing so, the court accepted that members' privileges were not

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\textsuperscript{257} \textit{Arena v Nader} (1997) 71 ALJR 1604 at 1605. Rather cryptically, the Court referred to the critical question being whether the legislation 'invalidly erodes the institution of Parliament itself'. Although this statement has been relied on to suggest that the freedom of speech may have been constitutionally entrenched (see H Evans, 'Franca Arena and parliamentary privilege' (1998) 1 \textit{Constitutional Law and Policy Review} 1), it must be remembered that it was only made in the context of whether special leave to appeal should be granted. Accordingly, it indicates that the point is arguable, not established.
\textsuperscript{258} \textit{Arena v Nader} (1997) 42 NSWLR 427 at 436.
\textsuperscript{259} \textit{Arena v Nader} (1997) 71 ALJR 1604 at 1605.
\textsuperscript{260} Presumably, this is also the position under s 10 of the \textit{Constitution Act 1934} (SA) in relation to the South Australian Legislative Council. There appears to be no manner and form requirement applicable to statutory variations to the privileges of the other State Parliaments.
\textsuperscript{262} (1870) LR 4 HL 661.
\end{quote}
abrogated, in particular, the immunity from arrest. While requiring express words in the statute to abrogate their privileges in this case, the Lord Chancellor, Lord Hatherley, relied on the fact that all previous bankruptcy legislation had expressly reserved them:

It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute... [emphasis added].

This decision must be considered in the light of the previous legislation which expressly reserved parliamentary privilege. In the absence of such a legislative history of express reservation, abrogation might not require express language. The preferable approach is to adopt the presumption recognised by the rules of statutory interpretation: the legislature does not intend to override fundamental common law principles, especially those concerned with individual rights, unless it has indicated a clear intention to do so. Rights which have enjoyed the benefit of this presumption under the general law include the right against self-incrimination and the right to compensation upon acquisition of property rights.263 The position is clearly stated by Isaacs J in *Ex parte Walsh and Johnson: Re Yates*:

... even where Parliament confessedly possesses plenary power within its own territory, the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would prima facie be expected to respect.264

But as Mason ACJ, Wilson and Dawson JJ observed in *Pyneboard Pty Ltd v Trade Practices Commission*, this presumption is rebuttable by virtue of ‘the general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges whether by express words or by necessary implication’.265

The test is solely one of ascertaining the intention of parliament, having regard to the language of the statute, interpreted in its historical context.266 The importance of the historical context is well illustrated by the rejection by the Judicial Committee of the

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263 See *Clissold v Percy* (1904) 1 CLR 363 at 373; *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563.
264 (1925) 37 CLR 36 at 93.
265 (1983) 152 CLR 328 at 341. See for example *Howkins v Gathercole* (1855) 24 LJ Ch 332 where the ecclesiastical privilege against distress was held not to be abrogated by statute.
Privy Council in *In re Parliamentary Privilege Act*\(^{267}\) of the argument that the *Parliamentary Privilege Act 1700* (Imp) had impliedly repealed art 9 of the *Bill of Rights*. That Act and its predecessors, beginning with the Act 12 & 13 Will 3, c 3 in 1700, permitted the commencement of suits against members of Parliament from the dissolution or prorogation of Parliament until the meeting of a new Parliament 'any privilege of Parliament to the contrary notwithstanding'. The argument that this abrogation of privilege also extended to the freedom of speech in Parliament was rejected. Parliament's intention was only to abrogate the privilege against civil proceedings being brought against members for the period of 40 days after Parliament's dissolution and 40 days prior to its meeting again.\(^{268}\)

The preferable view to adopt is that the presumption against the abrogation of fundamental rights is particularly strong in relation to parliamentary privileges, given their importance to the effective functioning of parliament. Parliament is unlikely to intend to alter its privileges without making its intention clear. Accordingly, a court will require very clear evidence of parliament's intention before parliamentary privilege is abrogated by statute.\(^{269}\) In some cases an express intention may be necessary; in others it may not.\(^{270}\)

**Commonwealth position**

In 1983 a Joint Opinion of the Commonwealth Attorney-General, Senator Gareth Evans, and the Commonwealth Solicitor-General, Sir Maurice Byers, was given that Commonwealth secrecy provisions did not abrogate the freedom of speech enjoyed by members of State Parliaments.\(^{271}\) The Joint Opinion arose out of revelations made in the South Australian House of Assembly by Mr Peter Duncan MLA which appeared to be based on evidence given in camera to the Hope Royal Commission on Australia's security and intelligence agencies. On the issue of statutory abrogation of parliamentary privilege, the Joint Opinion expressed this view:

> [I]t is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary

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\(^{267}\) [1958] AC 331.

\(^{268}\) See the dissent of Lord Denning which as a dissenting opinion of the Judicial Committee was unable to be published although it was subsequently published as an Annexure in G F Lock, above note 16 at 88. Lord Denning at 85 regarded the 1770 Act as directed to the Houses and art 9 as directed to the Courts so that no conflict was possible.

\(^{269}\) In *Aboriginal Legal Service of Western Australian (Inc) v Western Australia* (1993) 9 WAR 297, Rowland J at 304 accepted the submission that 'clear words in a statute' were required to limit parliamentary privileges.

\(^{270}\) See *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 453-4 per Fitzgerald P.

before it may be taken away: see *Duke of Newcastle v Morris* (1870) LR 4 HL 661 at 671, 677 and 680. In the case of the Parliament of the Commonwealth, s 49 of the Constitution requires an express declaration.\(^{272}\)

The first point (the need for an express declaration) has already been dealt with. The second requires closer examination, for it suggests that s 49 prevents the Commonwealth impossibly amending its privileges. Section 49, which has been cited earlier, contains two limbs. The first limb adopts the powers, privileges and immunities of the House of Commons as at 1901 until they are declared by the Commonwealth Parliament. The other limb empowers the Commonwealth Parliament to so declare. Although the High Court in *R v Richards; Ex parte Fitzpatrick and Browne*\(^ {273}\) referred to this limb as contemplating a comprehensive enactment of privileges, it did so in the context of an argument that the privilege of the House of Commons to commit for contempt was not available, as the Commonwealth had declared its privileges for the purposes of s 49 by enacting the *Parliamentary Papers Act 1908* (Cth) and the *Parliamentary Proceedings Broadcasting Act 1946* (Cth). The Court made it clear that the privileges of the House of Commons continue to apply until such time as the Parliament pursuant to s 49 has comprehensively declared its privileges. This still has not occurred.

It must follow, however, that its privileges, including those derived from the House of Commons, are amenable to ad hoc amendment and abrogation by Commonwealth legislation just as the privileges of the House of Commons in 1901 were subject to legislative change. But what is the legislative source of authority for these ad hoc amendments? In *R v Richards; Ex parte Fitzpatrick and Browne*\(^ {274}\) the view was expressed per curiam that both the *Parliamentary Papers Act 1908* (Cth) and the *Parliamentary Proceedings Broadcasting Act 1946* (Cth) were enacted pursuant to s 51(xxxix) as laws incidental to the execution of an exercise of power by Parliament, rather than pursuant to s 51(xxxvi)\(^ {275}\) and s 49. To which legislative power they were incidental is not clear — either it was s 49 with s 51(xxxvi), or else the whole body of Commonwealth legislative power. If ad hoc amendments do not constitute an exercise of the first limb of s 49 as such, s 49 cannot be relied on to support the need for an express declaration. Parliament must simply indicate its intention clearly in accordance with the principles of interpretation outlined earlier.

The issue of statutory abrogation of parliamentary privilege arises acutely in relation to witnesses appearing before Parliament or its committees when they are asked to provide evidence which they are under either a statutory or a general law duty not to disclose. It is clear that by virtue of art 9 of the *Bill of Rights* no witness can be impugned for disclosing information contrary to a duty of confidentiality under the general law. The difficulty lies in respect of statutory duties of

\(^{272}\) At 86 (para 8).

\(^{273}\) (1955) 92 CLR 157 at 168.

\(^{274}\) (1955) 92 CLR 157.

\(^{275}\) The power to make laws concerning ‘matters in respect of which the Constitution makes provision until the Parliament otherwise provides’. 

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confidentiality which have the potential to override the privilege of freedom of speech. If Parliament intends to abrogate freedom of speech when imposing these statutory duties, it must express this intention in very clear words.

Odgers\(^{276}\) asserts that witnesses appearing before a House or a parliamentary committee of the Commonwealth Parliament are immune from prosecution for disclosing information which they are prohibited by statute from disclosing. Two grounds are relied on: (i) the immunity accorded evidence given to a House or a committee by s 16 of the *Parliamentary Privileges Act 1987*; and (ii) that the relevant statutes do not expressly abrogate the immunity afforded by parliamentary privilege. As noted earlier, express abrogation may be unnecessary in some cases where Parliament's intention is clear. This view was expressed by the Commonwealth Solicitor-General in 1991 when the issue arose as to whether witnesses appearing before the Parliamentary Joint Committee on the National Crime Authority were protected by parliamentary privilege if they disclosed information contrary to secrecy provisions in the *National Crime Authority Act 1984* (Cth). A detailed account of the various opinions given by the Solicitor-General and the Attorney-General's Department is given in Odgers'.\(^{277}\) The final opinion of the Solicitor-General concluded that the secrecy provisions abrogated parliamentary privilege by 'necessary intendment' — in other words, express words were not required to amend parliamentary privilege. Nevertheless, Odgers' regards this issue as unresolved.\(^{278}\)

**Commonwealth abrogation of State parliamentary privilege**

The Joint Opinion referred to earlier in relation to the revelations made by Mr Peter Duncan MLA in 1983 in the South Australian House of Assembly also raised the issue of whether Commonwealth legislation could abrogate State parliamentary privileges.\(^{279}\) That Opinion concluded that Mr Duncan was not in breach of the relevant Commonwealth secrecy provisions since they did not purport to abrogate the parliamentary privilege of freedom of speech under s 38 of the *Constitution Act 1934* (SA). But it was the view expressed in the Joint Opinion that federal legislation was capable, in certain cases such as in time of war, of abrogating State parliamentary privilege — which prompted the Senate to refer that issue to its Standing Committee on Constitutional and Legal Affairs.

The Senate Committee in its 1985 Report cited earlier, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*,\(^{280}\) reached the contrary conclusion by a majority, on two grounds:

\(^{276}\) H Evans, above note 6, p 47.

\(^{277}\) H Evans, above note 6, pp 47-49.

\(^{278}\) H Evans, above note 6, p 50. E Campbell, above note 20, p 168 requires express words to abrogate privilege but when discussing the effect of statutory secrecy provisions at 171-172 omits reference to this issue.

\(^{279}\) See E Campbell, above note 139.

(i) that since State parliamentary privilege formed part of the 'Constitution' of each State, s 106 prevented the Commonwealth's legislative powers being used to abrogate that privilege even in time of war; and
(ii) abrogation of the privilege would infringe that limb of the Melbourne Corporation principle which protects the capacity of the States to function as such. 281
The latter of these grounds is the more persuasive since s 106 is made subject to the Constitution. 282 Contrary to the view expressed in the Joint Opinion that the Melbourne Corporation principle is confined to interference with State executive power, the High Court in Western Australia v Commonwealth (the Native Title Act Case) 283 has since held that the principle also protects State legislative power. Moreover, a Commonwealth law which purported to abrogate State parliamentary privilege would impair the very 'machinery of government', the Parliament, which, according to the Native Title Act case, is protected by the Melbourne Corporation principle. 284 A further basis for protecting State privileges is the implied freedom of political communication under the Commonwealth Constitution. 285

Conclusion

It is surprising that, despite several centuries of evolution, the precise scope and effect of parliamentary privilege remains obscure in so many respects. This chapter touches only on a few of the issues awaiting resolution. Central to them all is an appreciation of how far these privileges must extend to ensure the efficacy of parliament without at the same time unreasonably impairing individual rights. While an assessment of parliamentary privilege is desirable, the implied freedom of political communication may vest that task in the High Court rather than in the parliament, at least in relation to the privileges of the Commonwealth Parliament. The impact of that implied freedom is likely to be greater on the privilege of freedom of speech which is examined in the next chapter. 286

281 PP 235/1985: see conclusions (1) and (2) on p xix and chapter 3.
284 At 481.
285 E Campbell, above note 139 at 207-209.