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CONTEMPT OF PARLIAMENT IN VICTORIA

ABSTRACT

The wide powers of State Parliaments to punish members and outsiders vary from State to State. Authorities on contempt of Parliament have compared the different jurisdictions, but there has been no specific study of contempt of the Victorian Parliament. Its powers are different from those of the Commonwealth, New South Wales and Tasmanian parliaments, and it has a distinctive record of little-known contempt cases. This article provides an overview of the Victorian Parliament's powers and the way they have been used.

I INTRODUCTION

The special rights or privileges necessary to ensure the smooth working of Parliament include the power to punish interference or obstruction. Such interference constitutes contempt of Parliament. *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* summarises contempt in this way:

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 a contempt even though there is no precedent of the offence.¹

The two Houses of the Victorian Parliament get the full benefit of this very broad principle. Their contempt powers are based on those of the House of Commons of the United Kingdom. Each House of the Victorian Parliament, along with its committees and members, has the 'privileges immunities and powers' held by the House of Commons on 21 July 1855, the date of royal assent to the first Victorian Constitution Act.² Victorian legislation can modify these privileges, but the power to do so has remained largely unused.

The parliaments of Queensland, South Australia and Western Australia, too, have the powers, privileges and immunities of the House of Commons, as they stood at

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¹ William McKay (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, 2004), 128.

² *Constitution Act 1975* (Vic), s 19(1).

given dates in the past.³ This general grant of the privileges of the House of Commons puts these parliaments in a different position from the parliaments of New South Wales and Tasmania. Lacking a corresponding general grant, they have only the privileges that legislation creates specifically or that arise by implication from the other powers of the Parliament.⁴

The picture that emerges from the law and practice of contempt of Parliament in Victoria is of sweeping powers that are now rarely used. History provides examples of harsh, even slightly bizarre, uses of Parliament's power to punish outsiders, but the likely political reaction, and awareness of the requirements of fairness, make a repetition unlikely. Nevertheless, the law used in these cases remains almost unchanged, and while the powers remain, so too does the possibility of their use. Even in the more limited situations where Parliament is likely to take action in current times, the guarantees of procedural and substantive fairness are weak.

II FORMS OF CONTEMPT

The link with the powers of the House of Commons makes British practice the starting point for the forms of contempt of Parliament in Victoria. The following list, compiled by the United Kingdom Parliament's Joint Committee on Parliamentary Privilege, covers the most important varieties, although it is not intended to be complete. Contempts include:

- interrupting or disturbing the proceedings of, or engaging in other misconduct in the presence of, the House or a committee;
- assaulting, threatening, obstructing or intimidating a member or officer of the House in the discharge of the member's or officer's duty;
- deliberately attempting to mislead the House or a committee (by way of statement, evidence, or petition);
- deliberately publishing a false or misleading report of the proceedings of a House or a committee;
- removing, without authority, papers belonging to the House;
- falsifying or altering any papers belonging to the House or formally submitted to a committee of the House;

³ *Constitution Act 1934* (SA), s 38; *Constitution of Queensland 2001* (Qld), s 9; *Parliament of Queensland Act 2001* (Qld), s 39(1); *Parliamentary Privileges Act 1891* (WA), s 1.

⁴ Lawbook Co, *Laws of Australia* (at 19 April 2005), 19 Government, '19.2 Legislature' [83], [86]; *Egan v Willis* (1998) 195 CLR 424.

- deliberately altering, suppressing, concealing or destroying a paper required to be produced for the House or a committee;
- without reasonable excuse, failing to attend before the House or a committee after being summoned to do so;
- without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee;
- without reasonable excuse, disobeying a lawful order of the House or a committee;
- interfering with or obstructing a person who is carrying out a lawful order of the House or a committee;
- bribing or attempting to bribe a member to influence the member's conduct in respect of proceedings of the House or a committee;
- intimidating, preventing or hindering a witness from giving evidence or giving evidence in full to the House or a committee;
- bribing or attempting to bribe a witness;
- assaulting, threatening or disadvantaging a member, or a former member, on account of the member's conduct in Parliament;
- divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House.

Additionally, in the case of members:

- accepting a bribe intended to influence a member's conduct in respect of proceedings of the House or a committee;
- acting in breach of any orders of the House;
- failing to fulfil any requirement of the House, as declared in a code of conduct or otherwise, relating to the possession, declaration, or registration of financial interests or participation in debate or other proceedings.⁵

Just as interference will be a contempt even if there is no exact precedent, so too contempt need not be a breach of a particular privilege of Parliament, although interference with privileges is one category of contempt. As *House of Representatives Practice* puts it,

a breach of privilege (an infringement of one of the special rights or immunities of a House or a Member) is by its very nature a contempt (an act or omission which obstructs or impedes a House, a Member or an officer, or

⁵ Joint Committee on Parliamentary Privilege, *Report* (1999), [264], Parliament of the United Kingdom <<http://www.publications.parliament.uk>> at 20 April 2005. See also *Parliament of Queensland Act 2001* (Qld) s 37(2).

threatens or has a tendency so to do), but an action can constitute a contempt without breaching any particular right or immunity.⁶

Under s 4 of the *Parliamentary Privileges Act 1987* (Cth), conduct does not constitute contempt of a House of the Commonwealth Parliament 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’. An identical provision applies in Queensland.⁷ Contempt of the Victorian Parliament is not limited to these cases. Conduct that falls within a recognised category of contempt can be punished whether or not it satisfies the Commonwealth test, although protecting the functions of Parliament or its members remains the foundation of all contempts, at least in a historical sense.

A *Disruption and Intimidation*

The most obvious form of contempt is disruption of sittings of Parliament or its committees, through disorderly conduct, for example. Under the standing orders of the Legislative Assembly,

Any person who disobeys an order of the House, or any person other than a member who wilfully interrupts the sitting of the House, may be declared guilty of contempt.⁸

The standing orders of the Legislative Council are similar.⁹ Other examples of contempt include refusing to answer questions and giving false evidence when required to give evidence to a committee.¹⁰

Intimidation and improper influence of members in their parliamentary conduct are likewise contempts.¹¹ The best-known Australian example is the *Bankstown Observer* case, in which newspaper articles were published to intimidate and discredit a member of the House of Representatives. The House imprisoned the editor and the publisher for three months.¹²

⁶ I C Harris (ed), *House of Representatives Practice* (4th ed, 2001), 687–8.

⁷ *Parliament of Queensland Act 2001* (Qld), s 37(2).

⁸ Victoria, Standing Orders of the Legislative Assembly 2004 (‘SO, LA’), order 130.

⁹ Victoria, Standing Orders of the Legislative Council 2004 (‘SO, LC’), order 10.07. See also *ibid*, order 20.01; SO, LA, order 185.

¹⁰ McKay, above n 1, 130.

¹¹ McKay, above n 1, 143–7.

¹² Enid Campbell, *Parliamentary Privilege in Australia* (1966), 158–61; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

Interference with witnesses in parliamentary inquiries is prohibited by standing order 15.10 of the Legislative Council and standing order 200 of the Legislative Assembly.¹³ In 1969, the Legislative Council summoned a journalist and the editor of the *Sun* newspaper to the bar of the House and censured them for attacking the credibility of witnesses in a select committee inquiry.¹⁴

What if the pressure on members comes from their opponents in Parliament? In principle, intimidation will be a contempt no matter who makes the threats. The case closest to the borderline in recent times — perhaps over it — was a statement by the then Leader of the Opposition, Jeff Kennett, on 23 May 1991. Attempting to bring about an early general election, Mr Kennett made an announcement that included the following passages.

If the Government has not caused a State election to be announced by midnight, Wednesday, 29 May, 1991, then all sitting Australian Labor Party Members of the Victorian Parliament who retire from Parliament after that date and prior to the next State election, or who stand as a candidate at the next election and subsequently lose their seat will be denied access to the taxpayer funded component of their Parliamentary superannuation entitlement.

...

If the Government does allow:

- a significant number of retirements by Government Members;
- its defeat on the floor of the House, or
- its resignation

in time to allow for the date of the next State Election to be announced by midnight, Wednesday, 29 May 1991 and the subsequent prorogation of Parliament the next day to allow the passing of the Supply Bill by the Legislative Council, then all superannuation entitlements for Members who retire or lose their seats at the subsequent election will be guaranteed.¹⁵

The three-year minimum term for the Legislative Assembly had not yet expired, which accounted for the complexity of the steps demanded to make an election possible. Two of the three alternative demands related directly to the exercise of members' parliamentary functions (indeed, required them to resign their seats or

¹³ Interference with witnesses is discussed in Legislative Council Standing Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Report on Special Report from General Purpose Standing Committee No 2 Concerning a Possible Contempt* (1998), 17–24.

¹⁴ Raymond Wright, *A People's Counsel: A History of the Parliament of Victoria 1856–1990* (1992), 215–16.

¹⁵ Legislative Assembly Privileges Committee, Parliament of Victoria, *Report on Complaint made by the Treasurer* (1992), 98.

vote in a certain way in the House). The other limb of the demand was for the resignation of the government. The connection with proceedings in Parliament is less direct in this case, which might be said to have concerned the executive branch of government rather than the Parliament. But whatever the traditional distinctions between ministers' tenure in government and their work as MPs, in the modern context they can hardly be separated.

At the request of the Treasurer (to whom Mr Kennett had sent a copy), the Speaker considered the statement and concluded that there was a prima facie case of breach of privilege. The relevant privilege was freedom from molestation; the threat of imposing a pecuniary loss on a member on account of conduct in Parliament constituted the breach. The Assembly voted along party lines to refer the matter to its Privileges Committee.¹⁶

The Leader of the Opposition withdrew his demands, and the Privileges Committee divided on party lines, with the result that it made no finding on the matter. The Clerk of the Legislative Assembly identified two previous occasions (one in the nineteenth century) on which alleged threats by one member to another had led to motions for inquiry or punishment. The motions were withdrawn after explanations or expressions of regret. A third case, again from the nineteenth century, involved threats from a member of the public and was resolved in the same way.¹⁷

If it were not for one unusual feature of the case, it would be easy to conclude that the statement constituted a contempt of Parliament, in that it threatened members with financial disadvantage if they did not carry out their parliamentary functions in a certain way. The unusual feature was that Mr Kennett's threat was effectively one to introduce legislation; it could be carried out only by Parliament itself. The principle that underlies this form of contempt of parliament — the protection of members from intimidation — suggests that even a threat of this kind could constitute a contempt. The attempted coercion was no less real and potentially effective because Parliament was the instrument by which it was to be carried out.

B *Criticising Parliament or MPs*

Published attacks on the character or conduct of members of Parliament, in that capacity, can amount to contempt.¹⁸ Truth is no defence.¹⁹ Action for defamation is a more appropriate remedy, as a House of Commons Select Committee on

¹⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 May 1991, 2499–517.

¹⁷ *Report on Complaint made by the Treasurer*, above n 15, 72.

¹⁸ McKay, above n 1, 144–5.

¹⁹ Joint Select Committee on Parliamentary Privilege, Parliament of Australia, *Final Report* (1984), 85.

Parliamentary Privilege concluded in 1967.²⁰ Section 6 of the *Parliamentary Privileges Act 1987* (Cth) has abolished this branch of contempt in the Commonwealth Parliament, except where the offending words are spoken in the presence of the House or a committee. But the old law remains for the Victorian Parliament. The inappropriateness and potential unfairness of the member's House (and so perhaps the member's party) punishing a political critic will hopefully continue to deter modern parliaments from acting on this branch of the law of privilege. The implied freedom of political communication, discussed below, may now provide some protection against the use of the power in cases of political criticism.

Past cases show the absurdity of attempts to punish most such criticism. In 1906, the Legislative Assembly summoned a Methodist clergyman to explain a particularly violent attack on the government in one of his sermons. He was censured by the Assembly in what one of the government's own ministers described as a 'dreadful fiasco'.²¹ Nineteenth-century history includes several other examples of journalists and others being summoned to the bar of the House to explain criticism of Parliament or its members.²²

In 1996, a satirical newspaper report of parliamentary proceedings (which, among other things, curiously referred to the Premier by his wife's name as 'Mr Felicity Kennett') prompted the Speaker of the Legislative Assembly to take action. He issued instructions that the journalist concerned should be requested to appear before the Serjeant-at-Arms, who would 'instruct the journalist on what is fair and accurate'.²³ The meeting did not take place, and instead the editor of the newspaper and the Speaker resolved the case between themselves.²⁴

The Speaker's statement to Parliament about the case referred to the prohibition on satire in the Assembly's rules for broadcasting proceedings, although it is not clear why this was relevant to a newspaper report. A more obvious basis for his action was the Parliament's power to control reporters' access to the chambers and publication of its debates.²⁵

²⁰ House of Commons Select Committee on Parliamentary Privilege, Parliament of the United Kingdom, *Report* (1967).

²¹ E H Sugden and F W Eggleston, *George Swinburne: A Biography* (1931), 180.

²² Wright, above n 14, 49, 105, 106; Memorandum by the Parliament of Victoria, in Joint Committee on Parliamentary Privilege, above n 5, vol 3.

²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 30 May 1996, 407–8.

²⁴ Jules Scarlett, "'Sergeant Says': Contempt of Parliament in Victoria' (1996) 3 *Media Law Reporter* 101, 107.

²⁵ See McKay, above n 1, 98.

C *Petitions and Misleading Parliament*

Abuse of the right to petition Parliament is a contempt. In the past, such contempts in the British Parliament have included presenting a petition containing gross misrepresentations, and threatening to submit a petition unless a member conferred a benefit.²⁶ In the most extreme Australian example, the Legislative Council of Western Australia imprisoned Brian Easton in 1995 for failing to apologise for drawing up a misleading petition that was submitted to the House.²⁷

It is a contempt for a member deliberately to mislead the House.²⁸ Despite, or perhaps because of, the frequency of allegations of failure to tell the truth in politics, formal investigations into this form of contempt are rare. Where an attempt is made to initiate a privilege inquiry into a misleading statement, a common stumbling block is the need for evidence that the act was deliberate. If, as often happens, the Speaker rules that there is no *prima facie* case because of the lack of such evidence, the matter does not have precedence in debate and usually drops.²⁹ The alternative of proceeding by notice of motion effectively depends on the willingness of the government to allow the motion to be debated. Even if the Speaker does give the matter precedence, government MPs may vote on party lines to reject a reference to a privileges committee.³⁰

In 1991, the Legislative Assembly referred to the Privileges Committee the question of whether the Transport Minister, Peter Spyker, had misled the House in an answer to a question in Parliament. The government allowed the reference but commanded a majority in the committee, which divided along party lines in finding that the minister had relied in good faith on official advice and did not deliberately mislead the House.³¹

Making false statements to Parliament can constitute other, more general forms of contempt, as in the case of Franca Arena, a member of the New South Wales Legislative Council. After an investigation by a special commission of inquiry, the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics found that Mrs Arena had made untrue allegations that the Premier, the Leader of

²⁶ Ibid, 131–2, n 8.

²⁷ Heather Goodwin, Arran Stewart and Melville Thomas, 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25 *University of Western Australia Law Review* 187.

²⁸ McKay, above n 1, 132.

²⁹ Legislative Assembly Privileges Committee, Parliament of Victoria, *Report on Complaint made by the Leader of the National Party* (1991), 55; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 September 2000, 459–60.

³⁰ Eg Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 2000, 1111.

³¹ *Report on Complaint made by the Leader of the National Party*, above n 29, 43.

the Opposition and others had attempted to protect paedophiles from exposure by the Royal Commission into the New South Wales Police Service. The committee concluded that her conduct ‘fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute’ and that she was thus in contempt of the House.³² The Council resolved that Mrs Arena should withdraw her allegations and apologise, on pain of suspension from the House, but it later accepted a modified apology.³³

D *Corruption*

Corruption on the part of members is also a contempt. This branch of contempt has remained current in Britain, as the ‘cash for questions’ inquiry of 1994 demonstrated.³⁴ In Australia, cases of corruption are rarely, if ever, investigated through the machinery of a parliamentary privilege inquiry, although the Victorian Parliament’s greatest corruption scandal of the nineteenth century was investigated in this way, leading to the expulsion of two members in 1869.³⁵ In modern times, when party discipline dominates the Houses and their committees, other bodies, including the police, and boards and commissions of inquiry, are better equipped to investigate.

E *Publishing Committee Evidence*

The premature publication of committee debates, proceedings, evidence or draft reports is a contempt.³⁶ In the past, this prohibition on publication was theoretically absolute, but standing orders adopted in 2004 give the media more latitude. They regularise the previous practice of allowing publication of evidence that is given to committees in public hearings, before it has been reported to the House. Under standing order 14.14 of the Legislative Council and standing order 217 of the Legislative Assembly, evidence given to parliamentary committees is to be taken in public and may be published immediately. Evidence not taken in public, and committee documents and submissions not authorised for publication, are not to be disclosed before they are reported to the House. Publication of such documents remains a contempt.

³² Legislative Council Standing Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC* (1998), vol 1, 81.

³³ Legislative Council of New South Wales, *Minutes of the Proceedings*, 1 July 1998, 634–5; *ibid*, 16 September 1998, 694–6.

³⁴ See McKay, above n 1, 132–6.

³⁵ Legislative Assembly Select Committee on Complaint, Parliament of Victoria, *Report* (1869); Wright, above n 14, 65–8.

³⁶ McKay, above n 1, 139–42; *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444, 452 (Fitzgerald P).

F *Leave to Produce Hansard*

Until 1980, British courts commonly required litigants to obtain the leave of the House of Commons before producing records of its proceedings in evidence. This requirement is sometimes discussed as an adjunct to the privilege of freedom of speech (for example, in a report of the House of Representatives Committee of Privileges), but it also involves other privileges.³⁷ *Erskine May* treats it as a branch of the privilege of exclusive cognisance of proceedings, while the Privy Council has identified it with the privilege of restraining publication of parliamentary proceedings and noted that it has sometimes been confused with the restriction on questioning the propriety of parliamentary events.³⁸ As a former Clerk of the House of Commons pointed out, the House never resolved specifically to require leave for this use of its records, and no case of production without leave has been treated as a contempt.³⁹ The House of Commons resolved in 1980 not to require litigants to seek leave to produce Hansard, and the Senate passed a corresponding resolution in 1988.⁴⁰

In New South Wales, it has been held to be a breach of privilege to use parliamentary debates in court proceedings without the permission of the House concerned, but Blackburn CJ's later disagreement with this decision is more persuasive.⁴¹ Sometimes, New South Wales courts have not required permission of the House to admit Hansard in evidence, although restrictions on the uses to which Hansard may be put, based on art 9 of the *Bill of Rights 1689* (UK), remain. The House of Representatives Committee of Privileges objected to the course taken by the court in one such case.⁴² The New South Wales decisions are brief and sometimes fail clearly to identify the basis of the requirement, but the result is that

³⁷ See House of Representatives Committee of Privileges, Parliament of Australia, *Report Relating to the Use of or Reference to the Records or Proceedings of the House in the Courts* (1980), 5.

³⁸ McKay, above n 1, 104–5; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337.

³⁹ House of Commons Committee of Privileges, Parliament of the United Kingdom, *First Report: Reference to Official Report of Debates in Court Proceedings* (1978–9), in *Report Relating to the Use of or Reference to the Records or Proceedings of the House*, above n 37, 79.

⁴⁰ McKay, above n 1, 105; J R Odgers, *Odgers' Australian Senate Practice* (11th ed, 2004), 603–4.

⁴¹ *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435, 438–9 (Needham J); *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1, 4–5 (Blackburn CJ).

⁴² *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287 (Begg J); *Munday v Askin* [1982] 2 NSWLR 369 (CA); *Henning v Australian Consolidated Press Ltd* [1982] 2 NSWLR 374 (Hunt J); Harris, above n 6, 697–8; *Report Relating to the Use of or Reference to the Records or Proceedings of the House*, above n 37, 4–5.

in practice the courts accept Hansard in evidence without leave of the House concerned. In Victoria, it is unclear whether leave of the House has been sought for mere production in evidence of parliamentary records. The past Victorian cases listed by the House of Representatives Committee of Privileges in 1980 all concerned a different, although related matter: permission for the Clerk or members of the Legislative Assembly to give evidence.⁴³

A resolution of the House of Commons states that the House must give leave before officers or shorthand writers can give evidence of proceedings.⁴⁴ The resolution predates the recording of parliamentary debates by official shorthand writers, and refers only to minutes of evidence, not to records of debates, but in practice the House of Commons appears to have required leave before officials give any evidence of parliamentary proceedings, including debates.⁴⁵ Similarly, members cannot be compelled to give evidence regarding proceedings in Parliament without permission of the House, except to show merely that an event occurred — that documents were tabled, for instance.⁴⁶

Although, since 2004, Victorian standing orders no longer require the two Houses to follow the practice of the House of Commons where their own standing orders do not apply, they should follow the House of Commons resolution of 1980 and allow reference to Hansard without leave, if the question arose.⁴⁷

What Hansard is used to prove is, as the Clerk of the House of Commons said, ‘quite a different matter’.⁴⁸ Independently of requirements for obtaining leave to produce, the Bill of Rights and (in the case of Commonwealth debates) the *Parliamentary Privileges Act 1987* (Cth) govern the uses to which the material can be put.⁴⁹

Section 60 of the *Evidence Act 1958* (Vic) makes copies of votes and proceedings of Parliament admissible as evidence on mere production, without further proof. In *Wright and Advertiser Newspapers Ltd v Lewis*, the South Australian Supreme Court held that the corresponding provision in s 36 of the *Evidence Act 1929* (SA)

⁴³ *Report Relating to the Use of or Reference to the Records or Proceedings of the House*, above n 37, 86–7.

⁴⁴ McKay, above n 1, 104. SO, LC, 2004, order 15.12 and SO, LA, 2004, order 197 have the same effect.

⁴⁵ See McKay, above n 1, 104–5.

⁴⁶ *Ibid*; *Sankey v Whitlam* (1978) 142 CLR 1, 36–7 (Gibbs ACJ).

⁴⁷ Compare Standing Orders of the Legislative Council, 1992, order 308; Standing Orders and Rules of the Legislative Assembly, 1996, order 3; SO, LC, 2004, order 21.01; SO, LA, 2004, order 1.

⁴⁸ *Report Relating to the Use of or Reference to the Records or Proceedings of the House*, above n 37, 80.

⁴⁹ See Enid Campbell, *Parliamentary Privilege* (2003), ch 6.

allowed production of Hansard without the permission of Parliament.⁵⁰ But the South Australian provision goes beyond its Victorian counterpart, by referring to journals or minutes of either House as well as votes and proceedings (though without mentioning Hansard). It is also very doubtful whether s 60 of the Victorian Act was intended to have this effect, since it is directed to proof and admissibility rather than leave of the House to produce.

III OTHER CONTEMPTS

‘The categories of conduct constituting contempt are not closed’, as the United Kingdom Joint Committee on Parliamentary Privilege put it.⁵¹ New forms of interference with the work of Parliament, not previously punished, can constitute contempt. This allows Parliament to respond flexibly to new situations, but it also deprives contempt of the certainty sought in the criminal law.

A Victorian case shows how far Parliament can go in punishing new forms of contempt. In 1899, Melbourne newspapers reported the hearings of a parliamentary committee set up to investigate claims of nepotism against the President of the Board of Land and Works. The hearings were open to reporters and the public, and the reports included comment on witnesses and their evidence. The comment was circumspect by modern standards, but it offended MPs. Despite admissions that no precedent could be found, the Legislative Assembly ordered the imprisonment of two newspaper publishers on the ground that their reports were intended to influence the minds of the committee.⁵²

Apologies and payment of fees averted imprisonment of the two publishers, but punishing them for temperate public comment on open hearings was seen as extreme even at the time (not least by the Premier). Their conduct fell within none of the recognised categories of interference, such as intimidation or solicitation of witnesses.

A *Waiver*

Sometimes Parliament is said to be able to remove a potential contempt by waiving its privileges, but the law on this point has often been misunderstood. Much of the discussion of waiver has arisen in connection with the privilege of freedom of speech. A member cannot waive the privilege of freedom of speech. Nor can the House waive or alter it. It is part of the law that the courts must enforce in

⁵⁰ (1990) 53 SASR 416, 427 (King CJ; White J concurring), 443 (Olsson J).

⁵¹ Joint Committee on Parliamentary Privilege, above n 5, [264].

⁵² Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 1899, 2410–27.

proceedings before them, whatever the wishes of the House or the member concerned.⁵³ In Victoria, the President of the Legislative Council and the Speaker of the Legislative Assembly have jointly affirmed that the privilege of freedom of speech cannot be waived by individual members and that Parliament itself (or more accurately an individual House) 'has no power to permit its members or former members to waive any such privilege'.⁵⁴ The President of the Senate made a similar statement in 1985.⁵⁵

In other cases, where the questioning of parliamentary proceedings by a court is not at issue, the House may be able to achieve the effect of waiver by choosing not to insist on its privileges or not to treat actions as contempt.⁵⁶ The courts are reluctant to enforce a privilege if the House chooses not to. This effectively allows a breach of privilege if the House takes no action. In *Halden v Marks*, the Western Australian Supreme Court held that the remedy for a breach of parliamentary privilege by a royal commission was to bring it to the attention of Parliament, not to apply to the court. The judgment noted that the courts have considered parliamentary privilege in two main categories of case: where a question of privilege arises in a case already before the court (when a party seeks to rely on something done in Parliament, for example, contrary to the privilege of freedom of speech), and where the courts review action taken by Parliament to enforce its proceedings. The courts will not adjudicate on this topic except in these limited circumstances.⁵⁷

Legislation can allow waiver of the privilege of freedom of speech. Section 13 of the *Defamation Act 1996* (UK) aimed to deal with the problems created when privilege restricts the admissible evidence in defamation actions, potentially preventing a fair trial. The section allows a person whose conduct in proceedings in Parliament, or in relation to such proceedings, is in issue in defamation proceedings to waive the protection of art 9 of the Bill of Rights. The waiver is limited: it applies only to the person who gives it, and only to the defamation proceedings, and although it allows evidence of parliamentary proceedings to be given and questioned, it does not allow the imposition of legal liability. The operation of the Act has been criticised. A joint parliamentary committee has since recommended

⁵³ See McKay, above n 1, 77; Odgers, above n 40, 72; *Rann v Olsen* (2000) 76 SASR 450, 491 (Prior J); *Rowan v Cornwall (No 5)* (2002) 82 SASR 152, 181–2 (DeBelle J); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 335; *Hamilton v Al Fayed* [2001] 1 AC 395, 404 (Lord Browne-Wilkinson); Gerard Carney, *Members of Parliament: Law and Ethics* (2000), 210. Contra: *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513, 521 (Cooke P).

⁵⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 September 2000, 459.

⁵⁵ Australia, *Parliamentary Debates*, Senate, 25 March 1985, 741.

⁵⁶ See McKay, above n 1, 76–7.

⁵⁷ *Halden v Marks* (1995) 17 WAR 447, 462–3.

that the House, rather than the individual member, should have the capacity to waive art 9, and that waiver should be possible in all cases, not just those of defamation. Waiver would still stop short of allowing legal liability to be imposed.⁵⁸

No Australian jurisdiction has followed the British provision, although the *Special Commissions of Inquiry Amendment Act 1997* (NSW) did allow either House of the New South Wales Parliament to authorise an inquiry to be appointed by the Governor into matters relating to parliamentary proceedings. These provisions operated only for six months, to allow an inquiry into statements made in Parliament by a member of the Legislative Council, Franca Arena. The Act allowed each House to waive privilege in connection with the inquiry, although the right of individual members to claim privilege remained.⁵⁹

B Penalties

Penalties for contempt of Parliament are at the discretion of the House concerned, although the law imposes some restrictions on the kinds of punishment that can be imposed.⁶⁰ Most cases result in nothing more than an inquiry and sometimes a reprimand. However, each House retains the power to imprison as an ultimate sanction.

The House of Commons has resolved that its penal jurisdiction should be exercised (a) in any event as sparingly as possible, and (b) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions.⁶¹

Victorian standing orders contain no equivalent provision, although Parliament has shown similar self-restraint in practice, at least in modern times.

⁵⁸ Joint Committee on Parliamentary Privilege, above n 5, [60]–[82].

⁵⁹ *Special Commissions of Inquiry Amendment Act 1997* (NSW), s 3; *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, above n 32; *Arena v Nader* (1997) 42 NSWLR 427; Enid Campbell, ‘Investigating the Truth of Statements Made in Parliament: The Australian Experience’ [1998] *Public Law* 125.

⁶⁰ See generally Senate Committee of Privileges, Parliament of Australia, *Penalties for Contempt: Information Paper* (2000).

⁶¹ United Kingdom, House of Commons, *Journals*, 1977–8, 170, in Joint Committee on Parliamentary Privilege, above n 5, [20].

C Procedure

Procedure is largely at the discretion of the House when it investigates a possible contempt. A member must send a written complaint of contempt or breach of privilege to the presiding officer of the House concerned, unless the breach occurs in the course of debate. The presiding officer decides whether the matter should have precedence in debate; without precedence, the complaint is effectively shelved. The practice of the Legislative Assembly is that presiding officers base their decision on whether the matter falls within the general ambit of privilege and is not trivial.⁶² In the Legislative Council, the standing order that regulates procedure for dealing with matters of privilege does not specify grounds for giving the matter precedence, but in practice presiding officers have based their decision on whether the complaint raises a 'substantial' or 'real, substantial and important' issue of privilege.⁶³ If the presiding officer accepts the complaint, it is listed for debate the following day. The House can deal with the matter itself, but the usual practice is now to refer it to a committee.

When the House or committee comes to deal with the matter, it is free to follow whatever procedure it chooses.⁶⁴ The House can order the attendance of anyone who may have committed a contempt, along with others who can provide information; a committee can summon such people as witnesses. People who may have committed a contempt need not be informed of the allegations against them, although in practice they are.⁶⁵ Restrictions on judicial review, discussed below, greatly limit avenues of appeal.

The House of Commons has occasionally allowed persons accused of contempt to be represented by counsel when appearing before the House itself,⁶⁶ but this practice has not been followed in Victoria. Legal counsel cannot address a committee on behalf of others, unless the House gives special permission; committee witnesses cannot call or question other witnesses and may be refused permission to be accompanied by legal advisers.⁶⁷ Proceedings need not be open to the public.⁶⁸ A committee investigating a matter of privilege will usually receive written advice from the Clerk of the House about the relevant law and practice. The

⁶² Victoria, *Parliamentary Debates*, Legislative Assembly, 19 April 1978, 1756–7.

⁶³ SO, LC, order 19.01; Victoria, Legislative Council, *Minutes of the Proceedings*, 4 November 1999, 14; Victoria, *Parliamentary Debates*, Legislative Council, 18 May 1993, 915; *ibid*, 12 August 1992, 25.

⁶⁴ Campbell, *Parliamentary Privilege in Australia*, above n 12, 115.

⁶⁵ *Ibid*.

⁶⁶ McKay, above n 1, 169.

⁶⁷ Legislative Assembly Privileges Committee, Parliament of Victoria, *Report on Matter Referred to the Committee on 24 October 1991* (1992), 23.

⁶⁸ *Ibid*.

committee reports to the House, which then makes its own decision about the action to be taken. In the Legislative Assembly, members with a personal stake in the case are free to take part in proceedings, although the ordinary exclusion from voting of members with a direct pecuniary interest will apply. In the Council, members with a ‘personal, pecuniary or direct interest’ in a question are unable to vote.⁶⁹

Parliament has been increasingly conscious of the need for fairness in the way it exercises these powers, but, taken overall, the law of contempt allows wholesale breaches of the principles of procedural fairness. The European Court of Human Rights has held that the Maltese Parliament violated the right to a fair hearing by an independent and impartial tribunal, when members who had been attacked in the press participated in contempt proceedings against their critics.⁷⁰ These problems led the United Kingdom Joint Committee on Parliamentary Privilege to recommend transferring most of Parliament’s penal powers over non-members to the courts, and reforming the procedure for dealing with members to ensure that it meets the requirements of procedural fairness.⁷¹

D *Reprimand*

Each House can reprimand or admonish members and non-members for contempt. A non-member (a ‘stranger’) can be summoned to the bar of the House to hear the reprimand in person. Members can be reprimanded in their places or in their absence. They can even be taken into custody and reprimanded at the bar of the House.⁷²

E *Suspension and Expulsion of Members*

The standing orders of each House allow the suspension of members for misconduct of various forms, including disorderly conduct and disregarding the authority of the Chair. Suspension may be for the remainder of the sitting, or for such period as the House thinks fit.⁷³

Suspension under standing orders supplements a more general power. In British practice, suspension is not limited to the grounds set out in standing orders, but can also be ordered in other cases of contempt.⁷⁴ The Victorian standing orders

⁶⁹ See SO, LA, 2004, order 170; SO, LC, 2004, order 11.13.

⁷⁰ *Demicoli v Malta* (1992) 14 EHRR 47.

⁷¹ Joint Committee on Parliamentary Privilege, above n 5, [280]–[299], [304]–[314].

⁷² McKay, above n 1, 162–3.

⁷³ SO, LC, order 10.04; SO, LA, order 126. See also Sessional Orders of the Legislative Council, 2005, order 31.

⁷⁴ McKay, above n 1, 163–4.

preserve the power of each House to proceed against members in such cases.⁷⁵ Even apart from standing orders and British practice, a power of suspension is necessary for the performance of the functions of the House. In New South Wales, where Parliament lacks a general, statutory grant of powers and privileges, the power to suspend a member for contempt was confirmed in the case of the Treasurer, Michael Egan, after he disobeyed orders to produce documents to the Legislative Council.⁷⁶

Under the standing orders of the House of Commons, suspended members lose their parliamentary salary for the period of suspension; their entitlement to a salary derives not from statute but from resolutions of the House.⁷⁷ In Victoria, by contrast, members are paid under an Act of Parliament, the *Parliamentary Salaries and Superannuation Act 1968* (Vic), which contains no provision for non-payment during suspension. An attempt to suspend the salary would be inconsistent with the Act. The Queensland Supreme Court overturned an attempt to dock a suspended member's salary in 1946, albeit before the Legislative Assembly was given the full privileges of the House of Commons, and the same conclusion is likely to follow in Victoria.⁷⁸

Suspension is temporary, but expulsion deprives a member of his or her seat. Like suspension, it is a power derived from the House of Commons.⁷⁹ Section 8 of the *Parliamentary Privileges Act 1987* (Cth) has removed the power of each House of the Commonwealth Parliament to expel members, but no such restriction applies in Victoria. While the power remains, so too does the possibility that its exercise will divide the House on party lines, and that party considerations will weigh heavily in its use. All the Victorian cases, however, predate the emergence of a strong party system.

The Legislative Assembly expelled Patrick Costello for electoral fraud in 1861, James Butters and Charles Jones on grounds of corruption in 1869, Charles McKean in 1876 for criticising the Assembly, and Edward Findley in 1901 for his (apparently unwitting) role as publisher of a newspaper that printed an attack on the

⁷⁵ SO, LC, order 10.06; SO, LA, order 127(2).

⁷⁶ *Egan v Willis* (1998) 195 CLR 424.

⁷⁷ Joint Committee on Parliamentary Privilege, above n 5, [277]; McKay, above n 1, 23–4, 164; Standing Orders of the House of Commons—Public Business, 2004, order 45A.

⁷⁸ See *R v Dickson; Ex parte Barnes* [1947] St R Qd 133; Enid Campbell, 'The Penal Jurisdiction of Australian Houses of Parliament' (1963) 4 *Sydney Law Review* 212, 215–16.

⁷⁹ See McKay, above n 1, 164–6; Campbell, *Parliamentary Privilege in Australia*, above n 12, 103.

King.⁸⁰ The Legislative Council appears to have expelled none of its sitting members, although the result was similar when a committee declared the election of William Kaye void in 1857 on grounds of bribery.⁸¹ In New South Wales, the Legislative Assembly has expelled three members, but none since 1917; the only expulsion from the Legislative Council was in 1969.⁸² The Commonwealth Parliament has expelled only one member, Hugh Mahon, who was expelled from the House of Representatives in 1920 for what the Government regarded as a seditious speech at a public meeting about British policy in Ireland.⁸³

The expelled member is eligible to stand for re-election in the poll held to fill the vacancy. This effectively allows the voters to reverse the decision of the House, as they did by re-electing Butters and Jones despite clear evidence that they were corrupt. Expulsion also creates opportunities for political manipulation, if the target is an opposition member and the government has hopes of winning the resulting by-election.

F *Fine and Imprisonment*

Parliament's ultimate sanction for contempt is imprisonment. The power of the House of Commons, exercisable by each House of the Victorian Parliament, is to imprison until the end of the current session; the House of Commons has generally detained prisoners, not for a fixed period, but until they express 'proper contrition' or the House adopts a motion for discharge.⁸⁴ Because prorogation is rare in current Victorian practice, the current session could extend for up to four years. In both England and Australia, the places where prisoners have been held have varied. In the nineteenth century, the Legislative Assembly ordered detention in Parliament House itself or in prison.

Although the power to imprison undoubtedly exists, it is very rarely used. The House of Commons has detained hundreds of prisoners over the course of its history, but the most recent case was in 1880, aside from brief detention for misconduct in the public galleries.⁸⁵ All the Victorian examples date from the

⁸⁰ Wright, above n 14, 65, 68, 144–5; *Australian Dictionary of Biography* (1966–), vol 8, 496; Gareth Griffith, *Expulsion of Members of the NSW Parliament* (2003), 5.1.

⁸¹ Legislative Council Select Committee on Elections and Qualifications, Parliament of Victoria, *Report on the Petition of William Highett* (1857); Victoria, *Minutes of the Proceedings of the Legislative Council*, 29 April 1857, 117.

⁸² Griffith, *Expulsion of Members of the NSW Parliament*, above n 80, part 4; see *Armstrong v Budd* (1969) 71 SR (NSW) 386, and Gareth Griffith, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW* (2004).

⁸³ Gavin Souter, *Acts of Parliament: A Narrative History of the Senate and House of Representatives, Commonwealth of Australia* (1988), 182–4.

⁸⁴ McKay, above n 1, 160–1.

⁸⁵ *Ibid.*, 156, n 7.

nineteenth century. Those imprisoned were the publishers of the *Argus* newspaper, George Dill and Hugh George, who printed attacks on members of Parliament in 1862 and 1866; two businessmen, Hugh Glass and John Quarterman, implicated in parliamentary corruption in 1869; and, in 1876, a member of the Legislative Assembly, James McKean, who criticised Parliament during court proceedings.⁸⁶ As discussed below, the Assembly ordered the imprisonment of two newspaper publishers, John Packer and Alfred Ebsworth, in 1899, but they were discharged before being sent to gaol.

In 1955 the Commonwealth Parliament gaoled two prisoners for three months. They were Raymond Fitzpatrick and Frank Browne, owner and editor respectively of the *Bankstown Observer* newspaper, which the House of Representatives resolved had published an article intended to influence or intimidate one of its members.⁸⁷ Most recently, the Legislative Council of Western Australia imprisoned Brian Easton in 1995 for failing to comply with an order to apologise for drawing up a misleading petition.⁸⁸ Enid Campbell has listed four other cases of imprisonment by the parliaments of Queensland, South Australia, Tasmania and Western Australia, the most recent in 1904.⁸⁹

The House of Commons once had the power to impose fines, but it has remained unused since 1666.⁹⁰ The long period of disuse makes its continued existence very doubtful, as indeed was its existence in 1855, the point of reference for the contempt powers of the Victorian Parliament. Similar doubt surrounded the powers of the Commonwealth Parliament, until s 7(5) of the *Parliamentary Privileges Act 1987* (Cth) gave an explicit power to impose fines.⁹¹ The capacity of the Houses of the Victorian Parliament to impose fines is accordingly uncertain, although they are unlikely to have the power and appear never to have attempted to exercise it. By contrast, the Commonwealth, Queensland and Western Australian parliaments have statutory powers to impose fines.⁹²

⁸⁶ See *In re Dill* (1862) 1 W&W(L) 171; *Dill v Murphy* (1862) 1 W&W(L) 342; *Dill v Murphy* (1864) 1 Moo PC (NS) 487; 15 ER 784; *In re Glass* (1869) 6 WW&a'B(L) 45; *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560; 17 ER 170; Campbell, *Parliamentary Privilege in Australia*, above n 12, 125–7; J M Bennett, *Sir William Stawell: Second Chief Justice of Victoria 1857–1886* (2004), 112–17, 121–5.

⁸⁷ Souter, above n 83, 431–3; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

⁸⁸ Goodwin, Stewart and Thomas, above n 27.

⁸⁹ Campbell, 'The Penal Jurisdiction of Australian Houses of Parliament', above n 78, 212, 223–4, n 60.

⁹⁰ McKay, above n 1, 161–2.

⁹¹ Harris, above n 6, 719–20.

⁹² *Parliamentary Privileges Act 1987* (Cth) s 7(5); *Parliament of Queensland Act 2001* (Qld) s 39(2); *Parliamentary Privileges Act 1891* (WA) s 8.

Standing order 10.09 of the Legislative Council allows the President of the Council to set fees to be paid by prisoners of the House to defray the costs of their detention, a payment which, as early editions of *Erskine May* noted, ‘partakes of the character of a fine’.⁹³ The equivalent provision once found in the standing orders of the Legislative Assembly was omitted from standing orders adopted in 2004. In 1899, when the Assembly ordered the imprisonment of newspaper publishers Packer and Ebsworth, the Speaker announced his intention to defer issuing the relevant warrants until the next day, and another member foreshadowed that he would then move the prisoners’ discharge, subject to an apology and payment of the prescribed fees. The publishers apologised, paid the fees and were released almost as soon as they were detained. The outcome, as members were aware, was effectively to reprimand and fine them.⁹⁴

Under s 9 of the *Members of Parliament (Register of Interests) Act 1978* (Vic), wilful contravention of the Act amounts to contempt and may be punished by fine. The Act requires members to disclose their pecuniary interests, and includes a code of conduct.

IV JUDICIAL REVIEW

The courts strictly limit the opportunities for judicial review of decisions by Parliament to punish for contempt. In England, this approach is the result of old tensions between the courts and Parliament, in the context of a system in which Parliament has traditionally been sovereign and not subject to judicial review. In the past, these tensions have sometimes erupted into outright conflict, as when the House of Commons ordered the imprisonment of a litigant, lawyers and court officials in the *Stockdale* case in 1840; some members favoured the imprisonment of the judges as well.⁹⁵ In modern times, mutual restraint, partly expressed in the rules concerning judicial review, has prevented a repetition of such battles.

In Victoria, acceptance of judicial review of the validity of legislation produced a different climate. An early decision of the Supreme Court asserted a wide power of review of warrants issued by the Legislative Assembly for the imprisonment of

⁹³ Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (6th ed, 1868), 104.

⁹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 1899, 2419, 2426–7; *ibid*, 16 November 1899, 2444–6.

⁹⁵ See McKay, above n 1, ch 11; Memorandum by Mr Geoffrey Lock, in Joint Committee on Parliamentary Privilege, above n 5, vol 3; *Stockdale v Hansard* (1837) 7 Car & P 731; 173 ER 319; *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112; *Stockdale v Hansard* (1840) 11 Ad & El 253; 113 ER 411; *Stockdale v Hansard* (1840) 11 Ad & El 297; 113 ER 428.

people held to be in contempt, and required the House to specify the grounds for its action. The Privy Council, though, reversed the decision.⁹⁶

As the High Court concluded in *R v Richards; Ex parte Fitzpatrick and Browne*,

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. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.⁹⁷

This principle applies equally to State Parliaments.⁹⁸ The courts will declare invalid a claim by Parliament to a new privilege in the absence of legislation, as the Supreme Court did in *Stevenson v The Queen*,⁹⁹ but if the action taken by the House appears, on its face, to rely on existing privileges and the House does not state detailed grounds for its decision, the courts will not intervene, unless (conceivably) what is done infringes an overriding constitutional requirement, such as the implied freedom of political communication.

The courts will not consider whether the House has correctly interpreted its privileges in a case of imprisonment, unless the warrant specifies the grounds on which the House has acted. A special warrant explains why the House has ordered imprisonment, by detailing the facts alleged to constitute the offence; the court can review whether the alleged facts constitute contempt. A general warrant merely orders imprisonment on grounds of contempt, without saying more, thus preventing review. Under general law, the House is not required to use a special warrant,¹⁰⁰ although the rule has been reversed for the Commonwealth Parliament by s 9 of the *Parliamentary Privileges Act 1987* (Cth). The degree of judicial scrutiny of imprisonment for contempt is thus largely at the discretion of the House.

⁹⁶ *In re Glass* (1869) 6 WW&a'B(L) 45; *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560.

⁹⁷ (1955) 92 CLR 157, 162.

⁹⁸ *Egan v Willis* (1998) 195 CLR 424, 446 (Gaudron, Gummow and Hayne JJ). *Egan* itself involved special difficulties arising from the limited privileges of the New South Wales Parliament.

⁹⁹ (1865) 2 WW&a'B(L) 143.

¹⁰⁰ *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

The same approach applies equally to judicial review of other exercises of Parliament's powers to punish for contempt, such as the suspension or expulsion of a member.

It is a settled principle that the courts will not intrude on the role of Parliament and will endeavour to regulate their own proceedings so as to avoid doing so. There are many statements of high authority to the effect that questions as to the application of a privilege to the facts of a particular case, and as to the extent of the privilege in relation to those facts, belong to Parliament.¹⁰¹

As a general rule, the courts will not question a resolution to exclude a member, but judicial review should be possible if the resolution sets out the grounds on which the expulsion is based.¹⁰²

V THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

It is possible that, as Enid Campbell has argued, the implied freedom of political communication limits the power of houses of Parliament to regulate their own proceedings.¹⁰³ She considers the examples of a House adopting standing orders that restrict debate on particular topics, or suspending a member by reason of statements made inside or outside Parliament.

The High Court has held that the Australian Constitution protects 'that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors'.¹⁰⁴ The Constitution prevents the curtailment of that freedom by the exercise of legislative or executive power.¹⁰⁵ Although the contempt powers of the Victorian Parliament are defined by reference to the law and custom of the United Kingdom Parliament, they derive from statute, from the grant of powers, privileges and immunities contained in the *Constitution Act 1975* (Vic). That statute, like others, must comply with the implied freedom.

That the implied freedom limits the legislative powers of State parliaments is well established,¹⁰⁶ but some of the boundaries of the protected freedom of communication are more doubtful. Communications about federal government and

¹⁰¹ *Halden v Marks* (1995) 17 WAR 447, 462 (the Court).

¹⁰² Campbell, *Parliamentary Privilege*, above n 49, 200–1; Carney, above n 53, 170–6. Compare *Bradlaugh v Gossett* (1884) 12 QBD 271.

¹⁰³ Campbell, *ibid*, 64–5, 212–13, 218.

¹⁰⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (the Court).

¹⁰⁵ *Ibid*.

¹⁰⁶ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566.

politics are within it, and, to the extent that the contempt powers of a State Parliament can burden that communication, they should be subject to the implied guarantee. The application of the freedom to communications about State government and politics has been less certain, but the most recent comments from the High Court indicate, if hardly conclusively, that earlier authority holds good and the freedom does apply to such communications.¹⁰⁷

If this is correct, and the law of contempt of a State Parliament can burden the freedom of communication protected by the Australian Constitution, the question then becomes whether the restrictions imposed by that law are valid, on the basis that they are ‘reasonably appropriate and adapted to serve a legitimate end’ compatible with the system of government prescribed by the Constitution.¹⁰⁸

The purpose of the contempt powers of the Parliament is legitimate: they protect the operation of a core institution of State government. Their proportionality and adaptation to that purpose are much more doubtful. In the absence of a provision equivalent to s 4 of the *Parliamentary Privileges Act 1987* (Cth), which limits contempt to cases of interference with the functions of Parliament, contempt of the Victorian Parliament can extend to cases in which the link with the protection of the working of the Parliament is weak. Some of the cases, discussed above, in which the Parliament has imposed penalties for contempt, are examples. To that extent, the law that gives Parliament these powers is unlikely to satisfy the requirements for a valid restriction on freedom of communication. Reform of those powers, by linking them more closely to their underlying purpose, would make it easier for them to satisfy these requirements.

It remains to be seen how such an argument about the validity of the Parliament’s contempt powers would be raised in court. If the action of the House concerned were already justiciable under the principles discussed above, the operation of the implied freedom could be an additional ground of challenge. In other cases (where, for example, a warrant for imprisonment for contempt does not specify grounds), a challenge might rest on review, in light of the implied freedom, of the validity of the statutory grant of privileges to the House.¹⁰⁹

¹⁰⁷ *Roberts v Bass* (2002) 212 CLR 1, 29–30 (Gaudron, McHugh and Gummow JJ), 58 (Kirby J); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J); Geoffrey Lindell, ‘The Constitutional and Other Significance of *Roberts v Bass: Stephens v West Australian Newspapers Ltd* Reinstated?’ (2003) 14 *Public Law Review* 201. See also *Sellars v Coleman* [2001] 2 QR 565; *Cameron v Becker* (1995) 64 SASR 238. Contra: *R v Brisbane TV Ltd*; *Ex parte Criminal Justice Commission (No 2)* [1998] 2 Qd R 483.

¹⁰⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court).

¹⁰⁹ See Enid Campbell, ‘Contempt of Parliament and the Implied Freedom of Political Communication’ (1999) 10 *Public Law Review* 196, 200, 208.

VI CONCLUSION

The archaic principles of privilege and the draconian rules of contempt are badly in need of reform. In comparable jurisdictions, parliamentary inquiries have proposed many desirable changes.¹¹⁰ Commonwealth legislation has adopted some of the most important, such as the abolition of contempt by defamation, limitation of the power to imprison, and introduction of a power to fine. Other reforms, such as guarantees of due process in contempt proceedings, remain to be adopted in legislation. In Victoria, by contrast, the law of contempt of parliament has remained basically unchanged since the middle of the nineteenth century. All that saves it from general condemnation is that most of the powers it gives Parliament are now unused.

On the question of procedure, the conclusions of the British Joint Committee on Parliamentary Privilege are persuasive.

In dealing with especially serious cases, we consider it is essential that committees of both Houses should follow procedures providing safeguards at least as rigorous as those applied in the courts and professional disciplinary bodies. At this level the minimum requirements of fairness are for the member who is accused to be 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;
- the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.¹¹¹

Whether these standards are met in the Victorian Parliament in a particular case is at the discretion of the House or committee concerned.

¹¹⁰ See Joint Committee on Parliamentary Privilege, above n 5; Joint Select Committee on Parliamentary Privilege, above n 19; Joint Select Committee on Parliamentary Privilege, Parliament of New South Wales, *Parliamentary Privilege in New South Wales* (1985); Members' Ethics and Parliamentary Privileges Committee, Parliament of Queensland, *First Report on the Powers, Rights and Immunities of the Legislative Assembly, its Committees and Members* (1999); Enid Campbell, 'Adjudication of Parliamentary Offences' (2003) 22 *University of Queensland Law Journal* 173.

¹¹¹ Joint Committee on Parliamentary Privilege, above n 5, [281].

While discipline of members may be part of the self-regulation of the Houses, subjecting non-members to these procedures is harder to justify, as the Committee pointed out:

We do not think it practicable for Parliament to provide, and be seen to provide, the procedural safeguards appropriate today when penalising persons who are not members of Parliament. A debate by the whole House, for instance, on whether to impose a fine on a non-member, and if so how much, is far removed from current perceptions of the proper way to administer justice.¹¹²

The Committee recommended that the punishment of non-members for contempt should be transferred to the courts, leaving a residual, concurrent jurisdiction in the hands of the Houses.¹¹³ This procedure would have the added advantage of providing avenues of appeal that are now denied by the restrictions on judicial review — restrictions that may well breach the *International Covenant on Civil and Political Rights* in their current form.¹¹⁴

These proposals, however desirable in principle, depend for their implementation on Parliament's willingness to limit its own powers. Its reluctance to do this in the past shows an understandable self-interest, and also a belief that, as the Legislative Assembly Privileges Committee put it, the privileges of the Parliament are one of the 'cornerstones of a free society'.¹¹⁵ The challenge of reforming the law of contempt is to give due protection both to the Parliament's privileges and to the rights of others. The long history of inaction in Victoria gives little hope for speedy change, but a Parliament concerned to follow the standards of fairness required of courts and tribunals with similar powers would reform this branch of the law.

¹¹² Ibid, [306].

¹¹³ Ibid.

¹¹⁴ See Campbell, *Parliamentary Privilege*, above n 49, 204–5.

¹¹⁵ *Report on Matter Referred to the Committee on 24 October 1991*, above n 67, 20.