CONTEMPT OF PARLIAMENT — INSTRUMENT OF POLITICS OR LAW ?

By D. C. PEARCE*

Recent proceedings brought in the South Australian and Victorian Parliaments against persons alleged to be in contempt of Parliament and a report relating to the penal jurisdiction of Parliament that was presented to the House of Commons in 1967 have once again raised the issue whether Parliament is a proper body to exercise the power to punish certain conduct as contempt.

The proceedings referred to were all initiated in November 1968. The first in point of time related to a private person, one K. E. Klaebe, who was summoned to the Bar of the Legislative Council of South Australia to answer allegations that he had committed a contempt of the Council. The second concerned the chairman of the Victorian Public Service Board. He was found guilty of contempt of Parliament by the Victorian Legislative Assembly. This proceeding was followed almost immediately by an opposition motion alleging that the Premier of Victoria, Sir Henry Bolte, was guilty of contempt.

The report referred to was that prepared by a Select Committee of the House of Commons and published in December, 1967. It deals at length with the whole question of parliamentary privilege.[1]

The three proceedings mentioned warrant examination in some detail as they afford good examples of the manner in which Australian Parliaments exercise their jurisdiction to punish contempts. The proposals made by the House of Commons Committee for the alteration of the present practice followed by the Commons in dealing with contempts are also of considerable interest as the Committee's remarks and suggestions for reform are in the main applicable to the contempt jurisdiction of Australian Parliaments. It is hoped that an examination of the proceedings and the report will demonstrate that the present position with regard to the matters that constitute contempt of Parliament and the procedures adopted to determine whether or not a person is in contempt, leave much to be desired. It will be argued that, while the adoption of the proposals of the Commons Committee would go some way towards remedying these defects, the most satisfactory course of action would be for the conduct that constitutes contempt to be specified and for the jurisdiction to punish contempt to be transferred to the courts. Before dealing with these matters, however, it is desirable to outline briefly the conduct that constitutes contempt of Parliament and to mention the source of Parliament's jurisdiction to punish contempt.

* LL.B. (Adel.), LL.M. (A.N.U.), Barrister and Solicitor (S.A.); Lecturer in Law, School of General Studies, Australian National University.

[1] *Report from the Select Committee on Parliamentary Privilege* (1967).

Contempt of Parliament has been defined as "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".[2]

Apart from the more obvious actions such as creating a disturbance in the House, attempting to bribe a member, or preventing a member attending the House, the net of contempt of Parliament has been held to embrace such conduct as failing to attend before, or to produce documents to, committees of the House,[3] and, perhaps its widest extension, reflecting on the character or conduct of members of Parliament.[4]

It should be understood at the outset, however, that unless a legislature chooses to enact legislation specifying the actions that it will punish as contempt, there is no limitation on its power to determine that in a particular case certain conduct constitutes contempt. Parliament is the judge of what is and what is not contempt and the courts are virtually powerless to interfere.

This has been made clear in Australia by the High Court decision in *The Queen v. Richards; Ex parte Fitzpatrick and Browne*.[5] In that case, Dixon C.J., delivering the judgment of the Court, said:

> 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.[6]

It is the last part of this statement that is important in practice. If the warrant issued by the Speaker is in general terms, that is, if it simply says that the person named in it has been found in contempt of Parliament, the courts cannot intervene. While it could not be said to be the invariable practice of Parliament to issue general warrants, their use is quite common.[7]

---

[2] Cocks (ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (17th ed. 1964) (hereinafter referred to as "May"), 109.

[3] May, *op. cit.* 112.

[4] May, *op. cit.* 124.

[5] (1955) 92 C.L.R. 157.

[6] *Ibid.* 162. Dixon C.J. also negatived the suggestion that the separation of powers contemplated by the Constitution precluded the Federal Parliament exercising judicial powers: *ibid.* 166.

[7] May, *op. cit.* 94-96. The warrants to commit Fitzpatrick and Browne were in general terms.

The origin of the power of Parliament to punish conduct constituting contempt is uncertain and it is not necessary to delve into it here.[8] It is sufficient to say that by the end of the seventeenth century, it had become firmly established in Great Britain as an immutable principle of parliamentary government.

All the Australian legislatures, except New South Wales, have followed the example of Great Britain and have acquired (by statute) some means by which conduct that constitutes contempt of Parliament may be punished. The Victorian, South Australian and Commonwealth Parliaments have, in so many words, been given the same powers as the House of Commons to deal with contempt.[9] Tasmania, Queensland, Western Australia and the Northern Territory have enacted legislation that specifies the conduct that constitutes contempt.[10] In the case of each Parliament, either the standing orders of the Parliament or the Act setting out the conduct constituting contempt provides machinery for dealing with a person who has committed an alleged contempt.[11]

New South Wales alone seems to have no power to punish persons for conduct that is normally regarded as a contempt of Parliament.

Recent Australian Cases Relating To Contempt of Parliament

Cahill's Case

On 14 November 1968, the Member for Balwyn in the Victorian Legislative Assembly, Mr Taylor, sought, and was granted leave to raise a question of privilege.[12] Mr Taylor was the chairman of the Committee of Public Accounts. In a short speech dealing with the alleged contempt of Parliament, he referred to difficulties that the Public Accounts Committee had experienced in obtaining information from the chairman of the Public Service Board, Mr Cahill. These difficulties had culminated in a refusal by Mr Cahill to furnish to the Committee a copy of a document requested by Mr Taylor pursuant to the powers conferred on the Public Accounts Committee under Standing Order 169A of the Victorian Legislative Assembly. Within about an hour of this refusal Mr Taylor raised the matter in Parliament and moved that the refusal on the part

[8] The historical origin of contempt is discussed in the *Report from the Select Committee on Parliamentary Privilege* (1967), paras 27-35.

[9] Commonwealth of Australia Constitution Act (Eng.) s. 49; *Constitution Act Amendment Act* 1958 (Vic.) s. 12; and Constitution Act 1934-1965 (S.A.) s. 38.

[10] *Constitution Acts* 1867-1968 (Qld) s. 45; Parliamentary Privilege Act 1858 (Tas.) s. 3; Parliamentary Privileges Act 1891 (W.A.) s. 8; and *Legislative Council (Powers and Privileges) Ordinance* 1963-1966 (N.T.) s. 9.

[11] In relation to this procedure, see *infra* p. 262 and also Campbell, *Parliamentary Privilege in Australia* (1966), 114-117.

[12] 1968 *P. Deb.* (Vic.) 1744. The means by which contempts are brought before Parliament is on a "question of privilege". In relation to this nomenclature, see *infra* p. 254.

of the chairman of the Public Service Board to provide a copy of the report constituted a contempt of the House.[13]

In view of the short time that elapsed between the refusal to furnish the document and the raising by Mr Taylor of the question of privilege, it seems reasonable to assume that he acted in some heat.

The motion moved by Mr Taylor was called on for hearing on the next sitting day, 20 November 1968. Mr Taylor then read to the House a letter that he had received from the chairman of the Public Service Board.

> The substance of the letter was as follows:
>
> I regret that on Thursday last you considered it necessary to raise in Parliament the question of obtaining for the Public Accounts Committee a copy of [the relevant report].
>
> As you know I did on that day send you a copy of the report—this I did following your letter of that date requesting a copy of the report. I do not wish to go over other aspects but simply to make it clear that I certainly never intended that any question of contempt of Parliament could arise from my part in the matter and I regret that this possibility could have occurred to you or the Parliament.[14]

Mr Taylor then stated that, in view of the tone of the letter, he would seek the permission of the Speaker to move, in an amended form, the motion standing in his name. Accordingly he moved—

> That the refusal of the chairman of the Public Service Board to provide a copy of the P.A. Management Consultants Pty. Ltd. Report on Phase 1 of their investigations into the Public Works Department, sought by the Public Accounts Committee of this House pursuant to the powers conferred by Standing Order No. 169A, constitutes a contempt of this House of Parliament but, having regard to the prompt supply of the report and to the letter tendered by the chairman of the Public Service Board, this House now feels there may have been some misunderstanding and will now proceed to the consideration of the Orders of the Day.[15]

It can be seen that the motion, as amended, still found the chairman of the Public Service Board guilty of contempt of Parliament because of his failure to supply the relevant report to the Public Accounts Committee. However, by resolving that the House proceed to the consideration of the orders of the day, the House was to act as if the contempt did not warrant any punishment. A motion of this kind is not unusual —there are House of Commons precedents for it.[16]

The opposition, however, saw the chance of making some political capital out of the matter. The Leader of the Opposition, Mr Holding,

---

[13] *Op. cit.* 1745.
[14] 1968 *P. Deb.* (Vic.) 1891.
[15] *Ibid.*
[16] May, *op. cit.* 140.

pointed out that Mr Taylor, in the view of the opposition, had quite correctly raised the question of privilege; the question whether or not Mr Cahill had committed a contempt of Parliament should therefore be determined in the ordinary manner by the House.[17] He said that if the motion as proposed to be amended by Mr Taylor was passed, it would mean that Mr Cahill would be found guilty of contempt of Parliament without being given any opportunity to speak on the matter.

The debate which followed concerned itself more with allegations and denials of party "pressure" being placed on Mr Taylor to amend his motion than with the question whether Mr Cahill's actions constituted contempt of Parliament. The opposition moved a motion that, if passed, would have resulted in Mr Taylor's motion being expunged from the record. This was defeated and Mr Taylor's motion was passed—both on party lines.

The fact that the opposition's main purpose was to discomfort the government should not be allowed to detract from the validity of Mr Holding's point that Mr Cahill was being found guilty of contempt of Parliament without being given a hearing. The fact that no penalty was imposed on the chairman of the Public Service Board for his conduct should not, it seems, have resulted in his being denied an opportunity to refute the allegations made against him. If an analogy can be drawn with a prosecution before a court, it could not be doubted that a person who was charged with an offence and sentenced, for example, to the rising of the court or discharged under a power to discharge without proceeding to conviction, would have valid grounds for complaint if he were not given an opportunity to appear and defend the charge against him.

A finding that a person is guilty of contempt of Parliament should not be regarded as so trifling that the person would not care if such a finding were made against him. Presumably such a finding would not be regarded as a previous conviction for the purposes of determining the sentence that should be imposed on the person if he were subsequently convicted of a criminal offence. However, in the most unlikely event that the person concerned was again found to have committed a contempt of Parliament, his "previous conviction" would almost certainly count against him.

These hypothetical possibilities aside, the whole concept of natural justice is offended by a finding that a person has committed an offence, even if one for which no penalty is imposed, without being given an opportunity of defending himself. *Cahill's* case in fact reveals two major weaknesses in the parliamentary jurisdiction to punish for contempt—the difficulty of preventing a contempt charge becoming a political issue and the absence of guarantees that the person charged will be given a

[17] 1968 *P. Deb.* (Vic.) 1892.

proper hearing. Parliament is a political body and to expect it to suddenly drop its mantle and adjudicate upon some matter with the impartiality of a court is asking the impossible. But while this might explain an apparent failure by a Parliament to determine a charge against a person fairly, it is not an excuse for such a failure, rather it is a reason for the transfer of the jurisdiction to another body. Similarly, unless legislatures are prepared to adopt and follow rules of procedure that will ensure that a person receives a proper hearing, the question must be asked whether it is not more appropriate for the determination of contempt actions to be vested in a body such as a court where a fair hearing will be obtained.

While *Cahill's* case demonstrates the invidious situation that a private individual can find himself in if charged with contempt of Parliament, *Sir Henry Bolte's* case shows that a member of the Parliament is, if similarly charged, little better off.

Sir Henry Bolte's Case

On 21 November 1968, that is, the day after Mr Cahill had been found guilty of contempt, Mr Holding interrupted the debate to raise a matter of privilege.[18] He directed the attention of the Speaker to a radio news broadcast that included the following statements alleged to have been made by the Premier, Sir Henry Bolte:

> The Premier, Sir Henry Bolte, today stated emphatically that the Chairman of the Public Service Board, Mr Cahill, has not been found in contempt of Parliament.
>
> Sir Henry said a person could not be found in contempt through a misunderstanding, and in any case the matter would have to be debated before Parliament reached a decision.
>
> Sir Henry said the Legislative Assembly did not debate whether Mr Cahill had been in contempt of Parliament, or vote on it.
>
> He said Parliament voted that there had been a misunderstanding between the Chairman of the Parliamentary Public Accounts Committee, Mr Taylor and Mr Cahill, and that the matter should be dropped.
>
> Sir Henry said that any legal interpretation that Mr Taylor's motion concerning Mr Cahill resulted in Parliament finding Mr Cahill in contempt of the House is completely contrary to the spirit of the motion and the spirit of Parliament.
>
> It is the spirit that counts.[19]

In response to a request from the Premier, the Speaker ruled that the procedure to be followed consequential upon a suggestion that a member of the House had been in contempt was for the member concerned to

[18] *Ibid.* 2026. *Supra* n. 12 for the implications of this procedure.
[19] *Ibid.* 2028.

make an explanation and then to withdraw from the House.[20] The Speaker ruled that the member could thereafter take no further part in the debate and could not enter the Chamber after he had completed his explanation. This ruling of the Speaker accords with the procedure laid down for the House of Commons.[21]

The Premier then made an explanation of his statement as reported by the radio station.[22] The main point of the explanation was that he did say the matters referred to in the last two paragraphs of the statement: and that in his view it would be contrary to the spirit of the motion and the spirit of Parliament to suggest that the motion passed by the House had found Mr Cahill guilty of contempt of Parliament. The Premier then withdrew. The Leader of the Opposition gave notice of intention to move on the next sitting day a motion in the following terms:

> That this House dissociates itself from the statements attributed to the honourable Sir Henry Bolte, which statements were the subject of publication to members of the press and were broadcast over radio news services at station 3AW and this House is of the opinion that the Premier having admitted the accuracy of part of the statement, this House is of the opinion that as to that part the honourable the Premier has failed to comply with the Standing Orders and is guilty of a breach of privilege.[23]

The motion was called on for hearing on the next sitting day, 26 November 1968.

The primary contention advanced by the Leader of the Opposition to found the allegation that the Premier had been guilty of contempt of Parliament was that he had published a report of the proceedings of the House that was incorrect and which he knew to be incorrect.[24] He based his argument on a statement in May that so long as the debates are correctly and faithfully reported, the orders which prohibit their publication are not enforced; but when they are reported *mala fide*, the publisher is liable to punishment.[25] He claimed that the actions of the Premier were covered by this statement in that the Premier had wilfully and falsely misrepresented the motion passed by the Parliament. He concluded by saying that it was a question to be determined by members whether the Premier had made his statement to the press consciously misrepresenting the debate of the proceedings and the decisions of the House.

---

[20] *Ibid.*
[21] May, *op. cit.* 143.
[22] 1968 *P. Deb.* (Vic.) 2029.
[23] *Ibid.* 2031.
[24] *Ibid.* 2087.
[25] *May*, *op. cit.* 118-119.

The debate that followed lasted nearly seven hours. For present purposes it is probably sufficient to say that if the proceedings were to be regarded as an attempt to judge whether Sir Henry Bolte was guilty of contempt of Parliament they left much to be desired. The motion of the leader of the opposition was eventually defeated on party lines. In accordance with the ruling of the Speaker, Sir Henry Bolte took no part in the proceedings after his short "explanation".

Whether or not Sir Henry's conduct constituted contempt of Parliament, it was apparent that the proceedings were initiated by the opposition, at least in part, to discomfort the government. The case demonstrates how it is possible for contempt proceedings to be used for political means. This cannot do other than bring the contempt machinery into disrepute. Perhaps it can be regarded as fair tactics to allege a contempt by a member in order to create an opportunity to attack the party in power, but it can be seen that an unscrupulous government could use the contempt power to silence opposition either from within the Parliament or from without. This was in fact stressed by the leader of the opposition when moving his motion to condemn Sir Henry Bolte for contempt:

> Citizens must believe that the power of Parliament to deal with the average citizen for breach of privilege or contempt will not be used in the political armoury of the Government of the day, because such a usage leads to destruction of Parliamentary government and to the establishment of totalitarian régimes.[26]

A hint of the validity of this statement can be seen in the proceedings instituted against Klaebe by the South Australian Legislative Council.

Klaebe's Case

The South Australian Parliament introduced a Bill to prohibit scientology. After the Bill had passed the second reading stage in the Legislative Council, it was referred to a Select Committee of the Council, the chairman of which was the Honourable C. M. Hill M.L.C., the Minister for Local Government and Roads and Transport. Mr Hill had been a member of the Cabinet that had approved the introduction of the Scientology (Prohibition) Bill into the Parliament. The Select Committee heard evidence from members of the public who wished to present their views on the question whether or not scientology should be prohibited. Among these witnesses was one Kenneth Eric Klaebe.

On 5 November 1968, Mr Hill presented a special report of the Select Committee to the Legislative Council together with a letter and certain of the minutes of the proceedings before the Committee.[27] The

[26] 1968 *P. Deb.* (Vic.) 2096.
[27] 1968 *P. Deb.* (S.A.) 2160-2161.

report said that the attention of the Committee had been drawn to a letter from Mr Klaebe to the secretary of the Committee and that the letter appeared to reflect upon the conduct of the chairman. The Committee had therefore agreed to report the matter to the Council. The letter and relevant minutes were tabled with the report in order that the Council would be able to take such steps as it thought fit.

The minutes of evidence referred to in the report indicated that Mr Klaebe had asked for an assurance of the Committee that he would be granted an unbiased hearing and that the evidence that would be tendered by him would be examined in a completely impartial manner. The minutes disclosed that this assurance was given and accepted by Mr Klaebe.[28] The letter which was the subject matter of the report was addressed to the Secretary of the Committee and signed by Mr Klaebe. The substance of it was as follows:

> *re the Honourable Mr Hill*
>
> Although I accepted at the time the reassurance of the Committee *re* its impartiality, on further reflection I feel I must make the following statement.
>
> As I understand it from the comments of the Honourable Members during evidence on the 30th inst., if I believe that the abovenamed is unduly biased against Scientology I must formally charge him with that short-coming. I now take up that suggestion. In doing so I restate the allegations I made in my evidence which I may point out the Honourable Gentleman was not prepared to deny.[29]

The report of the Committee was not immediately debated; instead it was moved that it be considered on the following day. On the following day, it was moved, again without debate:

> That Mr. Kenneth Eric Klaebe be summoned to appear at the bar of the Council on Tuesday next, November 12, 1968, at 2.15 p.m., to answer such questions as the House may see fit to put to him regarding his letter dated October 30, 1968, concerning the Hon. C. M. Hill, Chairman of the Select Committee on Scientology (Prohibition) Bill, 1968.[30]

On the day appointed Mr Klaebe was brought to the Bar of the House by the Usher of the Black Rod.[31] He acknowledged that he was the Kenneth Eric Klaebe referred to and he admitted that he had signed the letter dated 30 October 1968, presented to him. He was asked to withdraw. The Council then resolved that it be declared and determined that the witness (*sic*) appearing at the Bar signed and was

---

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.* 2249.

[31] The proceedings of the Legislative Council from which the matters set out in the text are taken are set out in 1968 *P. Deb.* (S.A.) 2341-2346.

responsible for sending the chairman the letter tabled. Mr Klaebe was recalled to the Bar of the House. The following interchange then took place between the President of the Council and Mr. Klaebe:

> The President: Do you wish to offer any apology at this stage ?
>
> Mr Klaebe: I simply say I sent the letter.
>
> The President: I take it that the answer is 'No', and that you do not wish to offer any apology ?
>
> Mr Klaebe: I am sorry, Mr President; I am not sure for what I should apologise.
>
> The President: Obviously, we are discussing the letter and the sending of the letter about the chairman.
>
> Mr Klaebe: I did sign that letter, and it was my intention to send that letter.
>
> The President: I ask you to again withdraw.[32]

Mr Klaebe withdrew. The President then told the Council that it should consider what action it proposed to take in relation to the letter and resolve accordingly. The Honourable Sir Arthur Rymill M.L.C. moved as follows:

> That in the opinion of the House the writing and sending of the letter was highly improper conduct and the House, without proceeding to the question whether that conduct constitutes a contempt of the House, issues a warning to Mr Klaebe to refrain from a repetition of such conduct in the future which could be attended with most serious consequences.[33]

The four Labor Members of the Legislative Council opposed the motion on the basis that Klaebe had protested as to the impartiality of the chairman of the Select Committee in the only manner that was available to him. Speakers for the Liberal Party referred to the fact that Klaebe had been assured by the Select Committee that in fact it would view all evidence given before it impartially.

The motion proposed was carried fourteen votes to four, that is, along party lines. The President then recalled Mr Klaebe to the Bar of the House and addressed him as follows:

> Mr Klaebe, I have to inform you that in the opinion of the House the writing and sending of the letter was highly improper conduct and the House, without proceeding to the question whether that conduct constitutes a contempt of the House, issues a warning to you to refrain from a repetition of such conduct in the future, which could be attended with most serious consequences. To deliberately attribute to the chairman of a Select Committee a lack of impartiality is a contempt of the Legislative Council, which, on being duly

[32] *Ibid.* 2341.
[33] *Ibid.*

> established, can be severely punished.[34] Honourable members, when individually engaged on official duties both inside and outside the Chamber, are obliged to make up their minds and speak out as they think fit, but when sitting as members of a Select Committee they are, whatever they may have said before, under a strict duty to be impartial, and they invariably discharge their duties. That concludes the proceedings, Mr Klaebe, and you may withdraw.[35]

Mr Klaebe withdrew and the House proceeded to general business.

The procedure adopted in dealing with the case calls for comment. It is to be noticed that Klaebe was not given an opportunity to offer anything by way of explanation of the letter or in justification of the matters referred to in the letter. All that the President proffered to him was the opportunity to apologise to the Council for the statements made in the letter. As the House did not consider the question whether the sending of the letter constituted a contempt, this probably did not matter. However, in theory at least, as there was no motion before the Chair, there was nothing preventing the Council resolving that Klaebe had been guilty of contempt and accordingly the conduct of the proceedings by the Council could not be described as in any way complying with the rules of natural justice. Obviously, the President knew of the intention of Sir Arthur Rymill to move a motion that the House would not consider whether Klaebe's conduct constituted contempt, and one assumes that the conduct of the "hearing" was influenced by that fact.[36]

It may well have been that in view of the assurance given to Mr Klaebe at the hearing of the Committee, his action in sending the letter the subject matter of the complaint could be regarded as somewhat foolhardy. However, one cannot think how else it would have been possible for Klaebe to have raised the question whether or not a member of the Select Committee was biased. It would seem to be a person's democratic right to assert that a Committee established by the Parliament was not conducting its enquiry impartially. For the President to say that "to deliberately attribute to the Chairman of a Select Committee a lack of impartiality is a contempt of the Legislative Council" could well be said to constitute a denial of a person's right to assert something that it is in the public interest to disclose. One would have thought that Parliament would be prepared to accept, and indeed enquire into, an allegation of this kind—not to silence the maker of the complaint by threat of use of its penal powers. If the exceptional circumstance does arise where a member does not discharge his duty to act impartially, it should surely

---

[34] Such reflections have been held to constitute contempt in England: May, *op. cit.* 125.

[35] 1968 *P. Deb.* (S.A.) 2346.

[36] According to a newspaper report in the *Adelaide Advertiser* dated 20 November 1968, the President of the Legislative Council stated in answer to a question raised in a previous issue of the paper that, had Mr Klaebe been actually charged with contempt, he would have had the right to be heard or to be represented by counsel.

not be a contempt of Parliament to bring the partiality of that member to the attention of the Parliament.

The foregoing cases, if they do nothing else, show that Parliament, in determining whether conduct constitutes contempt or is in some other way offensive, does not conduct an enquiry that begins to measure up to the usual standards expected of a body exercising penal jurisdiction. The cases also give some insight into the very great power that the right to punish contempts gives to a Parliament. These and many other matters were considered by the Select Committee of the House of Commons appointed to review the law of parliamentary privilege.

REPORT OF SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

Terms of reference of Committee

The Committee was set up by an Order of the House of Commons dated 5 July 1966, its terms of reference being as follows:

> To review the law of parliamentary privilege as it affects this House and the procedure by which cases of privilege are raised and dealt with in this House and to report whether any changes in the law of privileges or practice of the House are desirable.[37]

In its fifty-one page report presented on 30 November 1967, the Committee reviewed the whole question of parliamentary privilege. However, only the proposals relating to the penal jurisdiction of the Parliament are relevant to the subject under discussion.

The Committee received written representations from a number of bodies, including the General Council of the Bar, the Law Society and the Study of Parliament Group. The Committee also took oral evidence.

The Committee stated as its broad approach to its terms of reference that it endeavoured to relate the role of parliamentary privilege to the basic requirements of a modern legislature.[38] It asked itself, firstly, whether parliamentary privilege is justifiable at all in modern times, and secondly, what are the reasonable limits of protection and immunity which must be claimed if the legislature is to fulfil its proper functions, if its members are to be able fearlessly to speak their minds and to pursue the grievances of those who elected them and if its officers are to be given the facility to carry out their several duties on behalf of the House and of its members. This approach was highly commendable. Parliamentary privilege, like so many other parliamentary traditions, can become immersed in a mystique that clouds its purpose for existing. The Committee might well have talked in terms of history and tradition

[37] *Report from the Select Committee on Parliamentary Privilege* 1967.

[38] *Report*, para. 11.

and, for fear of interfering with what had always existed because it had always existed, achieved very little. This was not the case: the Committee was quite prepared to recommend changes in relation to matters that the passage of time had rendered anachronistic. The Committee did not, however, deal with the first question that it had posed—is parliamentary privilege justifiable at all ? It clearly assumed that it was.

It is thought that in regard to the individual rights of members such as freedom of speech, exemption from attendance as a witness in court proceedings if the Parliament is sitting and so on, the assumption of the Committee was correct. But should certain conduct be regarded as in contempt of Parliament and therefore punishable ? Here again the assumption of the Committee, bearing in mind the suggestions that it subsequently set out as to the matters that should be regarded as contempt,[39] was probably right. Just as the courts could not function satisfactorily if their proceedings were able to be interrupted with impunity or their members subjected to physical attack or to corruption, so it is considered Parliament cannot function unless it and its members are protected from interference of this kind.

Major criticisms considered by Committee

The Committee set out the following as the main criticisms levelled against the parliamentary jurisdiction to punish contempts:

(1) Members are too sensitive to criticism and invoke too readily the penal jurisdiction of the House; they do so not merely in respect of matters which are too trivial to be worthy of that jurisdiction, but also on occasions when other remedies are available to them as citizens (for example, by action in the courts);

(2) the procedure for invoking the penal jurisdiction encourages its use for the purposes of publicity, is inequitable to persons whose conduct is under scrutiny and fails to accord with the ordinary principles of natural justice;

(3) the scope of Parliament's penal jurisdiction is too wide and too uncertain; the press and the public are wrongly inhibited from legitimate criticism of parliamentary institutions and of members' conduct by fear that the penal jurisdiction may be invoked against them;

(4) there is too great uncertainty about the defences which may legitimately be raised by those who are subjected to the penal jurisdiction; in particular it is a matter of doubt whether a person who has made truthful criticisms should be allowed to testify to their truth; this should be an undoubted right;

---

[39] *Infra*, p. 259.

(5) it is contrary to principle that Parliament should be both prosecutor and judge; its penal powers should be transferred to some other tribunal.[40]

Before proceeding to consider the validity of these criticisms, the Committee dealt with one matter that colours many comments on parliamentary privilege. It is common to refer to a person as having been in breach of parliamentary privilege when he has made, for example, a defamatory attack on a member of Parliament. This terminology implies that a member has privileges which the ordinary citizen does not have; that a member is one of a chosen class who is protected by special proceedings. The Committee was at pains to deny the validity of this. It insisted that there was no privilege in the member as such; there were only privileges in the Parliament. A person who prevented a member carrying out his parliamentary duty was not in breach of some privilege enjoyed by that member but was committing a contempt of the House. Accordingly, the Committee recommended that where a person commits an offence that warrants invoking the penal jurisdiction of Parliament, the person should not be said to have acted in breach of privilege but in contempt of the House.[41] The distinction drawn by the Committee has also been made by other writers.[42] It would undoubtedly clarify the matter if the terminology suggested by the Committee were adopted by all legislatures.

Validity of criticisms

The Committee was prepared to concede the validity of many of the criticisms made of Parliament's contempt powers. In relation to the suggestion that the scope of Parliament's penal jurisdiction is uncertain, the Committee said:

> Your Committee accept that the uncertainty which clouds the exercise of the penal jurisdiction of the House may play some part in inhibiting legitimate criticism of the way in which the House works and of the conduct of its Members. Your Committee have no doubt that these matters should not be immune from criticism. They accept the principle that a legislature which is isolated from informed and accurate criticism from outside cannot hope to recognise and to remedy all its own defects.[43]

The Committee then continued to say that it considered that the fears expressed in relation to this matter were greatly exaggerated and that the House had exercised its penal jurisdiction most sparingly. The Committee conceded however that the uncertainty in the minds of many people as to what precisely constituted contempt of Parliament served

---

[40] *Report*, para. 10.
[41] *Report*, paras 12-14.
[42] *E.g.* May, *op. cit.* 89-90; Campbell, *op. cit.* 111.
[43] *Report*, para. 17.

to perpetuate the fear that Parliament might exercise its penal jurisdiction more widely than was justified.

Klaebe's case serves as a good example of the uncertainty in which a person finds himself when dealing with parliamentary proceedings. Klaebe doubtless considered that he was raising a justifiable complaint. He probably expected it to be denied but may have hoped that it would be investigated. It seems unlikely that he would have expected to be summoned to the Bar of the Council to explain his letter. Indeed, it could not have been said with any degree of certainty prior to the actions of the South Australian Legislative Council that the letter sent by Klaebe would have been regarded as being of a kind warranting contempt of Parliament proceedings. So many and various are the aspersions cast upon members of Parliament that Klaebe's complaint, couched as it was in moderate language, did not seem to be unusually offensive. But, as far as the law is concerned, Klaebe was expected to know that statements of the kind made by him had been held to constitute contempt of Parliament,[44] (an assumption even more unreal in this case than usual). However, as was conceded by the House of Commons Committee and as Klaebe's case shows, Parliament has pursued an uneven policy in regard to summoning persons for contempt. While the comment that Parliament has exercised its penal jurisdiction most sparingly is true,[45] to some extent it only exacerbates the problem. It is not clear when some remark will be taken up as constituting contempt and when it will be allowed to pass as part of the vilification that is an occupational hazard of the job of being a member of Parliament.

The second major criticism that the Committee conceded to be justifiable was that some members have been over-sensitive to criticism and overready to invoke the penal jurisdiction of the House in respect of matters of relative triviality or matters which could as effectively be dealt with by the exercise of remedies open to the ordinary citizen.[46] To a certain extent this criticism is tied up with the procedure that is followed in the House of Commons for raising a question of breach of privilege. The practice is to raise such a matter immediately after question time; that is, at a time when it will attract the greatest possible publicity. Examples cited by the Committee did make it clear that many matters were raised by members that on investigation were found not worthy of pursuing by summoning the person concerned before the Bar of the House.[47]

---

[44] *Supra*, n. 34.

[45] Only ten people have been punished for contempt by Australian Parliaments: Campbell, *op. cit.* 121, n. 44. Usually an apology is all that is required of an offender.

[46] *Report*, para. 21.

[47] See the table set out at p. 24 of the Minutes of Evidence taken before the Committee. Of the twenty-eight complaints raised in the House of Commons between 1945 and 1965, twenty-one cases were disposed of as not constituting contempt, not warranting investigation or not requiring the imposition of any penalty.

Klaebe's case and, to a less extent, *Cahill's* case, illustrate the validity of this criticism as far as Australia is concerned. With respect, it would appear that the chairman of the Committee that caused Klaebe to be called before the Bar of the Legislative Council was, in the circumstances, somewhat over-sensitive to the criticism made against him. Whilst the allegations were undoubtedly most serious, it would seem that, in view of the previous experience of the Committee when dealing with Klaebe as a witness, the making of the complaint was not altogether unlikely. The subject matter of the Committee's inquiry was controversial and Klaebe fairly clearly had very strong feelings on the issue. In writing his letter he was doing little more than putting in written form the allegations that he had already made when appearing as a witness before the Committee. It is to be noted that the letter was written to the Secretary of the Committee. The allegations of impartiality were thus kept within the province of the Committee—they were made public by the action of the Committee in reporting the matter to the Council.

Cahill's case affords an example of a member raising as an alleged contempt of Parliament a matter that could well have been dealt with by other less public channels. It would seem that the chairman of the Public Accounts Committee was angered by the action of Mr Cahill. It is to be noted that he moved his motion alleging contempt of Parliament within an hour or so of the refusal by Mr Cahill to deliver the document in question to the Committee. It was open to the Committee to ask the Premier, as head of Mr Cahill's Department, to arrange for the delivery of the document to it and this would seem to have been the better course of action.

While the procedure allowing a member to raise allegations of contempt of Parliament is available, it is going to be used. And it is likely to be used by a member in haste when other means of obtaining what he wants are open to him. It is also available for use by a member who is anxious to gain publicity or who wishes to attack a person against whom he has some complaint that he could just as well pursue elsewhere.

The third matter on which the Committee was prepared to concede that criticism in relation to contempt of Parliament was justifiable was in relation to the method by which it is determined whether or not a person has committed a contempt.[48] It was satisfied that the procedure of the Commons did not ensure a person a hearing that complied with the basic principles of natural justice—the right to know the charge against him, the right to present his side of the case, the right to be present at the hearing and to be represented by counsel, and the right to cross-examine witnesses.

---

[48] *Report*, para. 22.

The Committee made several recommendations for changes in the procedure by which contempts of Parliament are judged. These are discussed below.[49] It is to be noted that the Committee rejected the idea of empowering the courts to deal with questions of contempt of Parliament. This too is referred to again below.[50]

The comments of the Committee are, of course, directed to the procedure adopted by the House of Commons but that they are no less applicable to proceedings in Australia is well illustrated by the two cases concerning Mr Cahill and Sir Henry Bolte. In *Cahill's* case, Cahill was found guilty of contempt of Parliament even though no penalty was imposed—but he was not present when the contempt issue was being debated and he was given no chance to refute the allegations made against him. Sir Henry Bolte was entitled under the Standing Orders, to make a statement in relation to the alleged contempt and was then expected to withdraw and take no further part in the debate. Presumably he would have known what was being said simply by listening to the broadcast of the debate in his room. However, he could not take an active part in the so-called enquiry or personally answer the allegations made against him.

Suggestions for reform: conduct constituting contempt of Parliament

Having conceded the validity of many of the criticisms of the law of contempt of Parliament, the Committee set out a number of suggestions for reform of that law.

It initially rejected the suggestion that the conduct that constituted contempt of Parliament ought to be codified.[51] Instead it recommended that, as a general rule, the House should exercise its penal jurisdiction, first, in any event as sparingly as possible and, secondly, only when it is satisfied that to do so 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 liable to cause, substantial interference with the performance of their respective functions.[52]

In rejecting the suggestion that contempt be codified, the Committee said:

> The very definition of 'contempt' which. . . [we] have proposed for the future guidance of the House clearly indicates that new forms of obstruction, new functions and new duties may all contribute to new forms of contempt. . . .[We] are convinced therefore that the House ought not to attempt by codification to inhibit its powers. . . .[We] are satisfied moreover that only under statutory authority

[49] *Infra*, p. 267.
[50] *Infra*, p. 263.
[51] *Report*, para. 40.
[52] *Report*, para. 15.

> can the House lawfully be divested of its powers in such manner as to bind its successors. Codification, if desirable at all, could be effective only if embodied in legislation.[53]

The comment in relation to the need to introduce legislation to codify contempt is no reason to reject the idea. Many other of the Committee's proposals require legislative action.[54]

As mentioned previously, the Queensland, Tasmanian, Western Australian and Northern Territory legislatures have passed legislation that sets out the conduct for which Parliament may punish a person. For example, section 45 of the *Constitution Acts* 1867-1968 (Qld) provides that the Legislative Assembly is empowered to punish in a summary manner as for contempt the following conduct:

(a) disobedience to any order of the House or of any committee duly authorized in that behalf to attend or to produce papers books records or other documents before the House or such committee unless excused by the House.

(b) refusing to be examined before or to answer any lawful and relevant question put by the House or any such committee unless excused by the House.

(c) assaulting obstructing or insulting any member in his coming to or going from the House or on account of his behaviour in Parliament or endeavouring to compel any member by force insult or menace to declare himself in favour of or against any proposition or matter pending or expected to be brought before the House.

(d) sending a member any threatening letter on account of his behaviour in Parliament.

(e) sending a challenge to fight a member.

(f) offering a bribe to or attempting to bribe a member.

(g) creating or joining in any disturbance in the House or in the vicinity of the House while the same is sitting whereby the proceedings of the House may be interrupted.

The conduct specified in the section does not exhaust the actions that have been held to constitute contempt by the House of Commons,[55] but it is difficult to envisage any other matters that ought to constitute contempt of Parliament. It is all very well for the Committee to urge the adoption of a general principle that acts as a guide to the House in the punishing of contempts but it still leaves the matter open to the charge of

---

[53] *Report*, para. 10.

[54] *E.g.* the proposals relating to penalties. See *Report*, paras 193-197 and *infra*, p. 269.

[55] The most noteworthy omission is of imputations directed against the House or its members, but if the Committee's recommendations were adopted, that offence would probably not need to be included: see *infra*, p. 260.

uncertainty. May's vague definition that has been set out previously[56] will be the only guide to a person of what conduct constitutes contempt. Further, to say that new forms of obstruction, new functions and new duties may all contribute to new forms of contempt is to acknowledge that Parliament may impose new conditions on persons without them having any indication that the conduct they are engaged in will be regarded as contempt of Parliament. The Committee seems, on this matter, to have begged the question. Its suggestions do not prevent Parliament arbitrarily declaring that which was lawful when done to be unlawful.

The Committee then proceeded to expand on its general principle by suggesting a series of rules[57] for the guidance of the House. If adopted, these rules would go a long way towards removing certain conduct from the threat of action for contempt of Parliament. The proposal that these rules should be adopted seems to be the obverse of specifying the conduct that constitutes contempt. It brings about the situation whereby, unless the circumstances are extreme (and always there will be the doubt what circumstances are extreme), certain types of conduct will not be subject to the parliamentary penal jurisdiction. The proposed rules for guidance are as follows:

(1) The House should exercise its penal jurisdiction—

(a) in any event as sparingly as possible; and

(b) only when it is satisfied that to do so 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.[58]

(2) It follows from (1) above that 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 benefit of investigation by the House or its Committee.

(3) In general, the power to commit for contempt should not be used as a deterrent against a person exercising a legal right, whether well-founded or not, to bring legal proceedings against a member or an officer.

(4) In general, where a member's complaint is of such a nature that if justified it could give rise to an action in the courts, whether or not the

[56] *Supra*, p. 242.

[57] *Report*, para. 48.

[58] It can be seen that this is a restatement of the general principle on which it is suggested the House should act when considering matters alleged to be contempt of Parliament.

defendant would be able to rely on any defence available in the courts, it ought not to be the subject of a request to the House to invoke its penal powers. In particular, those powers should not, in general, be invoked in respect of statements alleged to be defamatory, whether or not a defence of justification or fair comment, would lie.

(5) The general rule stated in (3) and (4) should remain subject to the ultimate right of the House to exercise its penal powers where it is essential for the reasonable protection of Parliament as set out in (1). Accordingly, those powers could properly be exercised where remedies by way of action or defence at law are shown to be inadequate to give such reasonable protection, for example, against improper obstruction or threat of improper obstruction of a member in the performance of his parliamentary functions.

The proposed rules reflect the desire of the Committee to limit the contempt jurisdiction to conduct that is directed against the House rather than against members as individuals. Rules (4) and (5) are perhaps the most interesting. In relation to these proposals the Committee said:

> Your Committee cannot however accept that in the normal case it is an essential protection for the House or its Members that they should be able to invoke [the contempt] jurisdiction when it is open to them, as it is to any other citizen, to take proceedings for defamation in the courts of law. Libels of the character described are, it is true, often couched in intemperate language. But the grosser the libel, the heavier the damage which the courts are likely to award; and if the libel is likely to be repeated, the courts have ample power to prevent the repetition by injunction and, if need be, by committal. Your Committee recommend that in the ordinary case where a Member has a remedy in the courts, he should not be permitted to invoke the penal jurisdiction of the House in *lieu* of or in addition to the exercise of that remedy. . . .The [foregoing] proposal. . . is fully consistent with the principle, which Your Committee believe to be right, that the House should be slow and reluctant to use its penal powers to stifle criticism or even abuse, whether of the machinery of the House, of a Member or of an identifiable group of Members, however strongly the criticism may be expressed and however unjustifiable it may appear to be. Your Committee regard such criticism as the lifeblood of democracy. In their view the sensible politician expects and even welcomes criticism of this nature. Nonetheless, a point may be reached at which conduct ceases to be merely intemperate criticism and abuse and becomes or is liable to become an improper obstruction of the functions of Parliament. For such cases, however rare, the penal powers must be preserved and the House must be prepared to exercise them.[59]

The Committee then went on to say that it was probable that in most cases it would be sufficient for a member to restrain continued abuse

[59] *Report*, paras 42, 43.

by means of an injunction.[60] It thought, however, that there was always the possibility of a case where the constant repetition of an unjustifiable and an improper attack, for example, by a powerful organ of the press, upon a group of members, might be pursued to the point of being a serious threat to the free expression of the members' consciences and to their free parliamentary actions. For such highly exceptional cases, the residual powers of the House should be preserved.

The approach suggested by the Committee is to be commended. It is one of the worst features of the present rules relating to contempt of Parliament that a member can expose a person to contempt of Parliament proceedings when an action could well be brought in the courts in respect of the statements made. A person who finds himself the subject of a complaint of contempt by a member of Parliament has much less protection than has a defendant before a court. Further, it is an abuse of the parliamentary machine to use the contempt power when in fact the allegations are being made against an individual member. It is in relation to this type of proceeding that it can with some justification be claimed that members of Parliament are a privileged class.

Applying the suggestions of the Commons Committee in practice, it would seem that *Klaebe's* case, for example, would not have been a matter that could have been raised as an alleged contempt of Parliament. Klaebe's letter was not critical of the Legislative Council or indeed of the Committee considering the scientology question. His complaints were directed against the chairman personally. It would seem therefore, that the sending of the letter was not an act of such a kind as to warrant contempt proceedings being brought for the reasonable protection of Parliament. Mr Hill would have been left to bring an action in the courts for defamation. This would seem to be quite sufficient. Unless one adopts arguments of the kind that there has been an affront to the dignity of Parliament, no harm is done the parliamentary process by allegations such as were made in Mr Klaebe's letter.

It is also interesting to speculate whether contempt proceedings would have been brought in the Commonwealth Parliament against Browne and Fitzpatrick had the rules proposed by the Commons Committee been in force.[61]

If it had merely been considered that the statements published in the *Bankstown Observer* defamed the member for Reid, it seems that the

---

[60] *Report*, para, 44.

[61] An article was published in the *Bankstown Observer* alleging that the member for Reid in the federal Parliament was implicated in an immigration racket involving the obtaining of entry permits for aliens. The Parliamentary proceedings are set out in 1955 *H. R.* Deb. 1613-1617, 1625-1664. A detailed report of the case appears in J. A. Pettifer, "The Case of the Bankstown Observer" (1955) 24 *The Table* 83 and Campbell, *op. cit.* 158-161.

Commons Committee's proposals would have precluded parliamentary action. The alleged libel could have been challenged in the courts. However, the view taken by the House of Representatives was that an attempt had been made to intimidate the member in an endeavour to prevent him saying certain things in Parliament. This would seem to attract the operation of the fifth rule propounded by the Committee—the defamatory matter constituted a threat of obstruction of the member in the performance of his parliamentary functions—and there would be a case for the exercise of Parliament's penal jurisdiction.[62]

It is to be noted that a finding that a person has been guilty of contempt of Parliament does not afford an answer to subsequent proceedings in the courts in respect of the same conduct. As the law stands at present, a person could, in theory at least, be imprisoned for a libel on a member and subsequently punished for criminal libel and sued for damages by the member. The proposals of the Commons Committee would overcome this unsatisfactory situation.

Defences to actions for contempt

In the light of the criticism that had been made, the Committee considered at some length the defences that should be available to persons charged with contempt of Parliament.[63] The comments of the Committee were concerned with instances of defamatory remarks directed against members. It would not appear that there would be many occasions when defamatory remarks would be able to constitute contempt if the rules proposed by the Committee were adopted by Parliament. However, the Committee did take the view that the defence of truth and public interest should be an answer to an alleged contempt of Parliament by a member of the public. The Committee also recommended that an honest and reasonable belief in the truth of allegations made, provided that the allegations were made after a reasonable investigation, should be a ground on which a person was entitled to be acquitted of contempt of Parliament. Even though these defences would seem only to arise in very limited circumstances, their recommendation by the Committee is to be welcomed as they do represent reasonable defences to allegations of contempt of Parliament.

Suggestions for reform of procedure relating to contempts

The Committee was critical of the present procedure that exists in the Commons to deal with alleged contempts of Parliament. Briefly that procedure is that the member raises the question before the commence-

[62] It is interesting to note that the clerk of the House of Representatives advised that there had been no contempt as the charges did not relate to the member's conduct at a time when he was a member of Parliament: Campbell, *op. cit.* 159.

[63] *Report*, paras 50-59.

ment of public business on any day. The Speaker then considers whether a sufficient case has been made out to warrant an enquiry by the Committee of Privileges. If it has, he refers the matter to that Committee. That Committee considers the question, takes evidence and so on, and makes a recommendation to the House. The report of the Committee of Privileges does not bind the House. The House may debate the question at large, and will certainly do so if the report of the Committee is controversial.

In Australia the procedure varies according to the Parliament but the usual pattern is not unlike the Commons' procedure. The member complaining raises his allegation of contempt in the form of a motion. The House may then deal with it,[64] or the matter may be referred to either a Standing Committee on Privileges[65] or to a special Committee. If the matter is referred to a Committee, the Committee investigates the alleged breach of privilege, makes a recommendation to the House, and the House considers the report of the Committee.

The two major objections to this procedure are, first, that Parliament acts as judge in its own cause and, secondly, that the procedure followed whether the investigation is carried out by a Committee or by the House does not accord with the general rules of natural justice. One of the suggestions advanced to overcome both these objections is to transfer the jurisdiction to try contempts to the courts. The Commons Committee was vigorously opposed to this for the following reasons:[66]

(a) that the functions and duties of the House are everchanging and accordingly the conduct that constitutes contempt cannot be determined once and for all.[67]

(b) that the question whether or not a person has been guilty of contempt will be influenced by political considerations which Parliament is better able to judge than the courts.

(c) that the penalty to be imposed for contempt is also likely to be influenced by political consideration, that a court could ill take into account.

(d) that, as the House concerned would have to determine whether or not to refer the matter to the courts, it would be necessary for the House to satisfy itself that a contempt had been committed before the necessary proceedings were instituted; accordingly little would be gained by transferring the jurisdiction to the court.

(e) that it would be contrary to normal practice for the House to transfer its jurisdiction over its own members.

---

[64] Cf. *Cahill's* case.

[65] Cf. the *Bankstown Observer* case.

[66] *Report*, paras 138-146.

[67] This amounts to a repetition of the earlier arguments against codification of contempt: *supra* p. 257.

Of the foregoing, (a), (b) and (c), each seem to afford a very strong argument in favour of *removing* the jurisdiction from Parliament and entrusting it to the courts. If a Bill provided that a minister should be empowered to find persons guilty of unspecified offences and could impose appropriate penalties, it is difficult to imagine Parliament or the public accepting the arguments set out above as justifying the provision. One feels the same is true as to Parliament's penal jurisdiction. It is not sufficient to say that members of Parliament represent the people and would not abuse their power. The action of the Parliament might have popular support but may well constitute a travesty of justice. That a person should only be able to be found guilty of a breach of the established law and only be sentenced to the prescribed penalty for that breach is fundamental to the rule of law and something that it ill-behoves Parliament to negate. To accept the first three reasons advanced by the Committee is to acknowledge arbitrariness as to offence, trial and penalty as being a valid principle in relation to the law of contempt of Parliament.

The fourth reason advanced by the Committee—that a person would in effect be tried twice—seems to misunderstand the role played by any body or person, be it a magistrate's court, an attorney-general or a private citizen, in deciding whether or not proceedings should be instituted for an offence. It is not a question of determining the guilt or innocence of the person before the proceedings are commenced; it is only a matter of inquiring whether there are such facts as would appear to warrant the case being brought before a court for determination.

This argument of the Committee also seems to overlook the fact that Parliament can and does direct the attorney-general to prosecute persons whose conduct constitutes a crime as well as contempt.[68]

The final reason given by the Committee—that Parliament should exercise disciplinary powers over its members—is valid. But it is no reason for giving it jurisdiction over private persons. And even in regard to its members, the determination of whether they have been guilty of contempt should be by means of an inquiry that complies with the basic principles of natural justice.

A further argument advanced in favour of the retention by Parliament of its jurisdiction to punish for contempt is that

> It is proper, then, and consistent with its dignity as the highest authority in the land, that Parliament should handle the punishment of contempt or breach of privilege in its own right.[69]

The dignity of Parliament does not justify an arbitrary determination of what conduct constitutes contempt nor does it justify a failure to

[68] *May*, *op. cit.* 104.

[69] Odgers, *Australian Senate Practice* (3rd ed. 1967), 463.

give a person charged an adequate hearing. The dignity of Parliament would, it seems, be much better served if the exercise of its powers in relation to contempt were beyond reproach.

An analogy is also drawn between the power of a court to commit for contempt and that of Parliament: if a court can commit why should Parliament not be able to do likewise ?[70] Two arguments can be raised against the validity of this analogy. First, a court is, after all, a court —a body that is trained to view all matters with impartiality; this a Parliament is not. Secondly, the analogy, rather than supporting the view that Parliament should try contempts, raises the question whether in fact the courts' committal proceedings are all that they should be. Should some independent body deal with alleged contempts of court ? Does an accused person receive a fair hearing ? These are matters that cannot be dealt with here but they do cast doubts on the validity of the analogy drawn.

Of course, before there could be any transfer of the penal jurisdiction of the Parliament to the courts it would be necessary to specify in legislation the conduct that constitutes contempt. It has already been suggested that this would be desirable whether such a transfer was made or not.[71]

There would seem to be many advantages in empowering the courts to deal with questions of contempt of Parliament—it would avoid the use of the contempt procedure for political purposes, it would deter hasty allegations of the commission of contempt, it would ensure a person the chance to put his own case properly—to mention some of the more obvious. Perhaps most importantly, the dignity of Parliament would be enhanced as it would avoid the aspersion cast against it of being both prosecutor and judge.

It is pertinent to note that the Northern Territory Legislative Council has transferred to the courts its power to deal with contempt.[72] The *Legislative Council (Powers and Privileges) Ordinance* 1963-1966 (N.T.) lists a series of matters that are to be regarded as offences against the Legislative Council—these cover the conduct that other legislatures brand as contempt—and provides by section 29 that a person who contravenes a provision of the Ordinance is guilty of an offence punishable on conviction by a fine not exceeding four hundred dollars or imprisonment for a term not exceeding six months. Section 27 of the Ordinance permits a prosecution for an offence to be commenced only by order of the President; the complaint is to be issued in the name of

[70] *Ibid.*

[71] *Supra* p. 258.

[72] A Bill to transfer the penal jurisdiction of the federal Parliament to the High Court was drawn up in 1934 but later dropped: Odgers, *op. cit.* 462-463. The *Parliamentary Powers and Privileges Ordinance* 1964 of the Territory of Papua and New Guinea is in terms similar to the Northern Territory Ordinance.

the Clerk of the Council. Section 28 provides for the proceedings to be dealt with summarily.

The operation of the Ordinance is, however, somewhat complicated by section 4. That section states that the powers, privileges and immunities of the Council and of its members and committees, to the extent that they are not declared by the provisions of the Ordinance, are to be the powers, privileges and immunities of the House of Commons of the Parliament of the United Kingdom at the time of the establishment of the Commonwealth. This section destroys much of the advantage that is gained by the specification in the Ordinance of the conduct that is punishable, in effect, as contempt. It reintroduces the uncertainty that is inherent in adopting the unspecified powers, privileges and immunities of the House of Commons. Further, it is not clear how the provision fits in with the prosecution section. If a matter is a contempt because it constitutes a breach of privilege of the House of Commons and is not a matter dealt with in the Ordinance, is it to be subject to prosecution in the manner provided in section 29 of the Ordinance ? The better view would seem to be that it is so punishable. It would still constitute a failure to comply with a provision of the Ordinance and hence come within the section.

One other point of interest with regard to the Northern Territory Ordinance is that no distinction is drawn in the application of the contempt provisions between members and other persons: members are equally subject to prosecution in the courts for a breach of the Ordinance. This is the ultimate step in the transfer to the courts of the jurisdiction to punish contempts. It could well be argued that Parliament should at least retain the power to discipline its own members for conduct that constitutes contempt. Most organizations have a power of this kind, usually subject to an appeal to the courts or to supervision by the courts by use of the prerogative writs. It would probably be sufficient if the same approach were adopted with respect to Parliament and its members. Parliament could deal with the member in the first instance but this should be subject to some procedure by which the member could protect himself from being victimised.[73]

The complete transfer of the Council's penal jurisdiction to the courts that is effected by the Northern Territory Ordinance does mean that members are less likely to be subjected to actions for "political" contempts. Proceedings such as those brought against Sir Henry Bolte would be avoided. As the proceedings in the courts can only be brought on the authority of the President, frivolous prosecutions for contempt are also prevented.

---

[73] The question of review by the courts of contempt proceedings conducted by the Parliament is returned to again *infra* p. 268.

Assuming, however, that a Parliament does not wish to empower the courts to deal with contempts, what procedure should it follow in the exercise of its penal jurisdiction ? The recommendations of the Commons Committee are of assistance in answering this question.[74]

The Committee suggested that the contempt proceedings should be initiated by the member concerned giving to the clerk to the Committee of Privileges a notice of his intention to make a complaint and full particulars of the complaint. The Committee of Privileges would then proceed to decide the preliminary question whether, on the information placed before it, there appeared to be sufficient merit in the complaint to justify the Committee entertaining it for the purpose of a full investigation. If the Committee decides against the member, the member should have the right to move in the House that the Committee be directed to carry out an enquiry. If the Committee of Privileges decides to investigate the complaint then it should be empowered to carry out a full-scale enquiry.

The suggestions of the Committee in relation to the conduct of this enquiry can be summarised as follows. Before the enquiry starts, the person alleged to be in contempt must be notified of the alleged contempt and of the intention to carry out the enquiry. Unless the Committee in its discretion decides otherwise, the complaining member and the person against whom the complaint is made should be entitled to attend the proceedings of the Committee throughout the hearing of evidence and submissions. At any stage during the hearing, the member and the person against whom the complaint is made, should be entitled to ask for and, if the Committee agrees, to be represented by counsel or solicitor. The Committee should be empowered to permit or to refuse permission for the calling of any witness by or on behalf of a person concerned in the enquiry. The right to counsel should include the right to examine, cross-examine and re-examine witnesses. Legal aid should be available to any person who is concerned in an enquiry before the Committee of Privileges.

The major criticism that can be made against these proposals is that so many of the so-called natural justice rights—the right to be present, the right to counsel and so on—are subject to the discretion of the Committee. The Committee could in fact carry out an enquiry in private without granting the person against whom the complaint has been made any right to appear or to make representations. If the person said to be in contempt is to be given a completely fair hearing—and this is implicit in the Committee's remarks—there seems to be no reason why the various rights necessary to guarantee this should not be written into the procedure governing the hearing by the Privileges Committee. These matters should not be able to be excluded at the discretion of the Committee.

---

[74] *Report*, paras 162-191.

If these rights were guaranteed, the Committee's proposals would seem to provide the best possible procedure that a parliamentary jurisdiction can offer. The requirement that a member raise the alleged contempt initially with the Privileges Committee and not in the House is perhaps the most important innovation. This would go a long way towards ensuring that allegations of contempt are not made for trivial or political reasons. The proposal that legal aid be available to persons appearing before the Privileges Committee is also to be commended.

The question does arise, however, whether a person found in contempt of Parliament by Parliament itself should have a right to have his conviction reviewed by a court. Any one of three types of review could be adopted.

The case could be entirely reheard by a court. There would seem to be little point in providing for such an appeal as a court might just as well be empowered to deal with the matter in the first instance.

Provision could be made for an appeal to a State Full Supreme Court, say, or the High Court in the case of the Commonwealth, on the same basis as appeals now lie from lower courts. This would be a most satisfactory kind of review as far as an alleged offender is concerned. He would be free to dispute the Parliament's findings of fact and its interpretation of the law. However, it seems unlikely that a Parliament that wished to deal with persons in contempt would agree to its decision being scrutinized in such a way by a court.

A third possible kind of review would be for a court to be empowered to examine the decision of the Parliament in the same manner as it would a decision of a lower court on the return of a writ of *certiorari*. The court could set aside the decision of the Parliament if it considered it was not made after a hearing that accorded with the principles of natural justice, if there was an error of law on the face of the record and so on.[75] This is a more limited kind of review and would perhaps be more acceptable to a Parliament. It would have the effect not of interfering with the exercise by the Parliament of its penal jurisdiction but of requiring the carrying out of a properly conducted enquiry and the making of a decision in accordance with law.

If Parliament insists on having the power to commit persons for contempt, some methods by which the exercise of that power can be reviewed seems most desirable. The third form of review set out above, would not amount to the abandonment by a Parliament of its jurisdiction but it would mean the acceptance by the Parliament of the idea that some form of supervision of the exercise of that jurisdiction was desirable.

---

[75] For the grounds on which *ceriorari* may issue: see Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966), 207-209.

Penalties

Two problems have beset legislatures that have not passed legislation specifying the penalties that can be imposed for contempt of Parliament —by convention they have no power to fine a person and the right to imprison does not allow incarceration beyond the one session of Parliament. The Committee considered that both these matters should be rectified.[76] There should be a power to imprison without limit subject to a maximum (unspecified by the Committee), and there should be a right to fine persons found guilty of contempt of Parliament. Both these suggestions are essential to the proper exercise of the penal jurisdiction, no matter to what body it is entrusted.[77]

Conclusion

The fact that in one month three proceedings for contempt of Parliament could arise indicates that the penal jurisdiction of Parliament is one that can never be overlooked. It is also noteworthy that in none of the cases could it be said that the procedure adopted by the respective Parliaments in the exercise of their jurisdiction was entirely satisfactory. Because of this, it is possible to say that the suggestions made by the Commons Committee cannot do other than improve the present position relating to contempt of Parliament. As has been pointed out above, those suggestions do not really overcome the major complaints against the exercise by Parliament of its contempt jurisdiction. First, in the absence of some form of declaratory legislation along the lines of the Queensland Act set out above,[78] it is not known precisely what conduct constitutes contempt of Parliament. Secondly, if a person is charged with contempt of Parliament, he cannot be certain that he will obtain a hearing that is free from bias. The only way to correct this situation is for it to be conceded that it is possible and desirable for the actions that constitute contempt to be specified; and having specified them, to provide that it should lie with the courts to determine whether a contempt has been committed and, if so, the punishment that should be imposed in respect of it.

If a Parliament cannot bring itself to part with its jurisdiction to punish for contempt, the procedure that it adopts to adjudicate upon the contempt should at least accord with the ordinary principles of

[76] *Report*, paras 193-197.

[77] In the course of the debate relating to the contempt charges brought against Browne and Fitzpatrick, the Prime Minister, Mr Menzies, referred to the fact that it would not be sufficient punishment to reprimand the offenders and this left imprisonment as the only punishment that could be inflicted upon them (1955 *H.R. Deb.* 1629). Dr Evatt, the Leader of the Opposition, moved a resolution that the House of Representatives should immediately empower itself to fine a person found in contempt (*op. cit.* 1634). On a free vote his motion was defeated.

[78] *Supra*, p. 258.

natural justice. To this end, the suggestions in relation to procedure advanced by the Commons Committee (with the insidious discretions removed) are to be commended.

It is to be hoped that there may be a revival of interest in this question sparked off by the report of the House of Commons Committee and that in the not too distant future, legislation may be introduced in the various Australian Parliaments that will put the law relating to contempt of Parliament on a sound and fair basis.

POSTSCRIPT

Since this article was written, two persons have been found guilty of contempt of the Victorian Legislative Council and reprimanded for their offence. The contempt consisted of writing and publishing in a daily newspaper an article that contained remarks that the Council considered were insulting to a witness who gave evidence before a select committee of the Council. At the "hearing" at the bar of the Council the persons concerned were given a chance only to offer an "explanation" of the article containing the offending remarks. They were summoned to appear on only thirty minutes notice. (They were, however, informed on the previous afternoon that they were going to be summoned to appear before the Council.) They were not permitted to be represented by counsel. There was no debate on the motions that the persons be found guilty of contempt.[79]

[79] *Melbourne Age*, 2 May 1969.