PARLIAMENTARY INQUIRIES AND GOVERNMENT WITNESSES*

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[The 1994 Senate Select Committee inquiry on certain government decisions concerning the foreign ownership of the print media brought to the fore, once again, the vexing question regarding whether executive privilege restricts the conduct of inquiries undertaken by the Commonwealth Parliament and its committees. This article explores the legal and constitutional issues involved in the resolution of that question. It also deals with the power of the Commonwealth Parliament to establish committees of inquiry and the existence of any constitutional limits on the scope of such inquiries; and in addition the coercive powers of the same Parliament to summon the attendance of witnesses and call for the production of papers for the purposes of those inquiries. Finally, the scope of judicial review in relation to these matters, particularly in the light of the enactment of the Parliamentary Privileges Act 1987 (Cth) is also canvassed in the article.]

I INTRODUCTION

In the course of commenting on the use made by the House of Commons of its Parliamentary Privileges during the Seventeenth Century, Sir William Holdsworth had occasion to make the following observations:

> The privilege of freedom of speech enabled it to criticize the conduct of the government and of its agents, and to suggest changes and reforms. And there is no doubt that the growth of the committee system made this criticism very much more effective and more searching than it had ever been before. One of the charges which Charles I. made against the Commons, in his declaration of 1629, was the extension of their privileges by the establishment of standing committees. He complained that 'there are so many chairs erected to make inquiry upon all sorts of men, where complaints of all sorts are entertained'; that young lawyers sitting there decried the opinion of the judges, and maintained that the resolutions of the House were binding upon them; and, last and worst, that they have sent for and examined the attorney-general, the treasurer, chancellor, and barons of the exchequer, some of the judges, and other officials, for matters done in the course of their respective duties, for which they were in no way accountable to the House of Commons. 'Under pretence of privilege and freedom of speech, they take liberty to declare against all authority of Council and Courts at their pleasure .... Their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overswaying power to themselves, which belongs only to us, and not to them.'[1]

Recent parliamentary inquiries have again brought to the fore the vexing

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[1] Sir William Holdsworth, *A History of English Law* (2nd ed, 1966) vol 6, 100.

question of the claim of executive privilege (formerly called 'Crown Privilege' and now usually referred to as 'public interest immunity') before parliamentary inquiries. The purpose of this article is to examine the legal and constitutional issues involved in the resolution of this question.

It will also deal with the power to establish parliamentary committees of inquiry and the existence of any constitutional limits on the scope of those inquiries, as well as the scope of the parliamentary power to 'send for persons, papers and records'. This will necessarily involve an examination of the rights and immunities of witnesses and, in particular, public servants who appear before Parliament and its committees. It will further entail an examination of the scope of judicial review in relation to these matters, especially in the light of the enactment of the Parliamentary Privileges Act 1987 (Cth). Although these issues can and do arise with all Australian parliaments they will be examined in this article with particular reference to the Commonwealth Parliament.

While these issues have been the subject of illuminating and comprehensive analysis before, especially by Professor Enid Campbell, they deserve further exploration in light of the enactment of the Parliamentary Privileges Act in 1987.[2]

II ESTABLISHMENT OF PARLIAMENTARY COMMITTEES: SOURCES OF POWER TO ESTABLISH AND SCOPE OF INQUIRIES

A *Non-statutory Committees*

The power to establish Commonwealth parliamentary committees of inquiry, otherwise than by legislation, would seem to derive from ss 49 and 50 of the Australian Constitution.[3] Those provisions read as follows:

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

[2] Enid Campbell, 'Parliament and the Executive' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) 88, 90-118; Enid Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees' in John Nethercote (ed), *Parliament and Bureaucracy* (1982) 179, 204-26; Enid Campbell, 'Parliamentary Inquiries and Executive Privilege' (1986) 1 *Legislative Studies* 10, 10-19; 'Parliamentary Committees: Powers Over and Protection Afforded to Witnesses', *Commonwealth Parliamentary Paper No 168* (1982) (the joint paper prepared by the then Commonwealth Attorney-General, Senator I Greenwood and the then Solicitor-General, referred to below as 'Law Officers Paper'); Gordon Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) 275-81; and generally Harry Evans (ed), *Odgers' Australian Senate Practice* (7th ed, 1995) chh 2 (especially 51-5, 56-7), 16, 17, 19 (especially 474-97); A Browning (ed), *House of Representatives Practice* (2nd ed, 1989) chh 17, 18 (especially 715-20). For significant writing on the modern position in the United Kingdom, see Diana Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (1994) ch 10; Patricia Leopold, 'The Power of the House of Commons to Question Private Individuals' [1992] *Public Law* 541.

[3] On the establishment of Commonwealth Parliamentary Committees, see Browning, above n 2, 583-9; Evans, above n 2, 359-62.

> 50. Each House of the Parliament may make rules and orders with respect to
>
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld;
>
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

At the establishment of the Commonwealth in 1901, the House of Commons in the United Kingdom had the authority to act and did act as the 'Grand Inquest of the Nation.'[4] In *Howard v Gossett*[5] Coleridge J said:

> [T]he Commons are, in the words of Lord Coke, the general inquisitors of the realm ... it would be difficult to define any limits by which the subject matter of their inquiry can be bounded ... they may inquire into everything which it concerns the public weal for them to know; and they themselves ... are entrusted with determination of what falls within that category. Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, [and] to enforce it by arrest where disobedience makes that necessary...[6]

Although the function described above may have assisted the House of Commons in the performance of its legislative functions, it seems clear that this inquisitorial function was not limited to only those cases which involved the enactment of legislation.[7]

The inquisitorial function was developed before the evolution of the British doctrine of Responsible Government, but it seems safe to assume that the function survived that development and has not fallen into disuse except perhaps as an incident of the power to impeach public officials.[8] It seems difficult to deny that there should be a general power to inquire into any matter that affects the public interest, read in its broadest sense. Strong and compelling notions of executive accountability to the Parliament can only reinforce that view, whether or not the kind of accountability adopted takes the form of Responsible Government. As will be explained later, modern developments tend to call into question the *way* the co-extensive power to punish persons who withhold information and documents for breach of parliamentary privilege is exercised, rather than the very *existence* of a parliamentary power to inquire.

It is true that before the enactment of the Parliamentary Privileges Act 1987 (Cth), the Commonwealth Parliament had enacted isolated legislative provisions which affected the powers and privileges of the Houses of the Federal Parliament. But those provisions did not displace the provisions of s 49 as an exercise of the power of the Parliament to make other provisions pursuant to ss 51(36)

[4] The phrase quoted in the text was used by Forster J in *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150, 156 ('*MacFarlane's* case'). Lord Coke sometimes used the alternative expression 'The Great Inquest of the Nation': Sir Edward Coke, *Institutes of the Laws of England* (1628) vol 4, 11; see also *Gossett v Howard* (1845) 10 QB 411, 450-1.

[5] (1845) 10 QBD 359.

[6] Ibid 379-80.

[7] *MacFarlane's* case (1971) 18 FLR 150, 157.

[8] The same assumption seems to have been made in the Law Officers Paper, above n 2, 3-5 paras 12-9.

and 49 of the Constitution.[9] Even if the provisions of the 1987 Act constitute other provisions of this kind, s 5 of that Act states that the provisions of s 49 of the Commonwealth Constitution continue in force except to the extent expressly provided in the same Act. The 1987 Act does not appear to deal with the general parliamentary power to inquire, although as will be seen later it does regulate and modify in a significant way the power of the Houses of Parliament to punish for contempt, that is, for breach of parliamentary privilege.

A strong case can therefore be made to show that the inquisitorial function of the House of Commons can be exercised by the Houses of the Federal Parliament because of s 49 of the Constitution. Nevertheless, there is judicial authority to support the view that s 49 did not have the effect of vesting the inquisitorial function in those Houses of the Parliament, principally on the surprising and unpersuasive ground that the power of the House of Commons to act as 'grand inquest' or 'grand inquisitor' was 'a function of the House of Commons and not a power'. This was the view taken by the Northern Territory Supreme Court in *MacFarlane's* case,[10] where Forster J was required to interpret the similar provisions enacted in relation to the powers and privileges of the Northern Territory Legislative Council. According to this approach s 49 of the Constitution only operated to vest the Federal Houses of Parliament with such powers of inquiry as were necessary to enable them to carry out their legislative functions.[11] It is possible that this limitation may not be so narrow as to require the introduction of a Bill in the Parliament in order to justify the establishment of a committee of investigation.[12] But in any event, the interpretation adopted by his Honour has already been convincingly criticised by Professor Campbell with whose views on this question the present writer is in complete agreement.[13]

If then, as seems to be highly likely, the inquisitorial function is a 'power' or 'privilege' within the meaning of s 49, any limitations on the matters which may be the subject of Federal Parliamentary inquiry will need to be derived by a process of constitutional implication or reading down the apparent width of the provisions of that section.

A more substantial possible limitation could be derived from the federal nature of the Australian Constitution. According to this possibility the topic of any federal parliamentary inquiry must be one that deals with a matter which is capable of being the subject of valid federal legislation, that is, relevant to the federal distribution of legislative power, for example, under ss 51 and 52 of the Constitution. At a broad level of abstraction similar issues arise in relation to the

9 *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 167-8 (*'Fitzpatrick and Browne's* case').

10 (1971) 18 FLR 150, 157.

11 This view was also shared by the Commonwealth Law Officers in their joint paper: Law Officers Paper, above n 2, 7 paras 24-6. They thought, however, that because of Responsible Government each House was entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence in the Ministers of the Crown.

12 *Aboriginal Legal Service WA Inc v Western Australia* (1992) 113 ALR 87, 97.

13 Campbell, 'Parliament and the Executive', above n 2, 92-8; see Patrick Lane, *Lane's Commentary on the Australian Constitution* (1986) 320, where Lane seems to agree with Campbell's criticism of the case referred to in the text.

scope of the Commonwealth's appropriation and executive powers.

Professor Lane[14] has drawn attention to the remarks contained in *Fitzpatrick and Browne's* case where it was said in relation to the 'very plain words of s 49 itself ':

> The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies.[15]

An analogous issue in a more direct sense has of course already arisen in relation to the power of the Federal Parliament to legislate for the creation of Royal Commissions of inquiry. Existing authority suggests that at least in relation to Royal Commissions armed with coercive authority to command the attendance of witnesses and the production of documents, and despite s 128 of the Constitution, the topics of inquiry must relate to matters which are capable of being the subject of valid federal legislation.[16]

This view is not without its difficulties and it has not escaped cogent criticism.[17] The main difficulty is that it is not easy to think of questions that could be put to a witness which could not have some possible bearing on Commonwealth legislative powers — a difficulty which over time has only been made worse by the generous interpretation accorded to Federal legislative powers by the High Court, for example, the Commonwealth's corporations and external affairs powers, not to forget the power of the Federal Parliament to make grants of financial assistance under s 96. The practical difficulties, when combined with the possibility that a Parliament may need to inquire into the need for an amendment to the Constitution to increase the scope of national legislative powers, point to the desirability of the Court departing from the view apparently favoured by the Privy Council in the *Royal Commissions* case.[18]

If this suggestion is accepted it would of course obviate the need to limit the literal reach of s 49 of the Constitution by reference to a similar federal limitation. The absence of any such limitation may well have had the support of the former Chief Justice when he stated in *Australian Capital Television Pty Ltd v The Commonwealth:*

14 Patrick Lane, *The Australian Federal System* (2nd ed, 1979) 479.

15 (1955) 92 CLR 157, 165 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

16 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 ('the *Royal Commissions'* case'); see also *Lockwood v The Commonwealth* (1954) 90 CLR 177; Lane, *The Australian Federal System*, above n 14, 479-82; Law Officers Paper, above n 2, 8-9 paras 28-32 but without the authors of that paper expressing a firm view on whether in the light of subsequent developments the *Royal Commissions'* case will be followed in relation to whether reliance can be placed on s 128 to support an inquiry into matters otherwise beyond legislative power.

17 Dennis Pearce, 'Inquiries by Senate Committees' (1971) 45 *Australian Law Journal* 652, 656-9; see also Law Officers Paper, above n 2.

18 (1913) 17 CLR 644.

> Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or its workings.[19]

The quoted remarks were made in the context of emphasising the indivisibility of freedom of communication in relation to political discussion and the public affairs of both the federal and State levels of government in Australia. This had the consequence, in his view, that the freedom of communication implied from the Federal Constitution 'extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connection with the affairs of a State, a local authority or a Territory and little or no connection with Commonwealth affairs.' He pointed to a continuing relationship between the various tiers of government (for example through s 96 grants of financial assistance to the States) which made it inevitable that matters of local concern have the potential to become matters of national concern. These considerations, even if only by way of analogy, help to underline the practical difficulty, emphasised earlier, of giving effect to a federal limitation on the matters which may be made the subject of federal inquiries in Australia.[20]

Even if, notwithstanding the above considerations, the power to establish parliamentary committees of inquiry is federally limited, two factors would combine to lessen the practical significance of such a limitation. The first is that the limitation may not come into play unless the committee is armed with compulsory powers to require the attendance of witnesses and the production of documents. In *Lockwood v The Commonwealth,* Fullagar J suggested that if the inquiry was not vested with compulsory powers 'the Commonwealth ... [can] make an inquiry into any subject', subject to the need for a parliamentary appropriation to fund the inquiry.[21] Secondly, there remains the difficulty of establishing that a matter may never be relevant to the Commonwealth's legislative powers.

Another and associated federal limitation relates to the possible inability to inquire into matters that concern the processes and workings of State (as distinct from Territory) governments and their instrumentalities. In *Koowarta v Bjelke-Petersen,* Stephen J acknowledged that there are limitations to be implied from the federal nature of the Constitution 'which will serve to protect the structural integrity of the State components of the federal framework, State legislatures and

19 (1992) 177 CLR 106, 142 (Mason CJ) ('the *Political Advertising Ban* case').

20 Ibid. His Honour's views in relation to the freedom of communication were subsequently adopted by a majority of the Court in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 122-3 ('the *Theophanous* case'); *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211, 232. There are parallels here with his reliance on practical difficulties as an important factor in justifying his unwillingness to give effect to legal limitations based on federalism in relation to the scope of the Commonwealth's appropriation power (s 81 Commonwealth Constitution) in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, 394-6 ('*Australian Assistance Plan* case').

21 (1954) 90 CLR 177, 182; see also Lane, *Lane's Commentary*, above n 13, 320; and also Lane, *The Australian Federal System*, above n 14, 479; Law Officers Paper, above n 2, 8 para 28.

State executives.'[22] Those limitations have revived, in a modified way, notions of inter-governmental immunity that were originally thought to have been laid to rest in the *Engineers'* case.[23] The modern doctrine has understandably been directed at limitations on the power of the Federal Parliament to make *laws* which bind State governments and their instrumentalities. These were summarised as laws which either:

1 discriminate against the States; or
2 operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[24]

These limitations on the power to make *laws* can also be used to limit the reach of other provisions contained in the Constitution which are not concerned with the power of the Federal Parliament to enact legislation, such as, for example, s 117, as was demonstrated by the approach adopted by Brennan J in *Street v Queensland Bar Association*.[25] No doubt similar reasoning can and should be used to restrict the scope of s 49.

Even if this view is accepted, it may not be easy to show that the mere holding of an inquiry into the affairs of a State government or its agents and officials will by itself violate the limitations mentioned above. Nevertheless, the Court might view differently any attempt to exercise the co-extensive power of the Federal Houses of Parliament to punish for contempt of Parliament the failure of State officials to answer questions or produce documents. The use of such coercive powers to further federal inquiries might well be seen as seeking to make State agencies and instrumentalities accountable and answerable to the Federal Parliament. The attempt by federal agencies to use coercive powers against a State for those purposes would, it is thought, run contrary to the well known remarks of Sir Owen Dixon when he stated:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.[26]

Such a view would be easier to accept if it was held that the Commonwealth

22 (1982) 153 CLR 168, 216; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 207 (Gibbs CJ), 217 (Mason J), 226 (Wilson J) ('*Queensland Electricity Commission* case').

23 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129 ('the *Engineers'* case').

24 *Queensland Electricity Commission* case (1985) 159 CLR 192, 217 (Mason J). This summary was quoted with approval in *Western Australia v The Commonwealth* (1995) 69 ALJR 309, 347-8 ('the *Native Title Act* case') and *Re Australian Education Union; ex parte Victoria* (1995) 69 ALJR 451, 464. In the *Native Title Act* case (1995) 69 ALJR 309, 348 the High Court left open whether the limitation could also be expressed as the Commonwealth Parliament's inability 'to impair the capacity of the States to exercise for themselves their constitutional functions: that is to say, their capacity ... to function effectually as independent units' as suggested by Dawson J in the *Queensland Electricity Commission* case (1985) 159 CLR 192, 260.

25 (1989) 168 CLR 461, 513.

26 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82. See also the advice given by the present Clerk of the Senate, Harry Evans, in a document dated 29 January 1993, published as Appendix 5 to the *Interim Report of the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council* (1993) 92-3; see also Browning, above n 2, 656-8; Evans, above n 2, 443-5.

power of inquiry was federally limited by reference to the subject matter of the inquiry. But even if there is no limit on the subject of the inquiry, the general inability to compel State agencies to cooperate with the inquiry, might well be justified on the ground that the Constitution protects the way in which State governments function, that is, the *processes* of State governments rather than the *content* of their powers.[27] It might also have the effect of rendering such inquiries ineffective in a practical sense.

Leaving aside the difficult federal problems discussed above, the present writer generally favours the need to give full effect to the literal meaning of the provisions of s 49 and does not support those provisions being read down. Their width is confirmed by the deliberate decision of the Framers not to limit the scope of the power of the Parliament to make its own provision in relation to its powers and privileges. They refused to limit that power by reference to the powers and privileges possessed by the British House of Commons. It was said that they should allow the clause to stand 'and trust to the good sense of the commonwealth as sufficient to guide us.'[28] In advancing this view it is not intended to suggest that the provisions of s 49 can be read in disregard of provisions such as s 71 of the Constitution. It is assumed, for example, that any inquiry would be established only to *inquire and report* and not to make *legally binding and final determinations of guilt or innocence,* so as to be exercising the 'judicial power of the Commonwealth.'[29]

That having been said, it is impossible to ignore the modern High Court's increasing disenchantment with British notions of constitutional law that rest upon having confidence in a parliamentary system of government and in the ability of voters to cure any abuse of power.[30] Under those notions any abuse of power is not a reason for denying its existence. This means that the potential for using parliamentary inquiries with the sole aim of exposing the private affairs of individuals may well encourage the modern Court to depart from the unwillingness of the Court in former times to imply restrictions on the powers created by s 49. It is easy to see how the reputations of individuals can be injured in a way that can leave them without any redress given the freedom of speech accorded to the proceedings of Parliament.

The possible willingness of the Court to prevent such abuse would contrast sharply with the adherence to the literal width of s 49 displayed in the unanimous judgment of the High Court in *Fitzpatrick and Browne's* case,[31] but this

[27] See, eg, Brennan J in *The Commonwealth v Tasmania* ('*Tasmanian Dam* case') (1983) 158 CLR 1, 214; *Street v Queensland Bar Association* (1989) 168 CLR 461, 512-3. The inability to compel State agencies to cooperate with the inquiry is unlikely to be absolute since some federal responsibilities may be seen as overriding in character, eg defence. The implied restraint on legislative power has not been treated as absolute.

[28] Reid and Forrest, above n 2, 251.

[29] Lane, *The Australian Federal System*, above n 14, 476; Lane, *Lane's Commentaries,* above n 13, 320-1, where reference is made in this connection to the well known case of *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

[30] The *Engineers'* case (1920) 28 CLR 129, especially 151-2; *Attorney-General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ).

[31] (1955) 92 CLR 157, especially 165, where reference was made to the 'very plain words of s 49 itself' being 'incapable of a restricted meaning.'

only highlights the changes in judicial approach which began to be apparent towards the end of the last decade. Without necessarily agreeing with the new approach, it suffices to say that the Court's new found concern for the rights of individuals (and conversely its increasing distrust for the workings of government) may well result in the scope of s 49 being restricted by impliedly limiting the power of inquiry in order to protect the rights of the ordinary citizen.

Beyond merely noting their possible existence, no attempt is made here to predict the nature and scope of those implied limits. The possible role of the doctrine of the separation of powers as a reason for impliedly limiting the scope of s 49 will be discussed later when dealing with the effectiveness or otherwise of claims of executive privilege as grounds for refusing to comply with orders to answer questions or produce documents.

B *Statutory Committees*

Some parliamentary committees are established by Federal legislation and presumably the source of constitutional power to establish them is to be found in s 51(39) of the Constitution, when read in conjunction with any other primary heads of legislative power that are relevant to the matters which may be the subject of inquiry by those committees.[32]

Similar issues would seem to arise with the constitutional power to establish statutory committees, to those that were discussed above in relation to non-statutory committees. It would be surprising if different results could be obtained by reference to whether the parliamentary committees were established by legislation or under s 49 of the Constitution.

III CONDUCT OF INQUIRIES

A *Power to Send for 'Persons, Papers and Records'*

It will be recalled that in the passage quoted from *Howard v Gossett*, Coleridge J indicated that the power to inquire would be ineffective without the co-extensive authority to call for the attendance of witnesses and to enforce it by arrest where disobedience makes that necessary.[33] This authority extends to the call for the production of documents and is sometimes referred to the power 'to call for persons, papers and records.'

The authority in question carried with it the exclusive power of the House of Commons to determine whether any disobedience constituted a breach of par-

[32] See, eg, the joint committees (ie committees constituted by members of both Houses of the Federal Parliament) created by the Public Accounts Committee Act 1951 (Cth) s 5 (Joint Committee of Public Accounts) and the Public Works Committee Act 1969 (Cth) s 7 (Parliamentary Standing Committee on Public Works). The provisions of those Acts also set out the powers of those Committees and the rights and obligations of witnesses who appear before them. Some parliamentary committees are established by legislation which state their terms of reference but provide that the powers and proceedings of those committees are to be determined by the resolution of both Houses, thereby drawing on the powers possessed by them under ss 49 and 50 of the Constitution. For an example of such a hybrid committee see National Crime Authority Act 1984 (Cth) Part III, especially s 54.

[33] (1845) 10 QBD 359, 379-80; see above, text accompanying nn 5-6.

liamentary privilege and also to impose penalties for that breach.

Questions have been raised about the basis and historical origin of this authority. There are problems with the traditional statement that the ability to punish for contempt was a privilege enjoyed by both Houses of the British Parliament collectively 'as a constituent part of the High Court of Parliament' since it has been suggested that only the House of Lords can be said to have the historical status as a 'High Court'.[34] The traditional statement would therefore make it difficult to explain the acknowledged existence and exercise of that authority by the House of Commons. It would also have obvious implications for the position in relation to the Federal Houses of Parliament notwithstanding s 49 of the Constitution since it is difficult to treat either of those Houses as a 'High Court'.

The present writer agrees that it is more realistic to view the power to send for persons, papers and records as associated with the fundamental right of Parliament to information, not in any judicial capacity, but in its scrutinising role as a legislature.[35]

While the theoretical existence of this authority is rarely questioned and is fully accepted in the recognised texts on parliamentary law and practice both in the United Kingdom and Australia, the need for its formal exercise is obviated by the usual willingness of prospective witnesses to cooperate with requests to appear or produce documents. However, in more recent times there are increasing signs that willingness is becoming less forthcoming, at least in the United Kingdom. This appears to be the case both as regards ordinary and official witnesses.[36] It may also be the case in Australia as regards the increasing use being made of executive privilege as a ground for the failure of government witnesses to comply with requests for information or documents sought by the Senate.[37]

The signs have been sufficiently strong to lead a number of commentators to point to a growing gap between the theoretical existence of the authority and the reality regarding its actual exercise.[38] The gap will be the subject of further discussion below but, for the present, it is necessary to mention that, so far as non-statutory committees are concerned, the power to send for persons, papers and records is regarded as being vested in the Houses of Parliament so that an appropriate delegation of the same power is needed before the power can be exercised by a parliamentary committee.[39] It seems that doubts have been expressed as to whether joint committees are invested with the same powers,

[34] Woodhouse, above n 2, 178-9 who refers to Erskine May, *Treatise on the Law: Privileges, Proceedings and Usage of Parliament* (20th ed, 1983) 71 and *Kielly v Carson* (1842) 4 Moore PC 63 in support of this view.

[35] Woodhouse, above n 2, 179.

[36] Leopold, above n 2, 543-9; Woodhouse, above n 2, 179, 193-202.

[37] See para 1(1) of the resolution of the Senate which led to the reference of the matter dealt with by the Senate Committee of Privileges in Senate Committee of Privileges, *The Forty-ninth Report of the Senate Committee of Privileges* (1994) para 1(1).

[38] Leopold, above n 2; Woodhouse, above n 2, 179, 193-202; Campbell, 'Parliamentary Inquiries', above n 2, 14.

[39] Evans, above n 2, 51, 397-9; Browning, above n 2, 646-7. The position is the same in relation to the Committees of the House of Commons: May, above n 34, 697; Woodhouse, above n 2, 180.

privileges and immunities as the committees of the individual Houses, apparently because s 49 of the Constitution invests the two Houses and the *committees of each House* with the powers, privileges and immunities of the House of Commons at the establishment of the Commonwealth.[40] If these are well founded they could prevent both Houses of the Federal Parliament lawfully delegating the power to send for persons, papers and records to joint committees. However it has also been suggested that these doubts have now been put to rest by the enactment of the Parliamentary Privileges Act.[41] Presumably the doubts could be overcome by legislation enacted pursuant to ss 49, 51(36) and 51(39). In the case of statutory committees it seems safe to assume that s 51(39) is wide enough to support legislation which vests the same power in those committees, including joint committees.[42]

The need for a delegation of power in relation to non-statutory committees can be expected to have practical implications for the establishment of inquiries into the conduct of Ministers and other government officials. A House of Parliament controlled by the Executive might well wish to use that control to prevent such a committee from having the necessary coercive authority needed to conduct that inquiry.[43] The same problem would not however arise in a House that is not controlled by the Executive as is usually the case with the Australian Senate.

B *Consequences for Failure to Obey Lawful Orders to Answer Questions and Interference with Witnesses*

It will be clear from the foregoing that the failure of a witness before a parliamentary inquiry to answer a question which a witness is obliged to answer could attract, in the case of non-statutory committees, the penal jurisdiction of the relevant House of Parliament. That jurisdiction is exercisable by the House since it is vested in the House and not its committees. Furthermore, the exercise of the jurisdiction is now subject to the Parliamentary Privileges Act and, in the case of the Senate, certain Resolutions passed by it to govern the exercise of its Parliamentary Privileges. As will be seen in more detail later, s 12 of that Act creates a separate statutory offence in relation to conduct which amounts to improper interference with witnesses.

In the case of some statutory committees, there are statutory provisions which

40 Browning, above n 2, 627-8 ; Evans, above n 2, 390-1.

41 Evans, above n 2, 390; see also Browning, above n 2, 628. Presumably this view is based on the extended definition of committees in s 3(1) which includes a committee of both Houses. However, if the doubts referred to in the text are well founded, it is difficult to see how this definition can have altered the position, since s 5 of the same Act merely provides for the continuance of the 'powers, privileges and immunities of each House, and of the members and committees of each House, as in force under s 49 of the Constitution immediately before the commencement of this Act.' The writer is, nevertheless, inclined to the view that the doubts are not well founded since they fail to give the provisions of s 49 a broad interpretation which is justified by their constitutional nature.

42 See, eg, Public Accounts Committee Act 1951 (Cth) s 13; Public Works Committee Act 1969 (Cth) s 21.

43 Woodhouse, above n 2, 189-92.

create offences triable and punishable in ordinary courts of law.[44] The obligations of witnesses are qualified by reference to whether the witness acts without a 'reasonable excuse'.[45] In the case of other committees of this kind (referred to earlier as the 'hybrid' variety), all matters which relate to their powers and proceedings are, as mentioned before, determined by resolutions passed by the Houses of Parliament.[46]

C *Possible Limitations on these Powers — Major Areas of Contention*

At this stage, it is convenient to deal with a number of possible limitations on the powers discussed above, before dealing in more detail with the legal consequences of the failure of witnesses to comply with lawful orders to answer questions or produce documents. Those possible limits arise out of the following matters:

1 Executive Privilege;
2 Secrecy provisions; and
3 Statutory immunities of witnesses.

1 *Executive Privilege — The Conclusiveness of Executive Certificates*

(a) Existing Position

The theoretical position discussed above would seem to suggest that the power to send for persons, papers and records can be exercised in relation to any person, whether the person is a government official or a private citizen.[47]

It is true that a special procedure may need to be employed in order to obtain the production of a public paper which concerns the royal prerogative. The Standing Orders of both Houses of the Federal Parliament require an address to the Governor-General praying that the paper be laid before the respective House.[48] It is also the case, as indicated by Professor Campbell, that it is not entirely clear whether the production of such papers can be coerced in the same way as disobedience to an order that a paper be laid before a House of the Parliament.[49] However this is likely to be a matter of parliamentary procedure which, at most, may only require a change or suspension in the Standing Orders of the relevant House pursuant to s 50 of the Constitution. Any difficulty as regards the obligation to produce such a document is likely to rest on more fundamental considerations are to be discussed below.

The power to send for persons, papers and records when official witnesses and

[44] See, eg, Public Accounts Committee Act 1951 (Cth) ss 15-19, 21; Public Works Committee Act 1969 (Cth) ss 28-33.

[45] Public Accounts Committee Act 1951 (Cth) s 15 and s 17 which refers to a witness acting without 'just cause'; Public Works Act 1969 (Cth) ss 28, 30.

[46] See the reference to 'hybrid committee', above n 32.

[47] Browning, above n 2, 646-9 ; Evans, above n 2, 47-8, 51-2, 398-9.

[48] Browning, above n 2, 560, 656; Evans, above n 2, 457-8; Campbell, 'Parliament and the Executive', above n 2, 99. A similar position prevails in the case of the British House of Commons: Woodhouse, above n 2, 187-8.

[49] Campbell, above n 2, 99.

papers are involved, has been complicated by at least two important considerations, which cannot be regarded as merely procedural. The first is the possibility of restricting the scope of this power by reference to the notion of public interest immunity (formerly described as 'Crown Privilege' and sometimes referred to in this article as 'executive privilege', when claimed by the Executive branch of Government).[50] The second consideration relates to the probable immunity of the members of one House of the Federal Parliament from the authority of the other House of the same Parliament.[51] The same immunity is acknowledged to exist in relation to the Houses of the British Parliament.[52] The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view, as well from an analytic perspective, since it may flow directly from the terms of s 49 of the Constitution if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth.

This immunity may therefore protect a Minister who is a member of the House of Representatives from the authority of the Senate, even though, paradoxically, a public servant employed in the same Minister's Department may not enjoy the same immunity. The crucial issue is whether the same public servant should enjoy a similar immunity in respect of actions undertaken by the public servant when acting in accordance with the instructions of the Minister.

The first of the two complications foreshadowed above has the capacity to raise a spectacular clash of powers between the Legislative and Executive branches of government especially where the conflict arises from the refusal of the Executive to comply with the orders of the Senate. So far, however, there has been what virtually amounts to a history of parliamentary acquiescence in cases where the Executive branch has been determined to maintain its claim to privilege.[53] But this has occurred without either House of Parliament ever conceding the legal effectiveness of claims to executive privilege in the context of parliamentary inquiries.[54]

Furthermore, and significantly, the Commonwealth Government has not gone so far as to claim the ability to direct civil servants who give evidence to parliamentary committees 'not [to] answer questions which are or appear to be di-

50 For a general discussion of the subject in relation to the workings of Parliament see Browning, above n 2, 578-82, 653-6; Evans, above n 2, 30, 454-5, 480-97; Reid and Forrest, above n 2, 275-81.

51 Evans, above n 2, 43-5, 51-2, 62, 398 and see also Browning, above n 2, 41-2, 658-60, 729. The immunity would not prevent the voluntary appearance of members of one House before the committees of the other House. It may perhaps be possible for one House to coerce its own members into appearing before the committees of the other House.

52 Woodhouse, above n 2, 181-2.

53 Reid and Forrest, above n 2, 278; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 207-9.

54 Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 207; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 10; Evans, above n 2, 30-1, 480-1, 493; Reid and Forrest, above n 2, 276; Joint Select Committee on Parliamentary Privilege (Commonwealth), *Exposure Report, Parliamentary Paper 87* (1984) 154 para 9.13 (*'Exposure Report'*); Senate Procedure Committee, *Third Report of 1992, Parliamentary Paper 510* (1992) 3.

rected to the conduct of themselves or other named officials', as has apparently occurred in the United Kingdom.[55] The latter development is comparatively recent and flies in the face of traditional statements of British parliamentary law and practice. The Commonwealth's claim to the conclusiveness of its assertions that it would be contrary to the public interest for evidence to be provided to a parliamentary inquiry can be traced back to a statement made to Parliament in 1953 by the then Prime Minister, Mr R G Menzies, and later also advice provided by the then Solicitor-General, Professor K H Bailey, which was tabled in Parliament in 1956.[56] Heavy reliance was placed by them on the decision of the House of Lords in *Duncan v Cammell, Laird & Co Ltd*[57] — a case which should be regarded as the high-water mark of the doctrine of public interest immunity.

As others have pointed out, the issues involved in public interest immunity which have been developed by the courts in ordinary litigation are not necessarily the same as those which can arise in parliamentary proceedings.[58] In one case the courts are concerned to balance the public interest in securing justice between litigants with the need to keep secret information, the disclosure of which could damage the community at large. In the other, the Houses of Parliament are concerned with the public interest at large and whether they have an overriding interest in being informed about and by the Executive; and also whether Ministers should be allowed to be the sole judges of what the public interest requires.[59]

The wider public interest gives rise to a number of important issues. Those are whether the Houses of Parliament have an overriding interest in being informed by the Executive and whether it is safe to allow Ministers to be the sole judges of what the public interest requires not to be disclosed. It surely requires little imagination to see how such a discretion could be used by Ministers wishing to escape public scrutiny in relation to their own conduct or that of other persons for whom they are responsible. In recent times the Matrix Churchill affair in the United Kingdom[60] and, to a lesser extent, in Australia, the attempt by the Com-

55 Woodhouse, above n 2, 209; Peter Hennessy, *Whitehall* (1989) 334-7. The instruction was announced by the then British Prime Minister, The Rt Hon Mrs M Thatcher, during the Westlands Affair.

56 Campbell, 'Parliament and the Executive', above n 2, 100-3; Evans, above n 2, 484-6. See also Law Officers Paper, above n 2, 33-40 paras 121-51 in which the then Commonwealth Attorney-General and the Solicitor-General supported the operation of executive privilege before parliamentary committees of inquiry and the conclusiveness of executive certificates, but only as a matter convention and not as a strict legal limitation on the powers of those committees to require evidence to be given or documents to be produced. The Attorney-General in question subsequently changed his mind after he ceased to occupy that office, when he indicated his preference for the view that '[t]he conclusiveness of the Minister's certificate is for the Senate to determine': Browning , above n 2, 580.

57 [1942] AC 624.

58 See, eg, Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 12; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 209-10; Campbell, 'Parliament and the Executive', above n 2, 103-4; see also Law Officers Paper, above n 2, 40 para 151.

59 Campbell, 'Parliament and the Executive', above n 2, 103-4.

60 A Bradley 'Justice, Good Government and Public Interest Immunity' [1992] *Public Law* 514; Ian Leigh, 'Matrix Churchill, Supergun and the Scott Inquiry' [1993] *Public Law* 630; Adam Tomkins, 'Public Interest Immunity After Matrix Churchill' [1993] *Public Law* 650.

monwealth Treasurer to prevent the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media having access to certain documents,[61] illustrate how claims to executive privilege can be, and are, arguably abused. This recalls the rather humorous remarks quoted by Megarry:

> If anything shall seem,
> The Minister shall deem:
> His certificate of demption
> Shall confer complete exemption.[62]

It is sometimes suggested that the remedy for any abuse of the claim to executive privilege before parliamentary committees lies in the so called 'court of public opinion', that is, in allowing the matter to be the subject of political judgment by the electorate.[63] In the view of this writer, however, it is most unlikely that electors would be able to focus on issues of such a detailed character in the course of an election.

There have also been important changes to the doctrine of public interest immunity as it applies to litigation in the ordinary courts of the land since the case of *Duncan v Cammell, Laird & Co Ltd* was decided. In the first place, the trend has been away from the ready recognition of such claims towards the position where the courts in Australia (and in the United Kingdom) assert the right to examine documents for themselves, if necessary in secret, in order to determine whether a claim to non-disclosure should be upheld. In other words, the claims are not treated as conclusive.[64]

The second important change relates to the enactment of the federal freedom of information legislation. As others have pointed out it would be difficult to sustain a claim for executive privilege in relation to matters which are required to be disclosed under that legislation.[65] The Official Government Guidelines

[61] Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, *Percentage Players: The 1991 and 1993 Fairfax Ownership Decisions, Commonwealth Parliamentary Paper 114* (1994) 19-32 (majority), 17-21 (minority) and Appendices D, E, F, H, and K (*'The Print Media Inquiry Report'*). It appears that in a case decided by the Federal Court Sheppard J rejected the Federal Government's claim for public interest immunity in relation to a number of the documents that had been sought by the Senate inquiry. The case involved litigation between groups who were unsuccessful in obtaining the takeover of the Fairfax newspapers and the Fairfax receivers: Richard Gilbert, 'Documentary Tug o' War in Federal Court' (1994) 13(21) *The House Magazine* 7, 5-9.

[62] R Megarry, *Miscellany-at-Law* (1955) 361.

[63] Commonwealth Government Submission to the Senate Standing Committee of Privileges in relation to its reference on the Parliamentary Privileges (Enforcement of Lawful Orders) Bill 1994 (Cth) (September, 1994) Submission No 10, especially paras 7-9. The phrase 'court of public opinion' was used by the Leader of the Government in the Senate, Senator Gareth Evans, during his appearance before the Senate Standing Committee for the purpose of elaborating the Government's Submission: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1994, 12, 14.

[64] Joint Select Committee on Parliamentary Privilege, above n 54, 153 para 9.12; *Sankey v Whitlam* (1978) 142 CLR 1; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604. The beginning of this trend can be traced to *Conway v Rimmer* [1968] AC 910.

[65] Freedom of Information Act 1982 (Cth). See Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 12. But the Senate does not treat the exemptions provisions in the freedom of information legislation as binding, as distinct from persuasive, grounds for not producing documents to that House of Parliament: Report of Senate Procedure Committee, above n 54, 1-6.

issued by the Federal Government to its employees and officers who are asked to appear before parliamentary committees (last revised in 1989) recognise that claims to executive privilege can still be made in areas which are exempt from disclosure under the freedom of information legislation. The categories of exemption make sense and should not, it is suggested, be lightly disregarded, as a matter of practice and convention.

However, even in the areas traditionally regarded as coming within the legitimate ambit of executive privilege such as, for example, defence, it is sobering to remember that the British House of Commons entertained an inquiry into the conduct of the Crimean War.[66] Moreover claims of executive privilege based on grounds relating to defence and national security were effective to prevent a House of Commons Committee from inquiring into matters which later came to light as a result of the refusal of a court to uphold the conclusiveness of claims of privilege advanced by four Ministers of the Crown in the prosecution of companies for exporting certain materials without export authority in the Matrix Churchill affair.[67]

It also needs to be borne in mind that the assertion of executive privilege sanctioned and even required by the Government Guidelines issued both in Australia and the United Kingdom has never received parliamentary approval or parliamentary acceptance in either country.[68] There is no obligation on the part of government officials to claim the exemption created by the freedom of information legislation.[69] In any event, it cannot be said that the same legislation is intended to modify or override the power and privileges of Parliament referred to in s 49.[70]

The extent, if any, to which executive privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answer questions or produce documents, remains an open question. Not surprisingly, and so far as this writer is aware, the matter has never been the subject of authoritative judicial resolution.[71] Nevertheless a question can be raised as to whether the issue will continue to remain unresolved.

Presumably the control exercised by a government under the Westminster system was and will continue to operate as a break on inquiries instituted in the lower or more popularly elected Houses of Parliament. Thus a government which enjoys the confidence of those chambers will no doubt be in a position to

66 Enid Campbell, *Parliamentary Privilege in Australia* (1966) 173-4.

67 See the articles cited above n 60.

68 For the position in Australia see Browning, above n 2, 648; Evans, above n 2, 490; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 199-200; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 11 (text accompanying n 14); Reid and Forrest, above n 2, 280. For the position in the United Kingdom see Woodhouse, above n 2, 193-200 (generally) and 194 ('no Parliamentary status whatsoever') and also 196 where the British Guidelines are disparagingly referred to as the 'Osmotherely Rules'.

69 Margaret Allars, *Introduction to Australian Administrative Law* (1990) 153 para 4.62; see also Freedom of Information Act 1982 (Cth) s 14.

70 For the reasons stated below, it is thought that express provisions were needed to show that such an intention was present: see below n 105 and accompanying text.

71 Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 14; Campbell, 'Parliament and the Executive', above n 2, 100.

block any attempt to ignore or overrule the claim to privilege advanced by the same government. The one possible exception may arise in the case of minority governments. Leaving aside that possibility, this means that care needs to be exercised before reliance can be placed on the position in the United Kingdom since even in the case of the House of Lords, the British Government would no doubt have ways of ensuring that the same body did not press its claims for information against the wishes of the government in office, especially having regard to the non-elective nature of that legislative chamber.

The same cannot be said about the position of the Senate which is of course an elective body even if arguments can be raised about whether its elective basis is as democratic as that of the House of Representatives. Moreover the likelihood of the Senate ignoring a claim to privilege advanced by the government of the day must be classed as much greater when, as is usually the case, government is unable to obtain a majority in that chamber. Presumably the only weapon a government could use to dissuade the Senate pressing its claims to information claimed to be privileged would be the threat of a double dissolution of the Parliament if the conditions for such a dissolution were satisfied or, but perhaps less effectively, a prorogation of the Parliament or a dissolution of only the House of Representatives.[72]

Whatever role public interest immunity can and should play as a matter of parliamentary practice or convention, in this writer's view, it should not operate to restrict the legal scope of parliamentary inquiries and the co-extensive powers needed to make those inquiries effective under s 49 of the Constitution.

No doubt it would be possible to construct arguments to support the contrary view based on the doctrines of Responsible Government or the separation of powers so as to implicitly cut down the potential reach of the powers that can otherwise be derived from s 49. According to those kinds of arguments the provisions of s 49 would need to be read subject to implied restrictions which might be seen to flow from ss 61 and 64 of the Constitution when those provisions are read against the background of the British notions of Responsible Government.

It is accepted that those notions are concerned to emphasise the responsibility which Ministers owe to Parliament or, to be more accurate, the lower or more

[72] British legal and constitutional history suggests that the Commonwealth Parliament can only lawfully function during a 'session' of the Parliament within the meaning of that term in s 5 of the Constitution. For reasons which are not elaborated here, the writer favours the view that both prorogation and a dissolution of the House of Representatives have the strict legal effect of terminating a session of the Parliament. Prorogation and dissolution are the traditional prerogative instruments by which the Executive could control the functioning of the Parliament. The Senate has not conceded the legal inability of itself or its committees to function during prorogation or the dissolution of the House of Representatives, despite legal advice to the contrary given by the Federal Government's Law Officers: Evans, above n 2, 178-9, 400, 514-22; cf Browning, above n 2, 259-60, 264-9, 617-18. The writer agrees with the view taken by the Law Officers as a correct statement of the present state of the law. This is not to deny , however, that there is a need to re-examine the appropriateness of the existing position, especially given the importance of ensuring greater accountability of the Executive to the Parliament.

popularly elected House of Parliament.[73] The 'responsibility' referred to here is essentially political in the sense that if a Minister or Ministers cease to enjoy the confidence of the appropriate chamber they are under a conventional duty to resign. Under traditional and, it is suggested, dated understandings of ministerial responsibility and Responsible Government, public servants would only be seen as emanations of the Ministers in charge of their departments and would only be 'accountable to the public through the accountability of ministers and cabinet to parliament.'[74]

These considerations have implications which go much further than the failure to give evidence covered by a claim of privilege and might well be used to deny:

1 not only the ability of parliamentary inquiries to require the giving of evidence by public servants (since if evidence is to be given at all it should be by the person who is regarded as being solely responsible to Parliament);
2 but, and more fundamentally, the legal obligation of the Minister to give the evidence.

In other words, the responsibility is purely political in the sense that the only sanction for failing to give the evidence is that the Minister or Ministers may lose the confidence of the Parliament and may in this way ultimately be forced to resign.

There are two responses which can be advanced against this highly restrictive view. In the first place the ability of a Parliament to withdraw its confidence in Ministers would be greatly assisted by ensuring that the Parliament can ascertain all the facts and information needed to make an informed judgment on the conduct of Ministers and the government agencies for which they are responsible. Some might even argue that this should be seen as not merely desirable, but essential, in ensuring the accountability of Ministers to the Legislature. Looked at from this perspective, and leaving aside any inter-House immunity which Ministers may enjoy by reason of their membership of the other House, the power to obtain evidence from government officials would actually aid and strengthen the operation of Responsible Government at the very time when its success as a form of government has come under serious challenge because of the executive domination of the Parliament. This would also apply to the power of the Parliament to override claims of executive Privilege.

Secondly, the writer has had occasion to comment before on the unsuitability of using the conventional rules of Responsible Government as a basis for legal

[73] Submission presented by G McGarry to the Senate Standing Committee of Privileges referred to above n 63, 25 as elaborated in evidence given before the same Committee: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1995, 45.

[74] H Collins, 'What shall we do with the Westminster Model?' in R Smith and P Weller (eds), *Public Service Inquiries in Australia* (1978) 366 quoted in the submission presented by Mr Ken Coghill, a former member and Speaker in the Victorian Parliament, to the Senate Standing Committee referred to above n 63, Submission No 8, 156. Coghill described the traditional view quoted in the text as being 'widely regarded both as a false description of how the system of government actually works and unrealistic in practical terms': at 156; see also Campbell, 'Parliament and the Executive', above n 2, 109-10

obligations or restrictions which are enforceable in a court of law.[75] The main difficulty is the inherent vagueness which surrounds most aspects of those rules — as is illustrated by the use of that notion to support opposing sides of the argument outlined above. There is also the loss of one of the supposed advantages of rules which are developed by practice and convention, namely, their flexibility and ability to adapt and change to meet new circumstances.

Similar considerations can, it is suggested, be used to reject limits on the power of parliamentary investigations to obtain evidence from governments which are based on the doctrine of the separation of powers. It has been said that it is one of the main general doctrines underlying the Constitution.[76] This is partly due to the design of the Constitution and, in particular, the provisions of ss 1, 61 and 71. The main significance of the doctrine in the Australian context has been the separation of the legislative and executive powers, on the one hand, from the judicial powers, on the other, given the union of the legislative and executive powers that results from the adoption of a Westminster style of government.[77]

Doubtless, a rigid application of the separation of powers doctrine in relation to the legislative and executive powers of the Commonwealth would cast considerable doubt on the ability of the Parliament to legislate, whether under s 49 or 51 of the Constitution, to

1 confer the 'executive power of the Commonwealth' on any body or person other than the Executive branch of the federal government; and to
2 interfere with the exercise of the same power by the same branch of the government in question.

Constitutional constraints of this kind have certainly been recognised in relation to the exercise of the judicial power of the Commonwealth. So far as the writer is aware, there has not been any judicial discussion of the second of the above two issues in relation to executive power, except for the issue of the constitutional immunity of the Commonwealth and its instrumentalities from the operation of State laws. That issue involves, however, special considerations based on the federal character of the Constitution.

There has also been very little judicial discussion of the first of those issues. It has had a bearing on the constitutional validity of Commonwealth-State cooperative arrangements. The writer and some other commentators have concluded that in the present state of the authorities, s 61 of the Constitution should not be read as precluding the vesting of the executive power of the Commonwealth in

[75] Geoffrey Lindell, 'Responsible Government' in Paul Finn (ed), *Essays on Law and Government, Volume 1: Principles and Values*(1995) 75, 80-9 especially 80 (including n 17) and 84-7.

[76] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ) (*'Nationwide News* case').

[77] *Attorney-General (Cth) v The Queen; ex parte The Boilermakers' Society of Australia* (1957) 95 CLR 529, 545-6 ('the *Boilermakers* case'); *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 389-90 (Windeyer J) (*'Tasmanian Breweries* case'); *Nationwide News* case (1992) 177 CLR 1, 70 (Deane and Toohey JJ); George Winterton, *Parliament, The Executive and The Governor General* (1983) 53, 61, 64, 85; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 142-3.

State officers and also autonomous federal statutory authorities.[78] Nevertheless, doubts persist regarding the constitutional validity of 'legislation which seeks to strengthen parliamentary control over the executive branch by giving either House authority to give binding directions to executive officers concerning the manner of performance of their legal functions and duties.'[79]

Even so, arming parliamentary investigations with the power to override claims of executive privilege and the holding of such investigations generally, does not amount to *vesting* those investigations with executive power so as to attract the doubts in question. It is true that they may be seen as a form of *interference* with the exercise of the same power. However, the extent to which they are viewed in this manner may have to be offset against the role such investigations play in making more effective the parliamentary oversight of the activities of the Executive and thereby help to strengthen the operation of Responsible Government in Australia. There is of course no shortage of judicial authority which makes it permissible to interpret the Constitution against the background of Responsible Government.[80]

The view advanced above is reinforced by the newly implied constitutional freedom of political communication based upon the doctrine of representative democracy.[81] The freedom and the doctrine from which it is derived can only emphasise the importance of maximising the free flow of information necessary to enable electors to make informed decisions about their political representatives. Thus, as was said by Mason CJ, Toohey and Gaudron JJ in the *Theophanous* case:

> [t]he implied freedom of communication is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information, ideas and debate, the freedom extends to all those who participate in political discussion. By protecting the free flow of information and ideas and of debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government.[82]

Principles of this character, although formulated in a different context, are not conducive to the encouragement of government secrecy which can be achieved through the use of claims to executive Privilege.

It is doubtless possible for powers of parliamentary investigation to be used to

78 Geoffrey Lindell, Book Review, (1983) 6 *University of New South Wales Law Journal* 261, 263-4 (including n 7) which refers to the same view held by Winterton in the book reviewed; Zines, *The High Court and the Constitution,* above n 77, 230-2, where reference is made to others who have expressed a different view. See now also *Horta v The Commonwealth* (1994) 181 CLR 183.

79 Zines, *The High Court and the Constitution,* above n 77, 230-2, where reference is made to Campbell as the author of the doubts expressed in the text. The doubts have implications for whether the Parliament could require the Executive Government of the Commonwealth to obtain parliamentary approval before entering into contracts and treaties.

80 See, eg, the *Engineers'* case (1920) 28 CLR 129, 147; *Nationwide News* case (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

81 *Nationwide News* case (1992) 177 CLR 1; *Political Advertising Ban* case (1992) 177 CLR 106; *Theophanous* case (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

82 (1994) 182 CLR 104, 122.

obstruct the operations of the Executive branch of government by forcing that branch to divert valuable resources needed to service onerous and burdensome demands for information made by such investigations. Presumably, Opposition parties could then use their numbers in the Senate to drive home their party political advantage, assuming that is, that the inquiries were able to uncover embarrassing information. Although unwelcome to some, others, including the writer, might well see such a result as a vindication of the accountability principle. However, damage could well be done if the powers of inquiry were pressed too far in the sensitive areas of foreign relations and defence.

One further problem that could and has arisen, concerns the unfortunate position of public servants who are ordered to give evidence to an inquiry instituted by one House of the Parliament despite a Ministerial instruction not to give the evidence in circumstances where the relevant Minister cannot be compelled to give the same evidence because the Minister is a member of the other House, that is, as a result of House immunity. The precise legal position of public servants who find themselves in such unenviable situations and that of their Ministers, will be discussed further below.[83]

Leaving aside that problem, it is, in the end, a matter of balancing the difficulties discussed above with the important consideration of accountability and of course the right of the public to be fully informed about the actions and conduct of its government. In these circumstances, and given the absence of judicial authority to support the operation of public interest immunity as a legal restriction on parliamentary powers of inquiry, the writer agrees with the view consistently taken by Professor Campbell under which the immunity in question does not legally limit those powers of inquiry derived from s 49 of the Constitution.[84]

Not surprisingly this is also the view asserted by various Senate committees.[85] The same view was apparently shared by the Joint Select Committee on Parliamentary Privilege.[86] What is more surprising is the important recent concession made by the Leader of the Government in the Senate which recognises the power of the Senate to overrule a claim to executive Privilege. When confronted by his acceptance of the power earlier when in Opposition and asked whether he still thought that 'executive privilege is for the Senate to determine,' he replied:

> In the particular context that we are talking about here — a tussle about whether or not some document or some information should be revealed — the claim that an executive government may make of public interest immunity, which is the currently preferred expression, is, I acknowledge, ultimately one for the House of Parliament to determine. That follows from first principles, if you accept that is the way the constitution works on these matters.
>
> As a technical matter, that is the case. But we are arguing, as so often is the case when it comes to constitutional matters, that the technical power might be absolute

83 Below in the text under Part V of this article, especially text accompanying nn 125-55.

84 Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 15; see also Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 222, 226; cf Campbell, 'Parliament and the Executive', above n 2, 112-13.

85 Evans, above n 2, 484-96.

86 *Exposure Report*, above n 54, 153-5 paras 9.11-9.15.

but the way in which it should be exercised in practice should be regarded as subject to all sorts of conventions and limitations.[87]

(b) Proposals for Change

The foregoing discussion has concentrated on the existing legal and constitutional position. Even if the view favoured by the writer is correct, various options have been advanced as to how the issue should be handled in the future. These may be categorised under four broad heads.

1 Retain the present position without any attempt to change the law on the understanding that as the law stands at present executive certificates of what should not be disclosed will *not* be treated by the courts as conclusive if the issue should ever be resolved by them.[88]
2 Retain the present position on the same understanding as was stated in the first option, but enable the relevant House of Parliament to seek the advice of independent arbitrators, appointed on an *ad hoc* basis, in deciding whether claims to executive privilege should be upheld in cases where this is thought appropriate.
3 Change the law to ensure that, whatever may be the correct understanding of the law as it stands at present, the Executive becomes the conclusive judge of what matters should not be disclosed, that is, treat executive certificates as conclusive, as has occurred in certain jurisdictions.[89]
4 Change the law to allow the courts to decide whether to uphold claims advanced by the Executive to privilege from disclosure by reference to whether this would be in the public interest.

The fourth option follows the solution to the problem adopted in the United States.[90] It is also one of the solutions which was advocated in the wake of the claim to executive privilege advanced in response to requests for documents and evidence made by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media. A private member's Bill was introduced into the Senate for this purpose by Senator Cheryl Kernot, the Leader of the Australian Democrats.[91] The same Bill would allow the Federal Court to resolve whether claims of public interest immunity should be upheld

87 In evidence given before the Senate Committee cited in n 63 above when elaborating the Government's Submission to the same Committee: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1994, 19.

88 As recommended by the Joint Select Committee on Parliamentary Privilege in *Exposure Report*, above n 54, 153-4 paras 9.11-9.15. Its efficacy depends on the courts resolving the question in this way.

89 For example, as in Papua New Guinea and the Northern Territory: Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 15 nn 54-5 and accompanying text. This solution was also preferred in the Law Officers Paper, above n 2, 39 paras 147, 149.

90 See Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 223-4; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 16 text accompanying nn 60-5; Law Officers Paper, above n 2, para 36-7.

91 Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (Cth) introduced on 23 March 1994. The Bill, along with the supporting Explanatory Memorandum and Senator Kernot's second reading speech, appear as Appendix A to the Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994: 49th Report* (September, 1994).

and would also seek to ensure that public servants could not be imprisoned for their refusal to give evidence or produce documents pursuant to a Ministerial direction to that effect.[92] This solution was, however, rejected by the Senate Committee of Privileges in the report presented to the Senate on the Bill in question.[93]

When the Senate referred the Bill to the Senate Privileges Committee for inquiry and report it noted a number of matters. In the first place it was asserted that on several recent occasions the government had failed to comply with orders and requests of the Senate and its committees for documents and information. The following three instances were cited by way of illustration:

1 the order of the Senate of 16 December 1993 concerning communications between Ministers on woodchip export licences;
2 requests by the Select Committee on the Australian Loan Council for evidence; and
3 requests by the Select Committee on Foreign Ownership Decisions in Relation to the Print Media for documents and evidence.

The Senate also stated that the government had, explicitly or implicitly, claimed executive privilege or public interest immunity in not providing the information and documents sought by the Senate and its committees. It asserted in its resolution that the grounds for these had not been established but merely asserted and that the Senate had no remedy against those refusals to provide information and documents, except its power to impose penalties for contempt. It further stated that the Senate probably could not impose such penalties on a Minister who was a member of another House and that it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acted on the directions of a Minister.[94]

The latter is a telling point which may well be an important reason to explain why the Senate has not seen fit to test its power to override claim of executive Privilege. A solution to this problem will need to be found if parliamentary inquiries are to function effectively without Executive obstruction and thus generally assist in the scrutiny role to be performed by the Parliament.

The rejection of the solution embodied in the private member's Bill was not based on grounds of constitutional invalidity although questions were raised by some of the witnesses who gave evidence to that Committee as to whether the Federal Court could be empowered to rule on issues of executive privilege before parliamentary inquiries because of the separation of powers doctrine. The questions centred on whether the performance of the function proposed to be given to the Court was not judicial within the meaning of the requirement implied from the Constitution in the *Boilermakers'* case.[95] A further problem perceived with the legislation was that even if the function was capable of being

92 Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill cl 2 which would have the effect of inserting a new s 11A in the Parliamentary Privileges Act 1987 (Cth).

93 Above n 91, 12-13 para 2.22.

94 Ibid 1 para 1.1.

95 *Attorney-General (Cth) v R* (1957) 95 CLR 529 (PC); [1957] AC 288.

characterised as judicial, the width of the discretion which it was proposed to vest in the Federal Court in the performance of that function under the legislation as drafted, was sufficient to destroy its character as judicial for the purposes of the same requirement.

Without examining the issue in any detail, the present writer is inclined to the view that the function in question is unlikely to be viewed as inherently non-judicial so as to be incapable of assignment to a court according to the approach taken by Isaacs J and approved in *R v Quinn; ex parte Consolidated Food Corporation*.[96] Rather, it is more likely that the function of ruling on claims of privilege before parliamentary committees is one that is subject 'to no *a priori* exclusive delimitation' and is therefore 'capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances.'[97] In addition, although not identical, it is sufficiently similar to the function which courts already perform when they adjudicate on claims of public interest immunity in ordinary litigation involving private citizens and the State.

However, if it is assigned to the courts it will have to be exercised in a judicial way. This may suggest the need to ensure that the breadth of any discretion which is entrusted to a court is circumscribed since it is accepted that the exercise of broad policy considerations is a distinguishing feature of the role played by the executive and legislative arms of government. Thus, while the concept of public interest might well be left undefined if the function of ruling on claims of privilege is vested in the Parliament or its committees, the same may not be the case if the function is given to a court of law. There may need to be 'objectively determinable criteria' to define what is meant by the public interest, if a court is to be required to determine when certain evidence should be treated as privileged from disclosure on that ground.[98] The prescription of factors to define the content of the public interest, for example, by reference to a class of evidence such as evidence involving the disclosure of matters relevant to defence or national security, should be sufficient to protect legislation of this kind from attack based on the second of the grounds relating to the separation of powers.

The private member's Bill referred to above envisaged that the Federal Court would be given the power to issue orders for the giving of evidence which was not found to be privileged by the Court and the commission of a statutory offence in the event of a failure to comply with any such orders. By relying on the courts to enforce the orders, and not the Parliament in the exercise of its

[96] (1977) 138 CLR 1, 8-9 (Jacobs J) with whose judgment Gibbs, Stephen and Mason JJ expressed agreement.

[97] *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178-9. See also 175 (Isaacs J).

[98] *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 400 (Windeyer J) and 376 (Kitto J), where reference is made to the 'application of any ascertainable criterion' and see also Zines, *The High Court and the Constitution*, above n 77, 170-4. The matter discussed in the text was raised by Anthony Morris QC in his submission made to the Senate Standing Committee of Privileges referred to above n 63, Submission No 6 (4 July 1994) 57-71 paras 3.01-3.15. Campbell had earlier warned against the conferral of jurisdiction by the use of provisions expressed in 'open-textured terms': Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 16-17.

power to punish for contempt, there can of course be no suggestion that a non-judicial body has been vested with the judicial power of the Commonwealth contrary to s 71 of the Constitution. This avoids the need for the High Court to reconsider the correctness of *Fitzpatrick and Browne's* case,[99] which suggests that the power of the Parliament to punish for contempt of Parliament is consistent with s 71 on historical grounds.[100] No doubt the provisions of s 80 would also have to be observed, whatever they may require.

The Senate Privileges Committee rejected the solution embodied in the private member's Bill and recommended that it not be proceeded with. It did not accept that the courts had a role to play in this area. The Committee considered that if an order of a House or committee of the House was not obeyed by a public servant acting on the instructions of a Minister, it was for the relevant House to take such action under its contempt powers as it considered appropriate in the circumstances.[101] This of course was based on the assumption that those powers existed.

The Committee had regard to evidence given by witnesses who appeared before it, which suggested that the issues that a court would be called on to decide were essentially political and that the Bill would undermine the authority possessed by the Houses of Parliament.[102] The submission tabled by the Government was also opposed to the Bill essentially because of the danger of courts becoming politicised. The Leader of the Government in the Senate also relied in speaking to the submission on the adequacy of the political processes for resolving conflicts between the Executive and Legislative branches of government. In his view the 'court of public opinion' would also act to cure any abuse of the claims to privilege advanced by a government unwilling to divulge information to the Parliament. It is however difficult to envisage electors being able to concentrate on issues of this kind in the course of an ordinary election. Moreover, as was pointed out by some witnesses, it would be difficult for electors to make an informed judgment when the Government itself is in a position to determine what information should be made public.[103]

Returning to the question whether the existing position should be changed by the enactment of the Bill introduced by Senator Kernot, the writer is not persuaded by the reasons advanced against its adoption. In particular, although it may be conceded that the function which a court performs in deciding on claims to privilege in ordinary litigation is not identical to the task it would be called on to perform under the Bill, the differences are not so great as to prevent a court performing that task. This would be especially so if the court was given adequate guidance on the factors which it should take into account in weighing up matters relevant to the public interest as explained above. In addition courts are already involved under our system of government in ruling on matters of a political

99 (1955) 92 CLR 157.

100 See Zines, *The High Court and the Constitution*, above n 77, 178-9 and compare the cases referred to below n 121.

101 Senate Committee of Privileges, above n 91, 12-13 para 2.22.

102 Ibid 9 paras 2.12 - 2.13.

103 Ibid 10 para 2.14.

character without this having the effect of calling into question their impartiality. It would also provide the mechanism which the Senate thought was lacking when it referred the private member's Bill for inquiry and report, namely, a 'mechanism for having claims of executive privilege or public interest immunity adjudicated and determined by an impartial tribunal.'[104] The kind of solution propounded in the Bill would also resolve the thorny question concerning the liability of a public servant for refusing to provide evidence to a parliamentary committee pursuant to a Ministerial instruction.

2 *Secrecy Provisions*

A second major area of contention regarding the scope of parliamentary inquiries concerns the operation of statutory provisions which make it an offence for public officials to divulge or make public information gained in the course of performing their statutory duties, for example, the provision of information by officials who are responsible for administering the collection and recovery of income tax.[105]

A further example of such a secrecy provision can be found in s 51 of the National Crimes Authority Act 1984 (Cth) and its existence has been cited as a reason for limiting the powers of inquiry possessed by the Joint Parliamentary Standing Committee on the National Crime Authority, an important statutory body established to investigate certain criminal activities. In particular, it has been suggested that the Committee cannot lawfully require the disclosure of information gained by the Authority in the course of its investigation of criminal activities.

A conflict arose between the Clerk of the Senate on the one hand, and the Federal Attorney-General's Department on the other, regarding whether the provisions of s 51 had the effect of overriding the powers of inquiry which the Standing Committee derived from s 49 of the Constitution.[106] The conflicting legal opinions included an opinion given by Dr G Griffith QC, the Commonwealth Solicitor-General.[107] Those advices seem to accept that the basic issue at stake is one of statutory interpretation, namely, whether the Parliament when it enacts a secrecy provision can be taken as having intended to override the parliamentary powers and privileges referred to in s 49 of the Constitution since it is open to the Parliament to modify or alter those powers and privileges under the same section of the Constitution, when read in conjunction with the provisions of s 51(36). There is also acceptance of what seems to be a sound principle of statutory interpretation under which it may be presumed that the Parliament should not be taken as intending to override its powers and privileges unless there are express provisions to that effect or such an intention can be inferred by necessary implication. The principle enjoys some judicial support and was

104 Ibid 1 para 1.1(1)(g).

105 Income Tax Assessment Act 1936 (Cth) s 16.

106 It will be recalled that the same Committee enjoys such powers as are conferred on it by resolution of both Houses of the Federal Parliament: above n 32.

107 Evans, above n 2, 43-7.

probably applied in *Duke of Newcastle v Morris*.[108]

The disagreement turns on the nature of the provisions which are needed to evince the contrary intention. The nature of statutory presumptions of this kind makes it almost inevitable that there will be disagreement about the kind of provisions needed to show the existence of the contrary intention. This, however, does not destroy the utility of the presumption discussed above given the importance that should attach to powers and privileges of both Houses of Parliament.

3 *Statutory Immunities of Witnesses*

The legislative power enjoyed by the Federal Parliament under ss 49 and 51(39) would seem to be clearly sufficient to support the enactment of legislation to clarify or alter the existing legal position with regard to the question of executive privilege discussed above. So far as the writer is aware and despite the need for such legislation, legislation of this kind has not been passed even in relation to those statutory committees which derive their existence from legislation.

It is true that witnesses before some of those committees are given the 'same protection and privileges' as are witnesses who appear before the High Court, for example, in relation to self incrimination or legal professional privilege.[109] However, as others have pointed out, it is difficult to treat public interest immunity as an immunity which belongs to the witness.[110] Accordingly, it is suggested that similar problems arise with witnesses who appear before statutory committees in relation to claims of executive privilege as were discussed above in relation to witnesses who appear before the non-statutory committees and also those statutory committees which derive their powers and privileges from s 49 of the Constitution.

The only differences would seem to be that the arguments which seek to restrict the powers to require the giving of evidence by reference to executive privilege would need to be based on restrictions implied from the relevant legislative provisions which establish and arm the committees with those powers. In addition, it may be argued that a public servant who fails to provide the evidence required by a parliamentary committee because of an instruction given by a Minister may have a 'reasonable excuse' or 'just cause' for refusing to give the evidence in question. According to this view the public servant would not commit the relevant statutory offence for acting in that way.[111]

108 (1870) LR 4 LRHL 661, 677, 680.

109 Public Works Committee Act 1969 (Cth) s 25; Public Accounts Committee Act 1951 (Cth) s 19(1).

110 Campbell, 'Parliament and the Executive', above n 2, 100-1.

111 Public Accounts Committee Act 1951 (Cth) ss 15, 17; Public Works Committee Act 1969 (Cth) ss 28, 30; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 222; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 14 (text accompanying nn 47-8).

IV PROTECTION AND IMMUNITIES OF WITNESSES

It is appropriate at this stage to consider the general question of what, if any, protection and immunities witnesses, including official witnesses, enjoy when they appear before parliamentary inquiries and investigations.

The position of witnesses before the statutory committees has already been mentioned. Apart from additional provisions which make it an offence to interfere with such witnesses, little more needs to be said, except that the statutory protection granted them seems to be generally satisfactory from a civil liberties perspective.

Much more open to criticism is the position faced by witnesses who appear before non-statutory committees and other committees which derive their powers and privileges from s 49 of the Constitution. At the outset it needs to be appreciated that those witnesses are not entitled to the same immunities, rights and privileges, as are those enjoyed by witnesses who appear in ordinary judicial proceedings. The relevant law which governs their position is to be found in the law which deals with parliamentary privilege. The disparity in the position of those witnesses has attracted criticism — and one that is easy to understand especially when it is recalled that the power to try and punish for contempt has in the past been thought to rest exclusively with the Houses of Parliament, although this has been considerably modified as will be shown below as a result of the passing of the Parliamentary Privileges Act 1987 (Cth).

Debate about the need to enact a general Parliamentary Witnesses Act has dated from very early times after the Commonwealth Parliament began to function.[112] Suffice it to say no such legislation was passed at least until 1987. While witnesses did not enjoy the same rights as witnesses in ordinary judicial proceedings, they did and continue, to enjoy the protection of Article 9 of the English Bill of Rights which operates in relation to the Commonwealth Parliament by virtue of s 49 of the Constitution and now also s 16(1) of the Parliamentary Privileges Act. Article 9 states:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The conduct of a regularly constituted parliamentary inquiry, whether conducted by either of the Houses of the Parliament or their committees, would undoubtedly give rise to a 'proceeding in Parliament.' This is put beyond doubt by the provisions of s 16(2)(a) of the Parliamentary Privileges Act. As a result, witnesses who appear before such inquiries are likely to enjoy protection from any liability in defamation in respect of any evidence given by them at those inquiries. They will also enjoy certain protection in relation to the use which may be made of the same evidence in ordinary civil or criminal judicial proceedings. As can be seen from the extensive notes which appear in the Explanatory Memorandum to the Parliamentary Privileges Act in relation to clause 16, the precise extent of that evidentiary protection had to be clarified in the light of the

[112] Reid and Forrest, above n 2, 257-69.

interpretation given to Article 9 by the New South Wales Supreme Court in cases involving the trials of the late Mr Justice Murphy and Judge Ford as well as other cases involving civil liability in defamation.[113] The scope of the protection as clarified by s 16 of the above Act has not escaped criticism. It is arguable that the purpose of Article 9 in preventing proceedings in Parliament being questioned in any court was to ensure that judges could not pass on the validity of parliamentary proceedings at a time when judges were seen as servants of the Crown and did not enjoy security of tenure.[114] On the other hand it is also arguable that the privileges which derive from Article 9 may still serve a useful and modern purpose of enabling the Parliament to obtain information and to scrutinise the activities of the Executive branch of government.

Be that as it may, it is worth noting that the immunity referred to may not be sufficient to protect the witness against the use of secondary evidence which was obtained as a result of the evidence given to the inquiry. Furthermore, the immunity is capable of being waived by the relevant House or committee by reason of s 16(4) of the Act in question. This serves to emphasise that the immunity is seen as not belonging to the witness. Its purpose is more properly seen as a means by which the Parliament can ensure that witnesses are not deterred from giving evidence.

The protection and immunities of witnesses before parliamentary inquiries now needs to be viewed against the background of the enactment of the Act adverted to above as well as certain resolutions passed by the Senate following the wide ranging recommendations for altering the law relating to parliamentary privilege made by the Joint Select Committee on Parliamentary Privilege in the Report presented to Parliament in 1984.[115]

The Act had a two-fold purpose:

1 to provide for the principal changes in the law recommended by the Joint Select Committee referred to above; and
2 to avoid the consequences of the interpretation of freedom of speech in Parliament by judgments of certain judges of the NSW Supreme Court also mentioned in passing above.[116]

While the Act modifies the law in certain important respects to be examined below it cannot be taken to be an exhaustive code on the subject. The provisions of s 5 of the Act state that except to the extent that the Act expressly provides otherwise, the power, privileges and immunities of each House, and of the members and committees of each House, as in force under s 49 of the Constitution immediately before the commencement of the Act, continue in force.

For present purposes the most important provisions are to be found in s 12 and, to a lesser extent, s 13. Given the crucial significance of s 12 it is worth quoting its provisions in full:

113 Explanatory Memorandum to the Parliamentary Privileges Bill 1987, 9-15; see also Evans, above n 2, 32-42.

114 Sir Clarrie Harders, 'Parliamentary Privilege—Parliament versus the Courts: Cross Examination of Witnesses' (1993) 67 *Australian Law Journal* 109, 112-16, especially 113-14.

115 *Exposure Report*, above n 54.

116 Explanatory Memorandum, above n 113, 1.

Protection of witnesses

12. (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or committee, or induce another person to refrain from giving any such evidence ....

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of —

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given,

before a House or a committee ....

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

The provisions omitted from sub-ss (1) and (2) provide in each case for a penalty in the case of a natural person, a fine of $5,000 or imprisonment for six months, and in the case of a corporation, a fine of $25,000. The provisions of s 13 create a further statutory offence against the unauthorised disclosure of evidence taken in secret. It will be noticed that the provisions of s 12 do not displace the ability of the Houses of Parliament to punish for contempt of Parliament, referred to in sub-s (3) as 'an offence against a House.' An important difference between the two offences lies in the fact that the statutory offence would be heard and tried by an ordinary court of law, while the other offence would, of course, be heard and tried by the relevant Houses of Parliament, that is, bodies that are not obviously judicial in character.

The Act has nevertheless made important changes to the conduct which can now constitute an offence against a House. Apart from abolishing contempts of Parliament which consist of remarks that defame the Houses of Parliament or their members,[117] what is more significant for present purposes, the provisions of s 4 have significantly narrowed the content of that offence by in effect providing the need to show that the impugned conduct amounts to an *improper interference with a House, its committees or members.* Those provisions state:

Essential elements of offences

4. Conduct (including the use of words) does not constitute an offence 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.

As will be explained below, this provision especially when it is read in conjunction with s 9 of the Act, will provide the courts with an opportunity to review the legality of any imprisonment of a person by a House of the Parliament. The difficult issue, however, will be the extent to which its inquiry into legality will reach into the kind of questions already explored in this article.

Also of importance are the Resolutions passed by the Senate on Parliamentary Privileges on 25 February 1988 which concede important procedural rights to

[117] The offences for which Fitzpatrick and Browne were imprisoned.

persons who appear before Senate Committees.[118] The resolutions implement a number of the recommendations made by the Joint Select Committee on Parliamentary Privilege in 1984. So far as this writer is aware a similar set of resolutions has yet to be passed by the House of Representatives.

The Senate Resolutions provide a code of procedures which must be observed in proceedings conducted by Senate committees and which also carry with them a right of appeal to the Senate if it is alleged that the terms of the Code were not observed. The Resolutions also deal with the area which has in the past attracted the most significant criticism. The area relates to the position of persons who are dealt with for contempt of Parliament before the Privileges Committee of the Senate. Such persons have, for example, been accorded the right to examine other witnesses, the right to be informed of the charges made against them and also the right to make submissions to the Senate before it makes up its collective mind.

These measures go a long way to provide basic procedural rights and safeguards to persons who are called on to appear before Senate Committees. It is to be hoped that the House of Representatives will follow suit and pass a similar set of resolutions in relation to itself and its committees. But as important as these measures are it is important to remember that the Resolutions only have the status of parliamentary working rules which on the face of them may not be judicially enforceable. In other words, it is highly doubtful whether the breach of those rules would of itself provide any right of recourse to the courts. The extent to which courts can intervene in relation to the conduct of parliamentary inquiries remains the final matter to be examined in this article, an issue which it is now appropriate to consider.

V JUSTICIABILITY — THE UNCERTAIN SCOPE OF JUDICIAL REVIEW

So far it has been assumed in this article that the issues under discussion are justiciable in the sense that a court could ultimately be called upon to decide them in properly constituted judicial proceedings. It is now necessary to test the correctness of that assumption. It is convenient to begin by considering the general ability and willingness of courts to review the legal effectiveness of parliamentary proceedings leaving to one side, for the moment, the possibility of judicial intervention in relation to the exercise of the power of the Parliament to punish persons for contempt of Parliament.

Not surprisingly there has been a traditional reluctance on the part of the courts to entertain proceedings which challenge the validity of parliamentary proceedings except of course when it comes to reviewing the legal validity of legislation. Certainly the reluctance here referred to has not prevented the High Court reviewing the validity of legislation both generally and by reference to

[118] For an extensive and helpful discussion of the nature and origin of those resolutions, as well as the provisions of the Parliamentary Privileges Act, see Harry Evans, 'Parliamentary Privilege: Changes to the Law at Federal Level' (1988) 11 *University of New South Wales Law Journal* 31, 44-7 (as regards the Resolutions); see also Evans, above n 2, 573-89 (text of Resolutions) and 52, 62-6, 434, 435, 440, 449.

whether the parliamentary conditions prescribed by s 57 have been followed as regards laws which were passed at a joint sitting of both Houses of Parliament. And even in that instance there is a reluctance to intervene before the process of enactment is completed.[119] While the analytical basis of the reluctance is not always made explicit, it is likely to be found in Article 9 of the English Bill of Rights, the terms of which have already been quoted.

An extreme illustration of the reluctance of courts to review the legal validity of the activities of the Houses of Parliament, not directly connected with the law relating to parliamentary privilege, can be found in *Bradlaugh v Gossett*.[120] In that case it was held that a court was powerless to interfere where a person was elected as a member of the House of Commons and was prevented from taking his seat even though it was alleged that in doing so the House was acting contrary to a particular statute. Stephens J said:

> It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.[121]

A further illustration can be found in the refusal of courts to impugn the validity of legislation by reference to non-compliance with the Standing Orders of a legislative chamber.[122]

The traditional reluctance was strikingly confirmed in the context of the law relating to parliamentary privilege by a unanimous High Court in 1955 in the well known *Fitzpatrick and Browne's* case referred to in several places in this article. It will be recalled that the Court refused to review the legality of the imprisonment of two persons found to be in contempt of the House of Representatives where the warrant for their imprisonment failed to specify or give particulars of the nature of the parliamentary privilege which those persons were alleged to have breached. While the decision seems quite consistent with English and pre-Federation Australian cases, what seems particularly striking, when the matter is considered in the present era, is the relative ease with which the Court brushed aside contrary arguments based on the different setting of the Australian Federal Constitution and, in particular, the existence of the doctrine of the separation of judicial powers and the general availability of judicial review. It is true that the modern cases relating to what constitutes the judicial power of the Commonwealth within the meaning of s 71 of the Constitution continue to suggest that the exercise of penal powers vested in the Houses of Parliament by reason of s 49 stand as one of a number of historical exceptions to the requirement that only the courts can exercise the judicial power of the Commonwealth. Even so the suspicion remains that perhaps the issue might be decided differ-

119 Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 184-6.

120 (1884) 12 QBD 271.

121 Ibid 280-1. The Act involved was the Parliamentary Oaths Act (1866) 29 Vic, c 19.

122 *Victoria v The Commonwealth* ('the *Petroleum and Minerals Authority* case') (1975) 134 CLR 81, 164 (Gibbs J); *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639.

ently if it were to arise today given the Court's new-found concern for the rights of individuals and the intrusion on their liberty which can result from the actions of a non-judicial body under the traditional view of the law relating to parliamentary privilege.[123]

The possibility remains that a modern High Court may not be minded to show the same reluctance to interfere in such matters. It is also significant to note that there have been two cases that have involved challenges to the regularity of parliamentary inquiries. In one of those cases the challenge was successful (admittedly for reasons which the writer and others have not found persuasive).[124] In the other, it is true that the challenge was dismissed but this was not because the issues sought to be raised were treated as non-justiciable, that is, in the sense that the court lacked jurisdiction to entertain the challenge or was unwilling to exercise jurisdiction by not considering the issues raised by the challenge.[125]

Be that as it may, it is possible that today a court may be required to pass on the issues discussed in this article as a result of the ability of the courts to review any imprisonment of a person by a House of the Federal Parliament, by reason of ss 4 and 9 of the Parliamentary Privileges Act. These provisions may well have opened the door to some kind of judicial review and, to that extent, have thereby removed the justification for following the traditional reluctance of the courts to interfere. This possibility requires further explanation.

In order to provide that explanation it is necessary to presuppose that one of the Houses of the Federal Parliament or its committees issues an order to a government official to either produce certain documents or give oral evidence either to the House or the committee. It is also necessary to assume that the Minister who administers the department in which the official is employed issues an instruction to claim executive privilege as the reason for not complying with the order in question. At this point the House or committee can either decline to pursue the matter any further and accept the Minister's view that it would be contrary to the public interest for the document to be produced or the evidence to be given. Alternatively it may decide to overrule the claim to privilege and persist with its original order and, in response, the Minister instructs the official to abide by the Minister's earlier instruction. Given the control which the Government is likely to exercise over the House of Representatives, the kind of

123 It is interesting to note that the Irish Supreme Court came to a contrary conclusion in relation to similar but not identical provisions of the Irish Constitution (Article 38) in *In re Haughey* [1971] Irish Reports 217. In addition, the European Court of Human Rights found that the law of Malta breached Article 6 of the European Convention of Human Rights in vesting the power to punish persons for contempt of Parliament in a non-judicial body, at least when those persons were not members of parliament: *Demicoli v Malta* (1991) 14 EHRR 47. The law of parliamentary privileges in Malta followed the British model. This gives rise to the possibility that the future exercise of the same jurisdiction in Australia may be contrary to Article 14 of the International Covenant of Civil and Political Rights with the consequence that a complaint could be taken to the United Nations Human Rights Committee under the First Optional Protocol to the Covenant: Anne Twomey, 'Parliamentary Privilege: Who wants to take this to Geneva?' (1995) 1 *Constitutional Centenary Foundation (Vic) Newsletter* 7.

124 *MacFarlane's* case (1971) 18 FLR 150, see above, text accompanying n 10.

125 *Aboriginal Legal Service WA Inc v Western Australia* (1993) 113 ALR 87.

situation outlined above is most likely to arise in the Senate and its committees. Nevertheless, it should not be overlooked that it could also arise in the House of Representatives if a minority Government held office.

So far, however, as was pointed out earlier in this article, the Senate has not seen fit to press its claims in the face of an intransigent government even though the Senate has never abandoned its own claim that it is not bound to accept an assertion of executive privilege. It will be recalled that this is probably due, at least in part, to the unfairness of punishing the Government official for contempt, essentially for following the instructions of a Minister or Ministers (including perhaps the Prime Minister) when the Minister or Ministers are members of the House of Representatives and thus quite probably not amenable to the penal jurisdiction of the Senate.

The position of independent statutory officials who are not subject to Ministerial instructions and wish to claim Public Interest Immunity (as distinct from executive privilege) will in a sense be simpler. Any difficulty involved with those officials is likely to result from an issue discussed earlier, namely, whether the relevant statute which establishes the office occupied by the official can be taken to override the powers and privileges derived from s 49 of the Constitution.

To return to the example involving non-statutory officials, the failure of the official to give the required evidence potentially exposes the official to punishment for contempt of Parliament under the powers enjoyed by the Senate which are derived from s 49 of the Constitution. But it needs to be recalled that since the enactment of the Parliamentary Privileges Act in 1987 the impugned conduct of the official does not constitute an offence against the Senate unless that conduct amounted to 'an *improper interference* with the free exercise by (the Senate) or committee (of the Senate) of its authority or functions,' with the emphasis being on the words which are italicised.[126] In addition, the provisions of s 9 of the same Act now require that if the Senate imposes a penalty of imprisonment (as distinct from a fine) upon a person, the resolution of the Senate and the necessary warrant to commit the person to custody must set out particulars of the offence committed by the person. Thus the provisions of s 9 state:

> **Resolutions and warrants for committal**
>
> 9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

This provision gives effect to one of the recommendations made by the Joint Select Committee on Parliamentary Privileges.[127] The crucial importance of the provision was helpfully explained in the Explanatory Memorandum.[128] It is true that the Act does not contain the provision recommended by the Joint Committee

[126] Section 4.

[127] Recommendation 23 paras (a), (b): *Exposure Report*, above n 54, 121 para 7.78 and generally 118-21 paras 7.71-7.78.

[128] Explanatory Memorandum, above n 113, 6.

for the High Court to make a non-enforceable declaration concerning an imprisonment of a person by a House of the Parliament.[129] However the Act also does not prevent a person who is imprisoned by a House from seeking a review by a court of the House's action by other means, such as by application for a writ of habeas corpus. As was also indicated in the Explanatory Memorandum, any requirement for the specification of the offence in a warrant would have the effect that a court could determine whether the ground for the imprisonment of a person is sufficient in law to amount to a contempt of a House.[130] This is so because of the following remarks that were made in the unanimous judgment delivered by the High Court in the *Fitzpatrick and Browne's* case:

> [I]t 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 the manner of its exercise. The judgment of the House is expressed by its resolution and 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.[131]

The writer sees no reason to disagree with the further view expressed in the Explanatory Memorandum, namely, that when the provisions of s 9 are read in conjunction with those of s 4, they will have the effect that a court may review any imprisonment of a person by a House to determine whether the person's conduct was capable of constituting an offence against a House of the Parliament as defined in s 4.[132]

The judicial review identified here would presumably not take place until the Senate had reached the stage of resolving that the official should be imprisoned. There is here an analogy with the usual refusal of courts to consider the validity

[129] Apparently because advice was received that a legislative provision to that effect would be invalid, since it was thought that it would amount to requiring or empowering the High Court to give an advisory opinion: ibid. The Joint Committee's recommendation can be found in *Exposure Report*, above n 54, Recommendation 23 paras (c)-(e), 121 para 7.78 and see generally 119-21 paras 7.74-7.77.

[130] Explanatory Memorandum , above n 113, 6.

[131] (1955) 92 CLR 157, 162 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ). See also *Exposure Report*, above n 54, 118-21 paras 7.71-7.77, especially para 7.73, where reference is made to previous judicial authority to support the High Court view quoted in the text, in particular, the remarks of Lord Ellenborough in *Burdett v Abbott* (1811) 14 East 150. In the view of the writer, it is unlikely that the provisions of s 9 would be treated as breaching the implied doctrine which prevents courts being vested with non-judicial functions, especially if courts were able to review the legality of specific warrants of imprisonment which alleged a breach of parliamentary privilege. This view can be justified by reference to historical considerations which help to inform the concept of judicial power: Zines, *The High Court and the Constitution*, above n 77, 178-9. In any event there seems to be a sufficient analogy with the kind of judicial review normally encountered in administrative law.

[132] Explanatory Memorandum, above n 113, 6. This view was also adopted in two of the legal opinions received by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media's first report, *The Print Media Inquiry Report,* above n 61. See the advice given by Mr Jackson QC, dated 8 March 1994, Appendix E paras 29-31, Appendices 41-2, and Mr Morris QC, dated 21 March 1994, Appendix H, Appendices 114-7.

of legislation before the processes of enactment are completed.[133] If this view is accepted, the modification to Article 9 of the Bill of Rights (with its injunction against courts impeaching or questioning a proceeding in Parliament) made by ss 4 and 9 of the Parliamentary Privileges Act only begins to take effect once the resolution is passed and the process of taking a person into custody has begun. Another limit on the judicial review created by the provisions of the Act discussed above concerns the failure of the same provisions to provide for the availability of judicial review in relation to the imposition of only a fine instead of imprisonment.

The question remains, however, even in relation to cases of imprisonment, as to how far the scope of the judicial review extends. Doubtless, to deal with two simple examples of its application, a court would intervene if:

1 the resolution of the Senate failed to provide the particulars of the privilege breached by the person who is ordered to be imprisoned. and;
2 the punishment is imposed by a committee of the Senate and not the Senate itself as is required by the provisions of s 7.[134]

By contrast it is far from clear that a court would or should interfere to review the correctness of the finding of facts which sustained the finding of ultimate guilt; and possibly also the legality of the establishment of the parliamentary inquiry by reference for example to the Standing Orders and other rules of an internal character.[135] In the case of the former example it is difficult to ignore the deliberate decision of the Parliament to retain for its Houses the power to try and punish for contempt of Parliament instead of transferring that jurisdiction to the ordinary courts of law, as has long occurred in the area of contested elections which are heard by Courts of Disputed Returns. The Joint Committee on Parliamentary Privileges considered the issue in some detail and concluded in favour of not transferring the jurisdiction to the ordinary courts of law although it did favour the enactment of provisions similar to those now contained in s 9 of the Act. Those provisions, it is suggested, should be seen as a compromise. This however does not necessarily rule out the kind of role courts play in reviewing decisions of statutory tribunals in administrative law. Even that narrower concept of the court's role is nevertheless likely to prove difficult and controversial.

With those examples in mind, would a court called upon to review the validity of a person's imprisonment be able to incidentally decide whether the Houses of Parliament have the power to override claims made of executive Privilege? As regards that question, it is thought unlikely that the mere advancement of a claim of executive privilege by a witness acting in compliance with Ministerial instructions is by itself sufficient to constitute a contempt of Parliament, at least in

133 See, eg, *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203; *Cormack v Cope* (1974) 131 CLR 432. The same approach seems to be adopted in relation to subordinate legislation: *Queensland v The Commonwealth* (1988) 62 ALJR 143.

134 The examples were given by D Jackson QC in paras 22-3 of the Opinion referred to, above n 132, Appendices 38-9.

135 Both Mr Jackson QC and Mr Morris QC were inclined to the view that the courts would be unlikely to determine the first of these issues and, more implicitly, the second of these issues as well: above n 132, Appendices 39-40 paras 24-5, 42-3 paras 32-5, 115-16.

cases where the claim is raised for the first time.[136] Such conduct can hardly be regarded as 'improper' within the meaning of s 4 of the Act. Moreover, in the case of the Senate the relevant Parliamentary Privilege Resolutions only prohibit the failure of witnesses to give evidence or produce documents when this occurs 'without reasonable excuse.'[137] Neither is the Minister's action in giving the instruction to claim privilege likely by itself to constitute contempt, for the same reason, even if the Minister is otherwise amenable to the jurisdiction of the Senate and where the claim is to be advanced in the first instance (as distinct from a repeated occurrence after the Senate has refused to accept the claim for privilege). The same view can be taken in relation to whether the Minister's instruction would contravene s 12 of the Act which, it will be recalled, seems to require the act which deters a witness from giving evidence to amount to 'fraud, intimidation, force or threat, ... or by other improper means, influenc[ing] a person in respect of any evidence to be given before a House or committee.'[138]

The position becomes decidedly more acute if the Minister's claim to privilege is overruled by the Senate and the Minister persists with the original instruction not to give evidence or produce documents. It is no doubt strongly arguable that the witness has a 'reasonable excuse' or does not act 'improperly' by complying with the Minister's instruction at that stage. The argument would be based on the basic unfairness of penalising the witness for obeying the instructions of his or her employer.[139] It might also seek to rely on the doctrines of Responsible Government and the separation of powers which were discussed earlier in this article, but the writer has already argued against the acceptance of those arguments.

Overall the better view, it is suggested, is to apply in this area an essential principle which the High Court had occasion to strongly reaffirm in *A v Hayden*.[140] That principle is that there is no defence in Australian law of superior orders and that the Executive does not have the capacity to dispense its servant and agents from the obligation to comply with the law. Thus Gibbs J said:

> It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[141]

Mason J said:

> [S]uperior orders are not and never have been a defence in our law.[142]

[136] The same view was taken in para 62 of the advice given by Mr Jackson QC: above n 132, Appendices 58.

[137] Senate Resolutions on Parliamentary Privilege, 25 February 1988, Resolutions 6(12)(b) and 6(13)(b) in Evans, above n 2, 586.

[138] The same view was taken in paras 59-63 of the advice given by Mr Jackson QC, above n 132, Appendices 56-8.

[139] As was suggested in relation to the position of witnesses who appear before statutory committees: above n 111.

[140] (1984) 156 CLR 532.

[141] Ibid 540.

[142] Ibid 550.

Murphy J said:

> In Australia it is no defence to the commission of a criminal act or omission that it is done in obedience to the orders of a superior or the government.[143]

Brennan J said:

> The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of parliamentary democracy.[144]

Deane J said:

> The criminal law of this country has no place for a general defence of superior orders or Crown or executive fiat.[145]

The principle can be seen as a basic aspect of the rule of law which, as Sir Owen Dixon once had occasion to describe, is a traditional conception in accordance with which the Constitution was framed.[146] As difficult as such a situation can be for a public servant caught in the dilemma of obeying one authority only by disobeying another, and generally the inability to serve two masters, it is suggested that this will be one situation when public servants will have to exercise their own independent judgment in order to ensure compliance with their higher duty of obeying the law. Fortunately such situations should not occur very frequently.

Notwithstanding the view taken by the writer, it is perhaps unlikely that the Senate would take coercive action against a public servant in the circumstances discussed above. So far as the position of the Minister who issued the instruction is concerned, presumably such an instruction and the decision to adhere to it, would have the backing of the Government at the highest level. It has been suggested that there are certain political sanctions open to a Senate intent on requiring compliance with its authority, namely, the postponement of Bills passed by the House of Representatives, the passing of censure motions and the refusal of Supply.[147]

The critical legal issue, however, is whether the Minister would have breached the newly created statutory offence in s 12 of the Act which prevents interference with witnesses or prospective witnesses on account of evidence given or to be given to a House or committee. Unlike its counterpart in the law of parlia-

143 Ibid 662.

144 Ibid 580.

145 Ibid 593; see also *Bropho v Western Australia* (1990) 171 CLR 1, 21, 26-7 ('*Bropho's* case'); *Jacobsen v Rogers* (1995) 69 ALJR 131.

146 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193. Not surprisingly the same concept underlies the case of *M v Home Office* [1994] 1 AC 377 where the House of Lords decided that a Minister of the Crown could be guilty of contempt of court. A valuable collection of the judicial authorities which accept the correctness of the principles discussed in the text can be found in the submission presented by Greg McCarry to the Senate Standing Committee referred to, above n 63, Submission No 1, 26, 27. Of course none of the authorities mentioned in the text or by McCarry dealt with the law of parliamentary privilege, although s 12 of the Parliamentary Privilege Act creates a separate offence.

147 Evans, above n 2, 497; see also Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 226.

mentary privileges, it does not carry any possible limitations regarding the inability of the Senate to punish members of the House of Representatives. In fact it does not involve the penal jurisdiction of either House of the Parliament. If the writer's views on the ability of the Senate to override claims of executive privilege are sound, the Minister's instruction to a government witness not to accede to the Senate's orders to give the evidence or produce a document would at the very least constitute influencing the witness in respect of any evidence to be given to the Senate contrary to s 12.[148]

The question of course remains whether the Minister can be said to act 'improperly' within the meaning of s 12 in giving such an instruction, especially if the term in question is read against the background of traditional understandings of ministerial responsibility. According to those understandings a public servant would only be seen as an emanation of the Minister who would normally be expected to comply and obey the Minister's wishes. As argued above, however, these understandings appear to be dated.[149]

It is also true that the Act in question does contain express provisions to indicate that it binds the Crown and that it was passed before the decision of the High Court in *Bropho v Western Australia* .[150] But, in the view of the writer, it seems difficult to deny that the very nature of the Act envisages a universal application to all persons and bodies who participate in the affairs of government so as to satisfy the now weakened principle of statutory construction that statutes are not presumed to bind the Crown.[151]

There is accordingly, a serious possibility that the Ministerial instruction discussed above would breach s 12 of the Parliamentary Privileges Act — a possibility which, on balance, the writer is inclined to favour.

If this possibility is soundly based, some years ago, and before the passing of the same Act, Professor Geoffrey Sawer had occasion to remark in relation to the role of Crown Privilege before parliamentary inquiries:

> Hence so far as the Houses do pay regard to judicial doctrines of privilege, it is by their own choice, not because they are bound by those doctrines as a matter of law. The reason why the Senate has invariably backed off and is likely to back off from any direct confrontation with the government and Representatives majority on these issues is primarily one of power, in both the legal and the extra-legal sense. The ministers and officials between them are in legal

148 Paras 60-1 of the advice given by Mr Jackson QC, above n 132, Appendices 56-7.

149 See text accompanying nn 73-4.

150 (1990) 171 CLR 1, 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), cf 28-9 (Brennan J) for the significance of the date of the enactment of the Act referred to in the text; see further *Jacobsen v Rogers* (1995) 69 ALJR 131, 135 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

151 As a result of *Bropho's* case it is not necessary to show that the intention of the legislature to bind the Crown is manifest from the terms of the statute or that its purpose would be wholly frustrated if the Crown was not bound by the statute: *Bropho's* case (1990) 171 CLR 1, 21-3. See also the remarks regarding the effect of a failure of a legislature to indicate by express provisions or by necessary implication that the provisions of Criminal Code or general criminal statute were applicable to servants of the Crown acting in the course of their duties: *Bropho's* case (1990) 171 CLR 1, 21 and also 26-7. In addition see, in relation to the application of provisions concerned with the investigation and prosecution of criminal offences to servants of the Crown, *Jacobsen v Rogers* (1995) 69 ALJR 131, 135 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

> command of effective force; the Senate commands very little. The police are in the last resort answerable to a minister in the government of the day, not to the President of the Senate.[152]

Professor Sawer clearly had in mind the exercise of the penal jurisdiction of the Senate whereas the focus of attention above has shifted to a possible breach of what appears to be a statutory offence triable in the ordinary courts of the land. 'Effective force' in relation to the prosecution of statutory offences must in the first instance depend on who can institute the prosecution; in the second instance on who can discontinue the prosecution; and in the third instance on who will be responsible for enforcing the punishment in case of conviction. So far as the first of these matters is concerned, there seems to be no provision to reverse the usual rule that any person can commence the prosecution.[153]

In addition, and since Professor Sawer wrote those remarks, the office of Commonwealth Director of Public Prosecutions has been created, with the person occupying that office being an independent statutory official who is vested with the power to commence prosecutions for breaches of Commonwealth law (such as the offence created by s 12 of the Parliamentary Privileges Act).[154] However, this did not affect the authority of the Commonwealth Attorney-General to discontinue a prosecution.[155]

Even if a government is in a position to discontinue the prosecution and members of the police forces are amenable to government direction in the enforcement process (rather than being independent in the performance of such functions), in a democratic country with a strong tradition for observing the rule of law the notion that a Minister of the Crown has breached the law carries with it an inevitable momentum of its own.

152 Geoffrey Sawer, *Federation Under Strain* (1977) 183. Those comments were made in the wake of the so-called 'Loans Affair' under which a number of high ranking civil servants claimed Crown Privilege when they were summoned to appear before the Senate: see Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 211-16.

153 Crimes Act 1914 (Cth) s 13. As to what is required to show the intention of the legislature to reverse this rule, see *Brebner v Bruce* (1950) 82 CLR 161.

154 Director of Public Prosecutions Act 1983 (Cth) ss 5, 6(1)(c) and (d).

155 Judiciary Act 1903 (Cth) s 71 and see also the Director of Public Prosecutions Act s 10(1)(d) which authorises the Commonwealth Attorney-General to give the Director directions in relation to the prosecution of particular cases.