

# Oversight as it Intersects with Parliament

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By

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*Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual.<sup>1</sup>*

Sir Anthony Mason

In Canada in 2008 the Standing Committee on Public Accounts conducted an inquiry into the mismanagement of the Royal Canadian Mounted Police pension fund. During the inquiry, Barbara George, the former Deputy Commissioner of the RCMP, 'a decorated law enforcement officer with an unblemished 30-year track record of accomplishment and professionalism'<sup>2</sup> was accused of perjury by other witnesses. The Public Accounts Committee sent a recommendation to the House of Commons that she be found in contempt for 'misleading' the committee. The House did so, without any debate or deliberation.

Found in contempt, Ms George was unable to continue her duties as a Mountie and resigned her position.

Two separate investigations found she was not guilty of any wrongdoing.

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<sup>1</sup> Sir Anthony Mason, 'Future Directions in Australian Law', (1987) 13(3) *Monash Law Review* 149, 163.

<sup>2</sup> Daniel D. Veniez, 'Meet the RCMP Officer Who's Guilty of Crimes She Didn't Commit', *Huffington Post Canada* (online), 23 September 2012 <[http://www.huffingtonpost.ca/daniel-d-veniez/barbara-george\\_b\\_1907737.html](http://www.huffingtonpost.ca/daniel-d-veniez/barbara-george_b_1907737.html)>

Whatever the merits, five years later, the alleged injustice was still keenly felt, as a journalist noted:

*Ms George was an honest cop, accused of meddling in an investigation by politicians out for blood in the midst of a public spending scandal. As even her main detractor has been forced to admit, she had done nothing wrong, and was always an innocent victim of a witch-hunt.*<sup>3</sup>

The journalist remarked that this was 'a dark day for democracy and the rule of law in Canada'.

Unfair treatment of witnesses by committees has also been alleged in Australia, and it has been suggested that the increase in parliamentary scrutiny of the public service may lead to a rise in such incidences.<sup>4</sup>

Parliamentary committees play an important role in holding government to account and maintaining public trust in government. However, the powers granted to committees to enable them to conduct inquiries and perform their oversight functions also create the potential for their actions to affect the lives and reputations of individuals, who may have no form of redress because of the operation of parliamentary privilege. In these circumstances, a failure by committees to respect the basic principles of procedural fairness may itself betray the public trust.

## **Parliamentary Privilege and Public Trust**

### **Parliamentary Committees and Accountability**

Since the middle of last century, parliamentary committees have proliferated in parliaments throughout the world.<sup>5</sup> The purpose of parliamentary committees is of course to perform functions that the Houses are ill equipped to perform, including oversight and scrutiny of the Executive.<sup>6</sup> In Australia, many parliamentary committees have been established to conduct oversight of the public service and

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<sup>3</sup> Ibid.

<sup>4</sup> Chris Selby-Smith and David Corbett, 'Parliamentary Committees, Public Servants and Due Process (1995) 54(1) *Australian Journal of Public Administration* 19, 20.

<sup>5</sup> Lawrence Longley and Roger Davidson, 'Parliamentary Committees: Changing Perspectives on Changing Institutions', (1998) 4 *The Journal of Legislative Studies* 1, 2.

<sup>6</sup> B. C. Wright (ed.), *House of Representatives Practice*, Department of the House of Representatives, Canberra (6<sup>th</sup> edition, 2012) 639.

independent agencies. These committees play an important role in ensuring government accountability and providing a check on the improper exercise of public power, a principal function of parliament.<sup>7</sup>

To perform this oversight function, committees typically have powers to call for the appearance of witnesses and the production of documents, to hold hearings, and produce reports.<sup>8</sup> Each House determines its rules governing the conduct of inquiries and the treatment of witnesses. As parliamentary privilege grants Houses of Parliament exclusive control over their internal affairs, the conduct of these inquiries is not judicially reviewable.

### Parliamentary Privilege

Gareth Griffith describes parliamentary privilege as: 'the powers, privileges and immunities from aspects of the general law conferred on Houses of Parliament, their members, officers and committees'.<sup>9</sup> In Australia, these powers are said to arise from a 'combination of custom, inherent rights and statutory powers and immunities'.<sup>10</sup> The privileges include the freedom of speech in parliament, and a House's exclusive cognisance over its internal affairs. However, this autonomy comes with a necessary concomitant of self-regulation.<sup>11</sup>

The justification for parliamentary privilege is that these freedoms are necessary for the effective performance of parliament's constitutional functions of inquiry, debate, and legislation.<sup>12</sup>

The strength of the test of necessity has grown over the years.

In the UK in 1935, a judge refused to hear a complaint about the unlicensed sale of alcohol in Parliament.<sup>13</sup>

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<sup>7</sup> Gareth Griffith, 'Parliament and Accountability: The role of parliamentary oversight committees', (2006) 21(1) *Australasian Parliamentary Review* 7; John Hatzistergos, 'Permanent Commissions of Inquiry and the Parliamentary Interface', (2001) 16(2) *Australasian Parliamentary Review*, 87.

<sup>8</sup> See, for example, Parliament of Western Australia, *Standing Orders of the Legislative Assembly*, Chapter 24: Standing and Select Committees.

<sup>9</sup> Gareth Griffith, *Parliamentary Privilege: First Principles and Recent Applications*, Briefing Paper No. 1/2009, NSW Parliamentary Library Research Service, 1.

<sup>10</sup> *Ibid.* 2.

<sup>11</sup> Rachel Macreadie and Greg Gardiner, *An Introduction to Parliamentary Privilege*, Research Paper No. 2/2010, Parliament of Victoria, 16.

<sup>12</sup> Griffith, above n. 9, 6; see also *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

<sup>13</sup> *R v Graham-Campbell ex parte Herbert* (1935) 1 KB 594.

It is possible that case would now be decided differently. The Canadian Supreme Court found in 2005 that parliamentary privilege did not render the Speaker immune from an employee's complaint of unfair dismissal on the basis of race.<sup>14</sup>

The necessity test was affirmed by the Supreme Court of New Zealand in the 2011 case, *Attorney-General and Gow v Leigh*,<sup>15</sup> holding that it was not necessary for the proper functioning of parliament that communications between departmental staff and a Minister be subject to absolute privilege and thus immune from a defamation suit. The defence of qualified privilege available in defamation law was found to be sufficient to protect the proper functioning of parliament.<sup>16</sup> Whilst the subsequent Privileges Committee Report<sup>17</sup> does make some legitimate criticisms of the decision in *Leigh*, especially regarding the specific application of the necessity test,<sup>18</sup> the Supreme Court's confirmation of the doctrine of necessity as the basis for parliamentary privilege is in line with the developments in Canada and the United Kingdom.

Courts now seem more willing to inquire into the specific circumstances of an assertion of privilege and what is necessary for the proper functioning of parliament, rather than closing off the entire sphere of matters having any connection with parliament.

As Eve Gallagher puts it:

*Parliamentary privilege is a means to an end, not an end in itself. Even if parliamentary privilege did once resemble something like the divine right of kings, it should now be understood as the privileges Parliament needs in order to carry out its constitutional functions.*<sup>19</sup>

In other words privilege should extend only to what is necessary for the effective functioning of parliament.<sup>20</sup> Lord Hope in *Jackson*

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<sup>14</sup> *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

<sup>15</sup> *Attorney-General and Gow v Leigh* [2011] NZSC 106.

<sup>16</sup> *Ibid.* at [20].

<sup>17</sup> New Zealand House of Representatives, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, Report of the Privileges Committee, June 2013.

<sup>18</sup> Including that the logic of the Supreme Court decision relies too heavily on defamation law, which will not always be relevant to a claim of privilege.

<sup>19</sup> Eve Gallagher, 'All Rights Reserved: Should parliamentarians maintain their monopoly on rights enjoyment in Australia's federal parliament?' ANZACATT Research Paper, 2009, 4.

<sup>20</sup> *Stockdale v Hansard* (1839) 112 ER 1112; Griffith, above n. 9, 6.

asserted that the rule of law is now the dominant constitutional principle in the UK.<sup>21</sup> This would apply with at least as much force in Australia, with our written Constitution.<sup>22</sup>

Indeed, it has been suggested that public perception of parliamentary privilege as allowing Members to damage the reputations of others without any of the legal consequences or procedural protections that exist outside of Parliament, has led to Members of Parliament being held in low esteem by members of the public.<sup>23</sup>

It is important that Parliament be able to effectively and efficiently perform its roles, including oversight of government agencies.

But Parliament is also a repository of public trust, and must act in a way that accords with fundamental principles of democracy, trust, accountability, and fairness. As a UK Joint Committee recently recognised: 'Despite its ancient origins, parliamentary privilege must meet the current needs of Parliament, and must do so in a way acceptable today as fair and reasonable.'<sup>24</sup>

### Public Trust in Government

In a discussion of public trust and accountability, Justice Paul Finn points to three principles which are fundamental to our civil order:<sup>25</sup>

1. Sovereign power resides in the people.
2. Where the public's power is entrusted to institutions and officials for the purposes of government, they hold that power of the people to be exercised for the people. They are the public's trustees.
3. Those entrusted with public power are accountable to the public for the exercise of their trust.

This public trust principle – that government exists for the public, to serve the interests of the public – was also recognised as a value

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<sup>21</sup> *R (Jackson) v Attorney General* [2006] 1 AC 262 at [107].

<sup>22</sup> Griffith, above n. 9, 35.

<sup>23</sup> Alice Jones, 'Should Australian parliaments retain the citizens' right of reply procedure? Is the most prevalent model the best one?', ANZACATT Research Paper, 2010, 1.

<sup>24</sup> UK Parliament, *Report of the Joint Committee on Parliamentary Privilege*, No. 1 (1999), Executive Summary, p. 2.

<sup>25</sup> Justice Paul Finn, 'Public Trust and public accountability' (1993) 65(2) *The Australian Quarterly* 50, 51.

underlying our constitutional arrangements in the Report of the WA Inc Royal Commission.<sup>26</sup>

That Report recognised the vital role of parliamentary committees in conducting effective review of government.<sup>27</sup> In this way parliament acts on behalf of the people to ensure power entrusted to public officials is not misused.

The integrity of parliamentary practice itself is also crucial, for as the Report held: 'Above all else, if there is to be government for the people, there must be public trust and confidence in the processes and practices of Parliament and in the role it performs in advancing and in safeguarding the interests of the public.'<sup>28</sup>

Parliament must therefore conduct its oversight activities in a way that is fair and reasonable, so that it is seen to be worthy of the public trust.

Whilst parliament may have exclusive control over its own affairs, this does not excuse it from the obligation to regulate its practice and procedure so that they are acceptable to the public.

Parliamentary supremacy does not mean that parliament is not subject to the rule of law, and it must abide by the law and the Constitution.<sup>29</sup>

As Sir Owen Dixon recognised, the common law is antecedent to our constitution, and surrounds and pervades the Australian system of law and government.<sup>30</sup>

Principles fundamental to the common law, such as procedural fairness, should therefore inform the exercise of public power under the Constitution.

## Procedural Fairness

### Origins of the Obligation

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<sup>26</sup> Justice Geoffrey Kennedy, Sir Ronald Wilson, Peter Brinsden, *Report of the WA Inc Royal Commission (No 2)* (12 November 1992) [1.25].

<sup>27</sup> *Ibid.* [1.3.6].

<sup>28</sup> *Ibid.* [5.1.2].

<sup>29</sup> Kirstin Lambert, 'Limits to select committee investigations – A New Zealand Perspective', ANZACATT Research Paper, 2004, 5.

<sup>30</sup> Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420, 424-5.

Procedural fairness of course existed before the advent of the common law. Chief Justice Robert French has stated that: 'Procedural fairness is part of our cultural heritage. It is deeply rooted in our law. ... As a normative marker for decision-making it predates by millennia the common law of England and its voyage to the Australian colonies.'<sup>31</sup> He refers to *Bagg's Case* of 1615, in which the lines from Seneca's *Medea* – 'Who ought decrees, nor hears both sides discust/ Does but unjustly, though his Doome be just' – were said to express the *audi alteram partem* rule.<sup>32</sup>

In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,<sup>33</sup> Callinan J quoted from de Smith, Woolf and Jowell<sup>34</sup> to illustrate the ancient pedigree of the doctrine:

*That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the Scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden.*<sup>35</sup>

The principle also appears in the Due Process Clause of the United States Constitution, and in many civil law systems.<sup>36</sup>

Just as the principle of procedural fairness is recognised as fundamental across many different legal systems, it is also recognised as applicable to a variety of the exercises of public power. The Chief Justice asserts that: 'the norms of procedural fairness reach well beyond the confines of the courtroom [...] They are important societal values applicable to any form of official decision-making which can affect individual interests.'<sup>37</sup>

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<sup>31</sup> Chief Justice Robert French, 'Procedural Fairness: Indispensable to Justice?', Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010, 1.

<sup>32</sup> *Ibid.* 5.

<sup>33</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

<sup>34</sup> S. A. De Smith, H. Woolf, and J. Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th edition, 1995) 378-379.

<sup>35</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [140].

<sup>36</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary*, (LexisNexis, 2<sup>nd</sup> edition, 2009) 686.

<sup>37</sup> French, above n. 31, 22-3.

## Development of Procedural Fairness

The High Court decision in *Kioa v West* set out the broad scope of natural justice, holding that: 'there is a common law duty to act fairly [...] in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'<sup>38</sup>

That the duty is presumptively applicable to government decision-making demonstrates the value placed on procedural fairness in our system of law and government.

However, its scope is not infinite, and some limitations are placed on its application for the purposes of judicial review. Review is generally limited to review of executive rather than legislative action, and even within the executive realm, some decisions are seen as non-justiciable – what is required for judicial intervention is a decision with some individual effect.<sup>39</sup>

Despite these restrictions, the reach of the requirement of procedural fairness has greatly expanded. The High Court in *Ainsworth* held that:

*It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may "destroy, defeat, or prejudice a person's rights, interests, or legitimate expectations" [...] thus, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise.*<sup>40</sup>

Thus in *Ainsworth* the Court found that a decision of the CJC to publish a report that would damage the reputation of an individual or organisation attracted the protection of the rules of procedural fairness.

*Ainsworth* recognises the importance of reputation as a protected interest, and also that it is the capacity of the public power to affect interests that warrants the protections of natural justice, rather than any formal characteristics of the decision-making process.

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<sup>38</sup> *Kioa v West* (1985) 159 CLR 550 at 584 [311].

<sup>39</sup> See, for example, *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 307 per Wilcox J.

<sup>40</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, at [24] per Mason CJ, Dawson, Toohey and Gaudron JJ.



## The Principle of Procedural Fairness

The requirements of procedural fairness are not fixed, and vary according to particular circumstances.<sup>41</sup> Thus the procedural protections granted in an adversarial judicial process may not all be appropriate for a more inquisitorial or informal process, or one where any effect on individual rights and interests is a peripheral rather than primary concern.

Procedural rights which may be required by an obligation to afford procedural fairness include:<sup>42</sup>

- Notice of a hearing and any adverse allegations, and a right to be heard in response;<sup>43</sup>
- Disclosure of any 'credible, relevant, or significant' evidence;<sup>44</sup>
- Adequate time to prepare a case;
- The right to an unbiased decision-maker who listens fairly to any relevant evidence conflicting with the finding; and
- The right to have decisions based on an evidential foundation.<sup>45</sup>

Depending on the circumstances of the case, procedural fairness may also require:

- The right to consult or be represented by counsel;<sup>46</sup> and
- An opportunity to cross-examine witnesses.<sup>47</sup>

Various complementary rationales for the provision of process rights exist,<sup>48</sup> including instrumental justifications that procedural rights help

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<sup>41</sup> *Kioa v West* (1985) 159 CLR 550 at 584; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 138.

<sup>42</sup> See for an overview, W B Lane and Simon Young, *Administrative Law in Australia* (Lawbook Co, 2007) pp. 116-130.

<sup>43</sup> *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

<sup>44</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411.

<sup>45</sup> *Mahon v Air New Zealand* [1984] AC 808.

<sup>46</sup> See *Cains v Jenkins* (1979) 28 ALR 219 at 230.

<sup>47</sup> See *Finch v Goldstein* (1981) 36 ALR 287 at 304ff.

<sup>48</sup> See for an overview, Paul Craig, *Administrative Law* (Sweet & Maxwell, 7<sup>th</sup> edition, 2012), p. 341.

to obtain more accurate decisions.<sup>49</sup> Non-instrumental justifications include that formal justice and the rule of law are enhanced by the objectivity and impartiality natural justice seeks to ensure,<sup>50</sup> and that procedural fairness protects human dignity.<sup>51</sup> The scope of judicial review, though broad, is restricted by a consciousness of the proper role of the courts in a democracy.<sup>52</sup> However, the rationales for recognising the principle of natural justice across the ages and around the globe apply wherever public power is exercised to affect the rights, interests, or legitimate expectations of individuals.

### Application to Parliamentary Committees

The fact that judicial review does not reach into parliamentary procedure has not meant that parliaments have entirely ignored the expansion and development of administrative law, and some have incorporated some of these common law developments into parliamentary practice.<sup>53</sup>

McClelland acknowledges that despite the lack of any enforceable *legal* requirement that parliamentary practice should accord with the principles of natural justice, 'current standards of public administration and fairness would seem to require parliaments and their committees to be guided by principles of natural justice, to the extent such principles can reasonably be applied.'<sup>54</sup>

The argument advanced for the obligation of parliamentary committees to afford procedural fairness is therefore based not on legality but on legitimacy.

Most Australian parliaments do make some provision for procedural fairness in certain circumstances, often with an awareness of the uncertain legitimacy of action taken in the absence of such

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<sup>49</sup> See, for example, J. Resnick, 'Due Process and Procedural Justice', in J. Pennock and J. Chapman (eds), *Due Process* (Nomos, 1977) p. 217.

<sup>50</sup> H L A Hart, *Concept of Law* (Oxford: Clarendon Press, 1961) pp. 156 and 202; J Rawls, *A Theory of Justice* (Oxford University Press, 1973), p. 235.

<sup>51</sup> Craig, above n. 48, p. 34; F Michelman, 'Formal and Associational Aims in Procedural Due Process' in J. Pennock and J. Chapman (eds), *Due Process* (Nomos, 1977).

<sup>52</sup> Ian Holloway, *Natural Justice and the High Court of Australia: A study in common law constitutionalism* (Ashgate, 2002), p. 272.

<sup>53</sup> John McMillan, *Vision in Hindsight: Parliament and Administrative Law*, Research Paper No. 13 (2000-01) 22.

<sup>54</sup> Robyn McClelland and Robina Jaffray, 'Natural Justice Issues for Parliamentary Committees', ANZACATT Professional Development Seminar for Parliamentary Officers, Wellington, January 2005, 2-3.

protections.<sup>55</sup> Jones refers to the right of reply procedures introduced into most of the Australian Houses of Parliament, which provide an opportunity for persons adversely referred to in debate to lodge an official rebuttal to be incorporated into Hansard. She explains that these procedures were instituted to address the low esteem in which Members of Parliament were held due to the perception that MPs could say what they like in parliament without any sense of restraint.<sup>56</sup> The right of reply procedures could therefore be seen as an attempt to maintain public trust in parliament.

### Procedural Fairness in Privileges Committees

The most extensive and detailed procedural protections afforded in parliamentary committee proceedings are usually in inquiries into privileges matters, and often Privileges Committees have separate rules for the treatment of witnesses.

In a particularly high-profile inquiry into comments made by the MP Franca Arena, the NSW Parliament sought advice from legal counsel to ensure that the Committee's investigation was fair and did not deny the Member natural justice.<sup>57</sup>

In 2007, the House of Representatives Committee of Privileges commissioned a report into the consideration of privilege matters and procedural fairness,<sup>58</sup> indicating that the House was conscious of, and concerned with, these matters.

However, the terms of reference explicitly excluded the consideration of the practice of any other parliamentary committees with regard to procedural fairness.<sup>59</sup>

The power of parliament to punish contempt is very broad. As Professors Lindell and Carney note, 'No other institution of government has the power to investigate an allegation as well as

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<sup>55</sup> See, for example, Parliament of New South Wales, Legislative Council, *Report on the Inquiry into the Conduct of the Honourable Franca Arena MLC*, Standing Committee on Parliamentary Privilege and Ethics, June 1998, pp. 9-12.

<sup>56</sup> Jones, above n. 23, 1; see also B. Chamberlain, 2001, 'Right of Reply in the Victorian Parliament – The Two Remedies' Paper presented to the 32<sup>nd</sup> Conference of Presiding Officers and Clerks, Wellington, New Zealand, July 2001.

<sup>57</sup> Parliament of New South Wales, above n. 51.

<sup>58</sup> Professors Geoffrey Lindell and Gerard Carney, *Review of Procedures of the House of Representatives Relating to the Consideration of Privilege Matters and Procedural Fairness*, presented to House of Representatives Standing Committee of Privileges, 23 February 2007.

<sup>59</sup> *Ibid.* p. 1.

effectively charge those alleged to be responsible, try the charge, and impose a penal sanction.<sup>60</sup>

In this context, natural justice is clearly necessary. This is so even where the nature of the proceeding is inquisitorial rather than adversarial, as such inquiries may engage in 'fishing expeditions' for relevant evidence, and witnesses may not know the exact nature or existence of any allegations against them and the matters on which they are called to testify.<sup>61</sup>

Lindell and Carney point to the 'suspect value of relying on untested evidence about sensitive matters', finding that providing witnesses with an opportunity to respond to adverse allegations not only serves to protect reputation but also makes it more likely that the 'correct' result (in terms of the truth or falsehood of the allegation) will be found.<sup>62</sup>

It is clear that where a parliamentary committee is aware that its findings may have a serious detrimental effect on the rights and interests of an individual (for instance, where a Member could be expelled), it is at pains to ensure that it complies with natural justice, at least as far as possible and appropriate in the circumstances. However, this concern should not be restricted to consideration of privileges matters. Although the powers of the House against its Members may be extensive, the work of its other committees also have the potential to impact on the rights and interests of individuals, whether or not they are Members of Parliament.

### **Reputation as a Protected Interest**

The reports and inquiries of general committees will usually only affect the interests of an individual in his or her reputation. A failure to provide appropriate procedural safeguards may be due to the fact that the significance of this interest has been overlooked.

In the Canadian case referred to earlier, the Canadian Parliament chose not to punish George for contempt; the dire consequences for her professional life arose solely from the finding of contempt and its effect on her reputation.

As the High Court held in *Ainsworth*, 'it has long been accepted that reputation is an interest attracting the protection of the rules of

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<sup>60</sup> *Ibid.* p. 3.

<sup>61</sup> *Ibid.* p. 14.

<sup>62</sup> *Ibid.* p. 34.

natural justice'.<sup>63</sup> This is so even where, as in *Ainsworth* and *Annetts*, the nature of the proceeding is non-adversarial and cannot have a direct impact on other rights and interests. An inquiry's potential impact on an individual's reputation enlivens the obligation to observe the rules of natural justice,<sup>64</sup> but does not mean that all aspects of the inquiry must be conducted to minimise damage to reputation<sup>65</sup> – the content of procedural fairness, as always, will depend on what is possible and appropriate in the circumstances.

## Comparative Rules

As stated, most parliaments in Australia have some rules in place providing a measure of procedural fairness in the conduct of committee inquiries. The question is whether the existing protections go far enough to protect the fundamental rights of witnesses before committees.

### Australian Senate

Privilege Resolution 1 of the Australian Senate forms the template for the rules for the treatment of witnesses in many Australian parliaments, which provide some measure of procedural fairness.<sup>66</sup> Although the House of Representatives has not adopted a procedural resolution despite repeated recommendations, McClelland states that the rules are generally followed in practice.<sup>67</sup>

Privilege Resolution 1 provides that witnesses are to be given notice of meetings, supplied with relevant information, and given an opportunity to make written submissions.<sup>68</sup> Witnesses may be accompanied by and consult an adviser. If evidence reflecting

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<sup>63</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, at [27] per Mason CJ, Dawson, Toohey and Gaudron JJ.

<sup>64</sup> *Annetts v McCann* (1990) 170 CLR 596.

<sup>65</sup> *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, at 28.

<sup>66</sup> See, for example, Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, Schedule 3: Instructions to Committees Regarding Witnesses; Parliament of Victoria, *Appearing Before a Parliamentary Committee: Guidelines for the Rights and Responsibilities of Witnesses*, (January 2008) available at: <<http://www.parliament.vic.gov.au/committees/get-involved/rights-&-responsibilities>>

<sup>67</sup> McClelland and Jaffray, above n. 54, 9.

<sup>68</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (13<sup>th</sup> edition, 2012), pp. 533-538; Appendix 2: Parliamentary privilege resolutions agreed to by the Senate on 25 February 1988.

adversely on a person is given the committee may expunge or forbid publication of that evidence, and if not, shall provide a reasonable opportunity for the person to have access to the evidence and to respond to it.<sup>69</sup>

As recognised by Lindell and Carney in their examination of privileges inquiries, procedural rights that are not recognised include the rights to a transcript of all the evidence; to be present throughout the hearing; to seek the subpoena of witnesses; and to address the committee on all the evidence.<sup>70</sup> Rights inadequately recognised include the right to sufficient time to prepare a case, the right to cross-examine witnesses, as well as the rights to full legal representation, to the privilege against self-incrimination, and to seek the refund of legal expenses.<sup>71</sup>

### Western Australia

In Western Australia, the Speaker's Procedural Rules on Committee Evidence apply to the conduct of committees in the Legislative Assembly.<sup>72</sup> The procedural rights recognised are similar to those protected in the Senate, but there is no obligation to notify a person of adverse comment made against them and provide them with an opportunity to respond. Instead, a person or body must request an opportunity to respond to adverse evidence, and only then will be given an opportunity to make a written submission, and may have access to the evidence.<sup>73</sup> This limits the effectiveness of the procedural protections, as the person may be unaware of adverse allegations until a report is published, by which time the damage to their reputation is already done.

The Procedure and Privileges Committee released a report in 2010 recognising the importance of considerations of procedural fairness as 'particularly important issues for privileges committees, and indeed for other committees when accusations are made against individuals or organisations'.<sup>74</sup> The report noted the reforms to procedures for privileges committees in the House of Representatives following Lindell and Carney's report, and considered their application in Western Australia.

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<sup>69</sup> Ibid.

<sup>70</sup> Lindell and Carney, above n. 58, p. 15.

<sup>71</sup> Ibid.

<sup>72</sup> Adopted under Standing Order No. 267.

<sup>73</sup> Parliament of Western Australia, *Standing Orders of the Legislative Assembly*, Speaker's Procedural Rules, r. 11.

<sup>74</sup> Parliament of Western Australia, Procedure and Privileges Committee, *Procedural Fairness and Powers of the House*, Report No. 8 (2010), 2.

The Committee found that certain rights were not appropriate in an inquisitorial process, including the right to cross-examination and full representation by counsel.<sup>75</sup> However, it did make several recommendations for amendments to the Speaker's Rules to remedy some deficiencies, including:

- Notification of persons adversely referred to in committee inquiries and provision of reasonable opportunity to respond;<sup>76</sup>
- A provision of significant adverse findings to the person concerned and a reasonable opportunity to respond;<sup>77</sup> and
- An opportunity to address a committee regarding any penalty to be imposed.<sup>78</sup>

The recommendations were unfortunately not adopted.

### Canada and the United Kingdom

The serious potential consequences of committee decisions for witnesses in the Canadian Parliament have already been noted. There are no formal protections for witnesses before parliamentary committees at the federal level in Canada.<sup>79</sup> However, recognising this absence, Rob Walsh suggests that natural justice could be applied to committee proceedings as a test of fairness, not as a measure of legality but a measure of legitimacy or good practice.<sup>80</sup> Thus even in the absence of any recognition of the direct application of the principles of procedural fairness, they may still be relevant in assessing how parliament performs its functions.

The United Kingdom does not have detailed procedural rules to protect the rights of witnesses appearing before parliamentary committees, but it has recently adopted detailed procedural rules for the conduct of public inquiries.<sup>81</sup> The debate in the UK has been 'characterised by a difference between those who favour the adoption of the same kind of safeguards enjoyed by witnesses in

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<sup>75</sup> Ibid. 11.

<sup>76</sup> Ibid. Proposed amended rules 16 and 17, p. 27.

<sup>77</sup> Ibid. Proposed amended rule 19, p.27.

<sup>78</sup> Ibid. Proposed amended rule 20, p. 28.

<sup>79</sup> See Audrey O'Brien and Marc Bosc, *House of Commons Procedure and Practice* (2<sup>nd</sup> edition, 2009) < <http://www.parl.gc.ca/procedure-book-livre>>

<sup>80</sup> Rob Walsh, 'Fairness in Committees' (2008) *Canadian Parliamentary Review* 23, 23.

<sup>81</sup> See *Inquiries Act 2005* (UK); see also <[www.publicinquiries.org](http://www.publicinquiries.org)> for detailed discussion of UK practice and procedure under the *Inquiries Act 2005*.

adversarial proceedings, [...] and those who argue that such safeguards are not appropriate to inquisitorial proceedings'.<sup>82</sup> The UK has thus far avoided coming down in favour of one or the other of the approaches, preferring a flexible approach that does not require a single set of model rules applicable to every inquiry.<sup>83</sup>

The UK preference for flexibility is also evident in a 2012 report on Parliamentary Privilege,<sup>84</sup> in which the view was expressed that the House of Commons was ill-equipped to afford proper protection of natural justice with respect to powers to punish non-members. This was not seen as a problem worth addressing, as the powers had never been used in modern times. The limited procedural protections for the exercise of other powers also did not seem to cause much concern.<sup>85</sup> Some limited protection is afforded in the House of Lords, where if a committee intends to make a personal criticism of a named individual in its report, the committee is 'encouraged to consider' whether to give notice to that individual.<sup>86</sup>

## United States

The United States Congress is seen as exceptional in terms of its reliance on committees, which have played a central part in its deliberation and executive oversight.<sup>87</sup> In conjunction with recognition of the importance of committee functions and the far-reaching nature of committee powers, there has long been acceptance of the importance of witnesses' rights. In 1957 the Supreme Court declared in *Watkins* that:

*It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This [...] assumes that the [...] rights of*

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<sup>82</sup> Geoffrey Lindell, *British Tribunals of Inquiry: Legislative and Judicial Control of the Inquisitorial Process – Relevance to Australian Royal Commissions* (Department of the Parliamentary Library, 2003) Research Paper No. 5, p. 4.

<sup>83</sup> *Ibid.* p. 6.

<sup>84</sup> UK Parliament, Office of the Leader of the House of Commons, *Parliamentary Privilege*, Green Paper, 26 April 2012.

<sup>85</sup> *Ibid.* 62-3.

<sup>86</sup> UK Parliament, House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, (23<sup>rd</sup> edition, 2013) [11.34].

<sup>87</sup> Longley and Davidson, above n. 5, 3-4.



*witnesses will be respected by the Congress as they are in a court of justice.*<sup>88</sup>

Some procedural rights for witnesses have been established by case law, including an entitlement to know the subject under inquiry, the legislative purpose being furthered, and the connection between the questions asked and the subject under inquiry.<sup>89</sup> The House of Representatives also provides fairly extensive procedural rights, including a right to be accompanied by counsel, and a requirement that persons adversely referred to must be notified, given an opportunity to voluntarily appear, and may request to subpoena additional witnesses.<sup>90</sup> As *Watkins* confirmed that the Bill of Rights applies to Congressional inquiries, certain constitutional rights exist alongside the procedural rules, including the privilege against self-incrimination, a prohibition on usurping judicial functions, and a limitation on the scope of inquiry to areas related to legitimate legislative purposes.<sup>91</sup>

The emphasis in the US has been on the requirements of fairness, and in the 1962 Supreme Court case of *Hutcheson v United States*, three of the six justices accepted 'fundamental fairness as an affirmative limitation on the power of congressional investigation'.<sup>92</sup> However, the recognition of the importance of fairness has not always led to development of codified rules. A Senate committee in 1955 suggested that: 'the problem of determining what rights or privileges to extend to witnesses is simply one of fair play. Courtesy and understanding on the part of committee members and staff would obviate any need for elaborate procedural devices.'<sup>93</sup> This more informal arrangement emphasizing fairness seems to have prevailed, as the principles developed in the Reports and case law from the 1950s and 60s are still relied on today.<sup>94</sup>

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<sup>88</sup> *Watkins v United States* (1957) 354 U.S. 178.

<sup>89</sup> 'The Rights of a Witness Before a Congressional Committee' (1960) 29(2) *Fordham Law Review* 357, 367.

<sup>90</sup> United States Congress, *Rules of the House of Representatives*, Rule XI, clause 2(k).

<sup>91</sup> 'Constitutional Law: Due Process as ground for refusing to testify before Congressional investigating committee – A novel approach rejected' (1963) *Duke Law Journal* 555, 556.

<sup>92</sup> *Ibid.* 562.

<sup>93</sup> United States, *Senate Report No 84-2* (1955), at 23; cited in Michael Bopp and DeLisa Lay, 'The Availability of Common Law Privileges for Witnesses in Congressional Investigations', (2012) 35(3) *Harvard Journal of Law & Public Policy* 897, 903.

<sup>94</sup> See Bopp and Lay, above n. 93.

## New Zealand

In New Zealand, under s 27(1) of the *Bill of Rights Act*, ‘everyone has the right to the observance of the principles of natural justice by a [...] public authority’.<sup>95</sup> Responsibilities of committees for procedural fairness are set out in the Standing Orders for the House of Representatives. The Committee rules protecting natural justice include those provided in the Australian Senate. Further, where adverse allegations are made against a person, or there is a risk of reputation being damaged, that person must be given notice and an opportunity to respond, and may ask the committee to hear from other witnesses in response, and may request material held by the committee.<sup>96</sup> The committee must consider the response before reporting adverse findings to the House.<sup>97</sup> Counsel may make written and oral submissions on procedure,<sup>98</sup> and Members can be excluded from participating in committee proceedings on grounds of apparent bias.<sup>99</sup>

The White Paper on the Bill of Rights states that the incorporation of the right to justice in New Zealand’s rights instrument reflects ‘basic principles of the common law’ and ‘recognises the pervasive nature of the powers of public authorities and the central importance of the principles of natural justice in helping ensure that they are exercised in a fair way.’<sup>100</sup> Procedural fairness is therefore seen as essential to public trust, and the principle is explicitly recognised as a fundamental societal value. New Zealand has struck a balance between the legitimate needs giving rise to parliamentary privilege, and the rights of individuals to be afforded natural justice, by providing for procedural fairness before Select Committees but stating that these procedures will not extend to limiting political debate.<sup>101</sup> This is in keeping with the values expressed in the Bill of Rights – that everyone has the right to the observance of principles of natural justice.

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<sup>95</sup> This may include parliament: *Bill of Rights Act 1990* (NZ) s 3; McClelland and Jaffray, above n. 54.

<sup>96</sup> New Zealand Parliament, *Standing Orders of the House of Representatives*, 2011, SO 224(2), 234.

<sup>97</sup> *Ibid.* SO 242.

<sup>98</sup> *Ibid.* SO 224(2).

<sup>99</sup> *Ibid.* SO 228.

<sup>100</sup> *A Bill of Rights for New Zealand: A White Paper*, Department of Justice, Wellington, 1985, [10.168].

<sup>101</sup> New Zealand Parliament, Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees*, 2010, 4.

## Conclusion

The nature of today's public domain – in which mass media, 24-hour news, and the internet disseminate information widely and immediately – means that the exercise of public power is subject to much 'broader and more critical scrutiny than was possible a century ago.'<sup>102</sup> In this new environment, the boundaries of parliamentary privilege and the need to protect a person's fundamental rights ought be examined with regard to what is necessary to both govern effectively and preserve the public trust.

The procedural rights referred to ought form part of all rules governing parliamentary committees. In some cases committees should also require satisfaction of an onus of proof before making findings, particularly those reflecting adversely on a person or body.

An appropriate way of resolving disputes would be to adopt a rule that where a fact is asserted there is a practical onus of proof on the person asserting it, and the amount of doubt necessary to defeat the assertion ought diminish with the seriousness of the accusation. Such a rule would protect individual rights to have findings made on an evidential foundation, and preserve the flexibility and inquisitorial nature of committee inquiries.

In some circumstances, the work of parliamentary committees may make full provision of natural justice impractical or inappropriate. It may therefore be necessary to preserve an element of discretion in what protections will be provided to witnesses in a particular case. However, the importance of the principle of procedural fairness means that it should be presumptively applicable, and should be overridden only where strictly necessary for the proper functioning of parliament. This is consistent with a proper understanding of the source and purpose of parliamentary power and privilege.

As John McMillan asserts: 'Parliament can itself be enriched – both as to its internal functioning and as to the exercise of its legislative authority – if it takes heed of the way in which administrative law principles are perceived and developed in other forums.'<sup>103</sup>

It is most important for parliaments to appreciate that the reliability of committee findings would be greatly enhanced by the adoption of and adherence to rules requiring procedural fairness.

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<sup>102</sup> Charles Robert and Blair Armitage, 'Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees' (2007) *Canadian Parliamentary Review* 29, 33.

<sup>103</sup> McMillan, above n. 53, 35.

Reasons of efficiency and effectiveness alone should therefore encourage parliaments to comply with the rules of natural justice. An even more compelling reason is that by ensuring that its procedures are fair, parliaments exercise their power in accordance with the basic standards of fairness and decency pervading the community and constitution from which they draw their power, and discharge the public trust to which they are subject.