

# **The Role of the Privileges Committee and the Relevancy of a Penal Jurisdiction of a House in Current-Day Parliaments**

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## ***Introduction***

Privilege is seen as essential to enable houses of Parliament and their members to carry out their functions effectively. However, privilege remains a nebulous concept, imprecisely defined and inconsistently enforced.

This paper will examine the current role of privileges committees in investigating and enforcing the privileges of the Parliament. With a particular focus on Victoria, it will examine whether a privileges committee is the best avenue for dealing with issues of privilege and contempt and explore possible alternative ways of administering the privileges of a House.

The second part of the paper will examine the penal jurisdiction of the Houses, its origin, current use and relevance in current-day Parliaments. Again with a particular focus on Victoria, it will examine whether the penal powers of Parliament are still necessary and explore avenues for clarifying or regulating its use.

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## ***Privileges Committees***

### ***Historical Need for Privilege***

The traditional justification for the existence of the privileges of the Houses of Parliament is the doctrine of necessity. May defines parliamentary privilege as being:

the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individual.<sup>1</sup>

In Victoria, the privileges of the Houses of Parliament are drawn from section 19 of the Constitution Act 1975 which provides:

The Council and the Assembly respectively and the committees and members thereof respectively shall hold enjoy and exercise such and the like privileges immunities and powers as at the 21st day of July, 1855 were held enjoyed and exercised by the House of Commons of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with any Act of the Parliament of Victoria, whether such privileges immunities or powers were so held possessed or enjoyed by custom statute or otherwise.

The exact rights and immunities that are granted by parliamentary privilege are not defined and rely on common law precedent and past practice.

### ***Procedure of Privileges Committees***

Privileges committees have been established in most jurisdictions to allow for a more detailed consideration of potential breaches of privilege or contempts. Some jurisdictions have standing committees and some have select committees. In Victoria, it has become practice since 1974 to appoint a select privileges committee at the start of each parliamentary session. The committee, however, is not required to meet until a matter is referred to it for investigation by the House.

In Victoria, all matters of privilege must first be raised with the Speaker (unless the contempt happens in the view of the House in which case the matter of privilege can be proceeded to immediately).<sup>2</sup> A member wishing to raise a matter must write to the Speaker, outlining the matter as soon as practicable. The Speaker then decides if there is a prima facie case of breach of privilege. If there is not, the member is informed. If there is, the Speaker announces the decision to the House and the complaining member can proceed with a substantive motion. Under standing orders this motion is given precedence.<sup>3</sup>

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<sup>1</sup> May, 23rd edn, p75

<sup>2</sup> Hansard, Vol 337 pp 1756–7 19.4.1978 (Wheeler)

<sup>3</sup> SO 150

Generally, the substantive motion is to refer the matter to the Privileges Committee. The Committee then investigates the matter and tables a report in the House for consideration. Since 1974, seven matters have been referred to the Privileges Committee. All have resulted in reports being tabled, but none has resulted in further action being taken.

### ***Functions of Privilege Committees***

Privilege committees perform two main functions — the investigative function and the reporting function.

#### *Investigative Function*

As with most committees, matters are referred to a privileges committee to allow for a more detailed consideration of the matters raised than would be possible in the House itself. In order to assist it in this function, privileges committees are generally granted the power to send for persons, papers and records.<sup>4</sup>

There are three main roles that a privileges committee performs. They are:

*Investigation of possible contempt* A contempt of parliament is defined by May as ‘any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.’<sup>5</sup>

#### ***Investigation of Possible Breach of Privilege***

A breach of privilege on the other hand is an infringement of the powers or immunities of the House or of its members. While all breaches of privilege usually constitute contempt, not all contempts are a breach of privilege.<sup>6</sup>

#### *Right of Reply*

Right of Reply is a procedure whereby non-members who feel they have been adversely affected by a statement in the House, have the ability to respond to that statement and have that response put on the public record.<sup>7</sup> In the Victorian Legislative Assembly, a person must first write to the Speaker outlining their

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<sup>4</sup> See for example VP (2003), p 74

<sup>5</sup> May, 23rd edn, p108

<sup>6</sup> Carney G, *Members of Parliament: law and ethics* (2000), p 186.

<sup>7</sup> Legislative Assembly of Victoria, Fact Sheet 11: Right of Reply by Persons Referred to in the House

complaint and how they feel they have been adversely affected. If the Speaker decides the matter is not trivial or frivolous, and it is practical to do so, the matter is referred to the Privileges Committee. The Committee then reports back to the House with a recommendation and, if necessary, an appropriate response.<sup>8</sup>

### *Reporting Function*

Once the Committee has completed its investigation, it reports its findings to the House. The Committee itself has no power to take action against a wrongdoer; it can merely report the fact to the House and recommend action. The ultimate decision on what action should be taken is made by the House itself.

However, the report of the privileges committee is a public document, and therefore serves a purpose as it makes the allegations and the results of the investigation publicly available.

### *Problems with Current Procedures of Privileges Committees*

There are a number of problems and perceived problems with the operation of privileges committees as outlined above. These include the political nature of privileges committees, that formal procedures are the only option, there are no clear guidelines for procedural fairness (natural justice) and there is difficulty implementing the recommendations of the committee.

### *Political Nature of Privilege Committees*

As privileges committees are composed of members of Parliament, they are by their very nature political bodies. As the government has the majority of the members of the House, the majority of the members on the privileges committee are also from the government.

Furthermore, the motion to refer a matter to the privileges committee must be carried by a majority of members present. As a result, the government can control the matters that are referred to the privileges committee. Once the report has been presented, the government also has the numbers to decide what action is taken.

This can result in the privileges committee being used for the political purposes of a government or can result in decisions of the committee being made along party lines. As a result, the prime focus can move from upholding the privileges of the House to earning political capital.

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<sup>8</sup> Full procedure is set out in SO 227

### ***Lack of Natural Justice***

Whilst a court is bound by rules of evidence and procedural fairness, there is no well defined procedure for the operation of a privileges committee. As select committees, their terms of reference are set out by the House with other procedural aspects defined by past precedent and the will of the committee.

In its Parliamentary Privilege First Report,<sup>9</sup> the Joint House of Commons and House of Lords Committee on Parliamentary Privilege recommended the following minimum standards of fairness be given to a member accused of contempt: a prompt and clear statement of the precise allegations against the member; adequate opportunity to take legal advice and have legal assistance throughout; the opportunity to be heard in person; the opportunity to call relevant witnesses at the appropriate time; the opportunity to examine other witnesses; the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.

In determining a member's guilt or innocence, the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. In the case of more serious charges, a higher standard of proof may be appropriate.<sup>10</sup>

As yet, none of these recommendations has been adopted in Victoria. There is also the possibility that committee investigations may be held in camera and there is no legal obligation for the full minutes of evidence taken before the committee to be published. Thus persons can have a penalty imposed against them for a contempt, without knowing what they did wrong and without having a chance to see the evidence against them or present evidence in their defence. Added to this, there is no avenue of appeal.

### ***Formal Procedures are Only Option***

Another issue with the processes of privileges committees is that formal procedures are the only option for dealing with matters of privilege. The Speaker, on receiving a complaint of a breach of privilege, must either decide the matter is trivial or unsubstantiated or report the matter to the House. There is no scope for the Speaker to try and resolve the situation through some informal arrangement between the parties involved, such as an apology or a personal explanation in the House.

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<sup>9</sup> <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>

<sup>10</sup> <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm>, para 281.

### ***Difficulties in Implementing Recommendations***

Privileges committee themselves do not have any powers to impose penalties for breaches of privilege or to otherwise reprimand members. Matters must be reported back to the House with a recommendation which can be followed or not followed, depending on the will of the House.

Therefore, if the main roles of the privileges committee are investigatory and advisory, it may be more appropriate for an independent investigatory body to be appointed to fulfil this role. This body could similarly have matters referred to it by the House and report back to the House with recommendations.

### ***Advantages of Privileges Committees***

Despite the drawbacks of privileges committees discussed above, there are still a number of admirable aspects which should be retained. These include gathering information for the House to make a decision, which is aided by the broad investigative powers of a parliamentary committee and the report is in itself a public declaration of the contempt.

### ***Information Gathering Function***

The main advantage of a parliamentary committee is that it is able to examine matters of privilege in much greater detail than would be possible in the House itself. The ability to send for papers and call witnesses allows the committee to gather further information which is not publicly available which it can then include in its report to the House. In particular, government departments and agencies can be required to produce information they would otherwise not release.

### ***The Report Itself is a Public Declaration of the Contempt***

Even if no action is taken following the preparation of a report by the privileges committee it can still be seen to have performed a useful function in that the report itself allows the matter to be aired publicly and points of views to be expressed. The ability in some jurisdictions for minority reports adds to this, allowing alternative points of view to be shared. All this information is then placed on the public record.

This is also seen as the justification for the Right of Reply procedure. The Right of Reply report includes a response from the person who feels their interests have been negatively affected. This response is available for all to read and provides the alternative side of the story. Furthermore, the report being tabled in the House allows for further discussion through motions to take note of the report or during the time allocated to statements on parliamentary committee reports.

### ***Possible Alternatives to Current Privileges Committees System***

Given the advantages and disadvantages of privileges committees as outlined above, the logical question is whether there is an alternative system which is preferable which retains all of the advantages, but overcomes the disadvantages. Several possible alternatives or modifications to the current system are examined below.

#### ***Courts***

The main alternative to a privileges committee would be to allow courts to hear and determine breaches of privilege. The main advantage of moving this function to the courts, is it would separate the judicial function (deciding individual cases of breach of privilege) from the legislative function (setting standards and defining privileges).

Courts also already have systems in place to allow for natural justice, through processes such as rules of evidence and the right of cross-examination.

One of the main obstacles to removing the power to adjudicate cases of contempt from the Parliament to the courts is that in most jurisdictions there is no definition of what constitutes a contempt. It is left up to the House of Parliament to decide on a case to case basis whether the action that has taken place is a breach of privilege or not. If the courts were to be given this power, it would be necessary to codify the contempt in some way or put guidelines in place through some other means.

One possible way of achieving this is for a defined set of privileges to be laid out in a Privileges Act or similar legislation. It could then be left to the court to decide whether particular conduct fell within the scope of the privilege. In other jurisdictions, such as the Commonwealth and Queensland, legislation defining privileges has been established taking an inclusive approach.<sup>11</sup> The legislation sets out clearly defined areas of privilege but does not exclude other matters which are not on the list. This would provide a basis for courts to make rulings, but also allow flexibility in their interpretation.

The courts fulfilling this role would also result in rulings on matters of privilege being more consistent. The courts would be able to draw on interpretative principles and precedent to help more clearly define privileges. If an inclusive definition is used, courts can also expand privilege to cover new areas that were unforeseen, if the privilege is analogous to existing privileges or if in their view such an extension of privilege would be logical and necessary. Therefore privilege would not necessarily remain stagnant.

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<sup>11</sup> Parliamentary Privileges Act 1987 (Cth); Parliament of Queensland Act 2001 (Qld), s37.

Whilst it may be argued that such a scheme would undermine the operation of the Parliament as it would remove its ability to determine its own privileges, this is not the case. As the privileges would be set out in legislation, it would always be possible for the Parliament to redefine its privileges, adding certain elements or removing privileges it no longer wished to enforce. Thus the Parliament would still be determining what its privileges are and it would be the role of the courts to decide, as a matter of fact, whether particular conduct occurred and whether it breached those privileges.

### ***Ombudsman***

Traditionally, however, courts have been reluctant to become involved in the internal workings of Parliament. If the ultimate power to determine matters of privilege were to remain with the House, it may be possible to move the reporting an investigative functions away from a privileges committee to a more independent body.

One such body is the Ombudsman. The Victorian Ombudsman currently performs an investigatory and reporting function under the Ombudsman Act 1973 and deals with complaints under the Whistleblowers Protection Act 2001. The Ombudsman has certain investigatory powers and the results of the investigations are reported to Parliament.

If the jurisdiction of the Ombudsman were expanded to include investigating matters of privilege, either referred by the Speaker or as a result of a complaint by a member of the public, the Ombudsman could then report the findings to the Parliament, making appropriate recommendations. As the Ombudsman is already an established independent officer of the Parliament with a number of powers to collect information, this role would fit comfortably with the existing functions. It would also allow the House to retain its decision making powers, but would remove the possible politicisation of the investigatory process.

### ***Parliamentary Commissioner for Standards***

In UK, there is an independent Parliamentary Commissioner for Standards specifically devoted to privilege and related matters. The role of the Commissioner includes<sup>12</sup> overseeing the maintenance and monitoring the operation of the Register of Members' Interests; providing advice on a confidential basis to individual Members and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members; preparing guidance and providing training for Members on

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<sup>12</sup> Parliamentary Commissioner for standards homepage  
[http://www.parliament.uk/about\\_commons/pcfs.cfm](http://www.parliament.uk/about_commons/pcfs.cfm)



matters of conduct, propriety and ethics; monitoring the operation of the Code of Conduct and Guide to the Rules and, where appropriate, proposing possible modifications of it to the Committee; receiving and investigating complaints about Members who are allegedly in breach of the Code of Conduct and Guide to the Rules, and reporting his findings to the Committee.

The Commissioner is appointed for a fixed five year term and is independent of the Parliament. The Commissioner does however have a close working relationship with the Select Committee on Standards and Privileges.<sup>13</sup> Once a complaint is made, the Commissioner conducts a preliminary inquiry to see if there is a case to answer. If not, this is reported to the Committee. If there is a case to answer, a more detailed investigation takes place and the facts and conclusions are reported to the Committee.

The Committee then considers this report and can conduct further investigation if it sees fit. The Committee then reports its findings to the House of Commons who can then decide what action to take, including possible penalties.

The advantages of this system are that it allows an independent investigation to take place. The Commissioner fulfils the role of the presiding officer in the Victorian Parliament of deciding whether there is a prima facie case to answer, however has greater powers with the ability to conduct investigations and produce a report.

The Commissioner also has a wider role of educating members on ethics and appropriate conduct. A written code of conduct clearly outlining the responsibilities of members assists with this. The Commissioner also has a role in interpreting and suggesting modifications to the Code of Conduct. There is currently no person or organisation fulfilling this role in an official way in the Victorian Parliament.

### ***Possibility of Less Formal Procedure***

An alternative to referring matters to the privileges committee would be to provide for a less formal procedure at the first instance. If a complaint is of a minor nature, or one that the presiding officer feels could be resolved quickly, an alternative procedure such as mediation may be more appropriate. Using the presiding officer, a qualified mediator or another appropriate person, the two parties to the dispute could meet and try to come to an agreement. This could be particularly useful if the dispute is between two members where an apology or a personal explanation in the House may prevent the matter escalating further. It would also reduce to cost and time involved going through the formal procedures of a privileges committee.

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<sup>13</sup> House of Commons Guide: Complaints Against a Member of Parliament  
<http://www.parliament.uk/documents/upload/PCFSComplaintsLeaflet>.

### ***Right of Reply managed by the Presiding Officer***

In the Legislative Council in Victoria, Right of Reply is managed by the President independently and does not involve the privileges committee.<sup>14</sup> All complaints must be made in writing to the President who then determines whether the matter should proceed and whether a response should be presented. If the President decides a response is appropriate, the President liaises with the person concerned about drafting an appropriate response and then presents it to the House.

The advantage of this procedure is that it moves the responsibility from the privileges committee to the presiding officer who must exercise this function, as with all of their other functions, impartially and without favouring either side. Whilst the presiding officer is a member of a political party, they are not subject to the same influences as other members who may be on the privileges committee. This alternative may also result in more consistent rulings as the presiding officer would make these decisions in consultation with the clerks and in accordance with past practice.

### ***Committees Can Investigate Their Own Leaks***

In Victoria, breaches of privilege in relation to the work of committees, in particular joint investigatory committees, can be investigated by the committee itself. Section 33(3) Parliamentary Committees Act 2003 has been interpreted to include the committee investigating breaches of privilege in relation to a tabled report or documents. This can include unauthorised disclosure of information provided to the committee and the failure of witnesses to appear before the committee. The committee's investigation of this matter can then be reported to the House for further action.<sup>15</sup>

Whilst this may ultimately result in the role of the privileges committee being performed by a different committee, it does move the decision as to whether to investigate a breach from the House to the committee. Therefore a committee whose privileges have been breached can make a detailed report on the matter to the House including any appropriate evidence.

### ***Penal Jurisdiction***

The first part of this paper has focussed on the role of the privileges committee in determining matters of contempt and defining the privileges of the House. However as the committee has no punitive powers, its role becomes less relevant if its

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<sup>14</sup> Legislative Council of Victoria, Information Sheet 12: Right of Reply. SOs 19.02–19.05.

<sup>15</sup> See for example, Public Accounts and Estimates' Committee's Investigation into a Possible Breach of the Standing Orders, PP 35 (1994–95).

recommendations are not enforced by the House. The second part of this paper will examine the growing reluctance of Houses to use their punitive powers and possible alternative bodies by whom this power could be exercised to better enforce the privileges of the Parliament.

### ***History***

The penal jurisdiction of the Parliament of Victoria was established when it adopted by statute all the powers privileges and immunities of the House of Commons as at 21 July 1855. This included all the powers that were necessary to enforce these privileges.

May states the penal jurisdiction of the Houses is necessary to ‘safeguard and enforce their necessary authority without the compromise or delay to which recourse to the ordinary courts would give rise.’<sup>16</sup>

There are a number of ways in which the House may exercise its penal jurisdiction, including imprisonment, fines, reprimand or admonition. Members may be suspended or expelled.<sup>17</sup> As the exercise of this power by the House is a proceeding in parliament, it is not reviewable by the courts.

The scope of the power is broad and there are very few limits. Possible limits include imprisonment can only continue until the end of the current parliamentary term<sup>18</sup> and the power to fine may no longer exist, having been lost through non use.<sup>19</sup> The exact limits, however, are unclear as they are not defined in legislation and have not been clarified by the courts.

### ***Use of Penal Powers by Current-Day Parliaments***

These days, it is very rare for penalties to be imposed by the House. In fact in Victoria, a person was last imprisoned by order of the House in 1900.<sup>20</sup> Whilst there is no clear procedural reason for this, it is most likely due to changes in society’s values and increased scrutiny by the media.

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<sup>16</sup> May, 23rd edn, p155.

<sup>17</sup> May, 23rd edn, pp161–165.

<sup>18</sup> Campbell E, *Parliamentary Privilege* (2003), p 189. Statutory provisions can allow for imprisonment beyond the dissolution of a parliament such as s7 of the *Parliamentary Privileges Act 1987* (Cth).

<sup>19</sup> May, 23rd edn, p161

<sup>20</sup> VP (1899–1900) p 175–181.

### ***Media Attention***

A main factor preventing the House using its punitive power is the media attention it would cause. If a member of the public were detained under the direction of the House for a period of time without charge, it is likely to become a hot political issue. Similarly if a member of the opposition were detained on the direction of the presiding officer, it is likely that the presiding officer would be accused of political bias. Instead, matters are generally dealt with by the police or the presiding officer outside of the public arena.

### ***Improved Security***

A further reason the parliament is no longer required to exercise its penal jurisdiction, is the greater involvement of the police in the security of the parliamentary precincts and more clearly defined offences in legislation. As a result, invaders of the chamber and people causing disturbances in the parliamentary precinct are escorted from the grounds by security and prosecuted by police under the relevant legislation. It is seen unnecessary, and a waste of the parliament's time, to bring them before the House for further punishment.

### ***Freedom of Political Communication***

Another possible reason for the failure of parliament to use its punitive powers is the increased importance placed on freedom of political communication. Previously, protesters who interrupted the business of the House or otherwise interfere with the work of members were seen to be defying the parliament. These days, it is seen as the fundamental right of every individual to express their political views and in particular it is the right of constituents to have access to their members of parliament to further their political causes. Therefore if a person were imprisoned or fined as a result of trying to express those views, even if it was in an unacceptable manner, it would be seen as an attempt to suppress that point of view. Therefore, more latitude is granted to political activists than in the past.

It has also been argued that the implied freedom of political communication under the Commonwealth Constitution may in fact limit the privileges of the state and federal parliaments and therefore exercising the penal jurisdiction of the House in a way that would infringe this freedom may be unlawful.<sup>21</sup> Whether this is the case is not clear.

However, the freedom of political communication can be restricted if the restriction can be justified as a proportionate response to protect some other public interest. The upholding the privileges of the House may be a sufficient public interest.

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<sup>21</sup> Carney G, *Members of Parliament: law and ethics* (2000), p 197–199.

### *Comparison with Other Jurisdictions*

Given that the penal jurisdiction is used very rarely, it has been questioned whether Houses need to retain these powers at all. In other jurisdictions, the imposition of penalties does not rest solely with the House, thus removing or reducing the need for the House to have punitive powers at all.

#### *Queensland*

In Queensland, the procedure for dealing with matters of contempt has recently changed under the Parliament of Queensland Act 2001. Under that Act, if a contempt also constitutes an offence against another Act, the Assembly can either deal with the issue itself as a matter of contempt or direct the Attorney-General to prosecute the person for the offence against the other Act.<sup>22</sup>

The Act also removed the penalty of imprisonment for contempt. The punishment can now only be a fine. There is however the ability to imprison an offender if they do not pay the fine within a reasonable time.<sup>23</sup> The Speaker may also order the arrest of a person who is interrupting proceedings of the Parliament or a committee until the person is dealt with by the Assembly.<sup>24</sup>

#### *Norway*

In Norway, the Parliament does not have any punitive powers. Instead it has the power to request the ordinary prosecuting authority to take the matter before the courts. Even members of parliament who fail to comply with the rules of procedure may be liable to a penalty after proceedings before a Court of Impeachment.<sup>25</sup>

#### *United States*

In the United States, contempts such as the failure of witnesses to appear before a committee can be brought before the courts.<sup>26</sup> The committee reports the breach to the House and it is then the duty of the presiding officer to refer the matter to the

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<sup>22</sup> Parliament of Queensland Act 2001, s4723.

<sup>23</sup> Parliament of Queensland Act 2001, s40.

<sup>24</sup> Parliament of Queensland Act 2001, s42.

<sup>25</sup> Commonwealth of Australia Senate Committee of Privileges: Information Paper on Penalties for Contempt, September 2000, p 17. [http://www.aph.gov.au/senate/committee/priv\\_ctte/completed\\_inquiries/1999-02/report\\_95/report.pdf](http://www.aph.gov.au/senate/committee/priv_ctte/completed_inquiries/1999-02/report_95/report.pdf).

<sup>26</sup> Commonwealth of Australia Senate Committee of Privileges: Information Paper on Penalties for Contempt, September 2000, p 23.

appropriate US Attorney for prosecution. The court then has the power to impose a penalty or a fine.<sup>27</sup>

### ***United Kingdom***

Whilst the situation in the United Kingdom remains similar to that in Victoria, there has been a growing movement for change. In its Parliamentary Privilege First Report, the Joint Committee on Parliamentary Privilege made the following recommendations:<sup>28</sup>

1. Contempt of Parliament should be codified in statute. Contempts comprise any conduct which improperly interferes with the performance by either House of its functions, or the performance by a member or officer of the House of his duties;
2. Parliament's power to imprison persons, whether members or not, who are in contempt of Parliament should be abolished, save that Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament;
3. For practical reasons Parliament's penal powers over non-members should, in general, be transferred to the High Court. Parliament should retain a residual jurisdiction, including power to admonish a non-member who accepts he acted in contempt of Parliament. Proceedings should be initiated on behalf of either House by the Attorney General, at the request of the Speaker, advised by the standards and privileges committee or of the Leader of the House of Lords acting on the advice of the committee for privileges. The court should have power to impose a fine of unlimited amount.

These recommendations have not been implemented, but such a system would allow a clearer system of administering privilege and regulating the penal jurisdiction of the House.

### ***Alternative Bodies in which to Vest the Penal Jurisdiction***

#### *Courts*

As suggested in the UK model, the main alternative suggested is the transfer of the power to the courts. In order for this to happen the court would need to be empowered by statute to apply penalties for breaches of contempt. This would also sit more comfortably with community's understanding of the role of the courts and the Parliament. It is well accepted that the courts are able to impose penalties.

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<sup>27</sup> United States Code, s192 and s194.

<sup>28</sup> <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm>, para 324.

This suggestion, however, was not supported by the Federal Parliament's Joint Select Committee on Parliamentary Privilege. It argued that the penal jurisdiction of the Parliament needed to be retained because<sup>29</sup> the jurisdiction exists as the ultimate guarantee of Parliament's independence and its free and effective working; the separateness of the courts from parliamentary institutions and their lack of acquired understanding of parliamentary life would make it difficult for them to assess whether conduct alleged to be contempt was such as to obstruct or impede Parliament or its members in the discharge of their functions; courts lack the flexibility that houses possess in their exercise of their penal jurisdiction since they cannot take into account factors which houses may entertain, chiefly the potent force of public opinion and the political consequences for Parliament and the principal Parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt; even if it were to be provided that prosecutions for contempt of parliament could not be initiated except on the instruction of a house, there would be potential for undesirable clashes between courts and Parliament regarding what conduct was in contempt; and transfer of the houses' penal jurisdiction to the courts would expose the courts to the odium that Parliament sometimes attracts when it exercises that jurisdiction.

Despite these objections, privilege would still ultimately remain in the control of the Parliament as it could set out guidelines in statute and enact legislation to reverse any trends in judicial decisions it did not approve of.

### ***Independent Tribunal***

Another option would be to allow an independent statutory tribunal to impose penalties. The tribunal's role would need to be set out in statute, and as with most tribunals there would be the possibility of appeal to courts on the grounds of procedural fairness or mistake of law.

The advantage of a tribunal is that the decision maker does not necessarily need to be a judge, with academics, community members and even former parliamentarians possible members of the tribunal. This would allow greater input from the public as to the standards they expect of members and the penalties they feel are appropriate.

### ***Presiding Officer***

If the power to impose penalties was transferred to the court or a tribunal, Parliament would still need to retain some powers to deal with immediate threats to the operation of the Parliament, such as intruders on the floor of the House.

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<sup>29</sup> Summary of reasoning taken from Campbell E, *Parliamentary Privilege* (2003), p 192.

Currently, the Speaker of the Legislative Assembly<sup>30</sup> and the President of the Legislative Council<sup>31</sup> in Victoria have this power under standing orders.

The UK Joint Committee on Parliamentary Privilege also recommended that the penal jurisdiction of the House be limited to the power to search and detain a person for a limited period of time if they have just committed misconduct within the precincts.<sup>32</sup>

It also recommended retaining the ability to call a person before the bar and reprimand them with no further action being taken and a residual penal jurisdiction in exceptional cases. The Committee stated '[w]e have no specific instances in mind, but the existence of this residual jurisdiction will serve as a reminder of the constitutional principle that Parliament itself has a penal jurisdiction over non-members.'<sup>33</sup> It is unclear whether this is necessary, as the Parliament inherently has this power which it can exercise through enabling legislation.

Another alternative would be to establish statutory offences, which like all other offences, are reportable to the police and prosecutable by the ordinary prosecuting authority. This has already been done to a limited extent, with offences such as not leaving the Parliamentary Precincts when directed to do so by an authorised officer statutorily codified in the Parliamentary Precincts Act 2001 (Vic).<sup>34</sup>

Defining these specific offences would allow a number of minor forms of contempt to be dealt with outside the House by the usual authorities. The House could then retain its jurisdiction, but only investigate it when it sufficiently serious. The decision as to the appropriate approach to take could rest with the presiding officer at first instance.

## *Conclusions*

Privileges committees have become less relevant in current-day parliaments. Their political nature, lack of procedural fairness and increased media scrutiny mean the role of the committee can easily be undermined and prevent the committee operating fairly and effectively.

There are a number of avenues of reform that need to be explored. Firstly, introducing the possibility of less formal procedures such as mediation may prevent

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<sup>30</sup> SOs 127–129

<sup>31</sup> Legislative Council SOs 10.05, 20.04

<sup>32</sup> <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm>, para 312.

<sup>33</sup> <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4310.htm>, para 314

<sup>34</sup> Parliamentary Precincts Act 2001, s 22.



privilege matters becoming larger issues than they need to be. Secondly, further support and training for members, through an officer similar to the UK Parliamentary Commissioner for Standards may prevent privilege issues arising in the first place.

If a matter needs to be investigated further, an independent investigatory officer or the courts who examine the conduct against codified guidelines in a Privileges Act would make the process more accountable and more transparent.

The penal jurisdiction should continue to be used sparingly. Transferring powers to the courts, either through a broad jurisdiction to deal with matters of privilege, or specific statutory offences would reduce the need for the House to intervene. The presiding officer, however, needs to retain the authority to deal with interruption on the floor of the House or in committee proceedings. ▲