Australian and New Zealand Association

of Clerks at the Table Conference

Natural justice in the parliamentary sphere: should parliaments retain the power to punish?

Address

by

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Perth
24 January 2018

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I am greatly honoured to have been invited to address this conference of Clerks of the parliaments of Australia and New Zealand. I am very pleased to welcome delegates from other parliaments in Australia and New Zealand to Perth, and sincerely hope that you enjoy your stay in our city.

The traditional owners

I commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia. I pay my respects to their Elders past and present and acknowledge their continuing stewardship of these lands.

Parliament's power to punish

In a previous address, I joined the many who have expressed concerns that the retention by many parliaments of the traditional power to punish for contempt lacks many of the safeguards, both substantive and procedural, which have evolved with respect to the imposition of punishment by courts.[2] In this paper I will develop that general proposition in more detail.

Criminal justice v parliamentary process

The powers of the parliaments of Australia and New Zealand to impose punishment for contempt of parliament vary from jurisdiction to jurisdiction, as do the legal regimes governing the exercise of those powers. It is not the purpose of this paper to undertake an analysis of

[2] Wayne Martin, 'Parliament and the courts: a contemporary assessment of the ethic of mutual respect' (Spring/Summer 2015) 30(2) *Australasian Parliamentary Review*, 80.

the varying breadth of those powers. Despite some jurisdictional variations, most parliaments in Australia and New Zealand retain privileges and powers to punish for breach of privilege which are analogous to, and derive from the powers and privileges enjoyed by the Houses of Parliament at Westminster. The propositions advanced in this paper will be developed on that general assumption, and without regard to the differences in the laws applicable in the different jurisdictions represented at this conference, although from time to time points will be illustrated by reference to the law and/or practices of a particular jurisdiction.

The thesis of this paper will be developed by a comparison between the various stages of the criminal justice process, and the analogous stages in proceedings for contempt of parliament.

No clear statement of prohibited conduct

The parliaments represented at this conference regularly pass laws which define the acts or omissions which will render a person liable to punishment with as much clarity and precision as can be achieved by the English language. So, in Western Australia, for example, with two exceptions, people can only be punished if they have acted, or failed to act, in a way which is specified in a written law. People who want to know whether any particular act or omission which they are contemplating will render them liable to punishment can review the relevant written law and form a view as to whether they will, or will

not, be potentially exposed to a sanction. The two exceptions are contempt of court[3] and contempt of parliament.

Like beauty, the acts which can constitute contempt of court or contempt of parliament can only be seen by the beholder. The uncertainty which this creates is exacerbated by the fact that the relevant 'beholder', be it a court or a parliament, is the same body which will investigate, formulate and present the charge, and will also determine guilt or innocence.

Defenders of the current arrangements with respect to contempt of parliament often draw analogies with the current arrangements relating to contempt of court, as and by way of justification for the parliamentary process. For my own part, I cannot see how one can justify uncertainty with respect to the range of conduct likely to attract a sanction, and a lack of impartiality in the determination of guilt or innocence by pointing to another system which has similar defects. The defects in the current arrangements relating to contempt in the face of the court is a topic for another day, but for present purposes it is sufficient to say that many of the issues I will be addressing in this paper apply with equal force to the issues which arise when proceedings are brought for contempt in the face of the court, and to

[3] Contempt of court was traditionally a common law offence, and the common law continues to play the dominant role in determining what constitutes contempt of court. However some contempt of court offences in Western Australia (primarily in the lower courts) are now in statutory form. See, for example, *Magistrates Court Act 2004* (WA) ss 15, 16; *District Court of Western Australia Act 1969* (WA) s 63; *Civil Judgments Enforcement Act 2004* (WA) ss 24(3), 30(4), 63(5), 89(5), 90, 98.

note that deficiencies in respect of arrangements relating to contempt of that kind have been recognised by law reform bodies.[4]

Defenders of the parliamentary process point to the fact that in many jurisdictions there are statutes which purport to define the conduct which can be punished as contempt of parliament. However, reference to those statutes reinforces the proposition I am advancing with respect to uncertainty. So, for example, s 4 of the *Parliamentary Privileges Act 1987* (Cth) provides:

> Conduct (including the use of words) does not constitute an offence against a House 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.

While there are clearly some categories of conduct which would fall outside the scope of the section, and not be liable to punishment as a contempt of parliament, the range of conduct which falls within the scope of the section, because, for example, it amounts to an improper interference with the free exercise of a House or committee of its authority or functions is far from clear or certain.

Taking, parochially perhaps, another example from the State in which this conference is being held, s 8 of the *Parliamentary Privileges Act 1891* (WA) provides that each House of the Western Australian Parliament is empowered to impose a fine in respect of conduct falling within seven specific categories enunciated in the section. However, s 1 of the same Act provides that the two Houses have and may

[4] Such as the Law Reform Commission of Western Australia, *Review of the Law of Contempt*, Project 93 (June 2003) 59-80.

exercise the privilege, immunities and powers set out in the Act and also, to the extent that they are not inconsistent with the Act, the privileges, immunities and powers of the House of Commons of the Parliament of the United Kingdom and its members and committees as at 1 January 1989.

In 1994, the equivalent section provided that the Houses of the Western Australian Parliament would have the same powers and privileges as the House of Commons from time to time rather than at a specific date but subject to the proviso that 'with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail'. Notwithstanding that proviso, in 1994 the Legislative Council purported to utilise the powers conferred by s 1 of the Act to imprison Mr Brian Easton for conduct which did not fall within any of the seven categories of conduct expressly enunciated in s 8. Professor Enid Campbell argued, with some force in my view, that the proviso to then s 1 had the effect that s 8 was a code, prescribing the entire range of conduct which could be punished as a contempt of the parliament.[5] Clearly the parliament took a different view, and the lawfulness of Mr Easton's detention was never reviewed by a court.

Whatever be the better view of the law as it was then, in 2004 s 1 was re-enacted without any equivalent to the proviso, with the consequence that it now appears clear that s 8 does not prescribe the

[5] See the discussion of the interplay between s 1 and s 8 of the *Parliamentary Privileges Act 1891* (WA) in Heather Goodwin, Arran Stewart and Melville Thomas, 'Imprisonment for contempt of the Western Australian Parliament', *University of Western Australia Law Review* (July 1995) 187, 199-200.

entire range of conduct which can render a person liable to punishment for contempt of the Western Australian Parliament.[6]

Defenders of parliamentary process might also point to resolutions agreed to by the Senate on 25 February 1988[7] in which the Senate resolved that 'without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions … may be treated by the Senate as contempts'.[8] Then follow 16 categories of conduct which may be treated as contempt. It is, however, clear from the terms of the resolution that those categories of conduct are not intended to provide an exhaustive statement of all conduct which can be punished as a contempt and in any event, the Senate is not, of course, bound by its own earlier resolutions, and is only one of the many Australasian Houses with a power to punish for contempt.

Investigation

The investigation of suspected crime is usually conducted by trained and experienced police officers who are subject to procedures specified in police manuals and laws which protect the rights of persons under investigation. Taking Western Australia as an example, those laws specify the rights which a suspect must be given, including

[6] Heather Goodwin, Arran Stewart and Melville Thomas, 'Imprisonment for contempt of the Western Australian Parliament', *University of Western Australia Law Review* (July 1995) 187.
[7] Which are published as appendix 2 to Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016).
[8] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 791.

the cautions which must be administered,[9] and further require that any interview of a suspect must be video recorded.[10] The conduct of police officers can be subjected to internal review within the police force, and in many jurisdictions, to external review by bodies such as the Law Enforcement Conduct Commission in New South Wales[11] or the Corruption and Crime Commission in Western Australia.[12]

By contrast, a person suspected of committing a contempt of parliament enjoys none of these rights and the officers of the parliament responsible for the investigation of such conduct are subject to none of the constraints or avenues of review to which I have referred. Indeed, any person, entity or agency purporting to regulate or oversee the conduct of such officers in the course of investigation of a possible contempt of parliament could themselves be the subject of proceedings for contempt.

The charge

Any charge of a criminal offence must state clearly and precisely what the person charged is alleged to have done, or not done,[13] and the law which is said to have been infringed.[14] By contrast, there are no formal or minimum requirements with respect to the content of a motion to the effect that a person be punished for contempt of parliament. Although s 9 of the *Parliamentary Privileges Act 1987*

[9] *Criminal Investigation Act 2006* (WA) s 138(2)(b).
[10] *Criminal Investigation Act 2006* (WA) s 118.
[11] Established by the *Law Enforcement Conduct Commission Act* (NSW) s 17.
[12] Established by the *Corruption, Crime and Misconduct Act 2003* (WA) s 8.
[13] *Criminal Procedure Act 2004* (WA) Sch 1 cl 5(1)(a).
[14] *Criminal Procedure Act 2004* (WA) Sch 1 cl 5(1)(b).

(Cth) requires that the resolution of the House imposing a penalty and the warrant committing a person to custody must set out particulars of the matters determined by the House to constitute the offence,[15] there is no legislative provision requiring the provision of particulars to the person concerned at the commencement of the contempt proceedings.[16]

Independent review of a prosecution

All the jurisdictions represented at this conference have created independent statutory officers, generally styled as Directors of Public Prosecutions, charged with the responsibility of reviewing charges brought by police (at least in more serious cases) and deciding whether those charges should proceed. One of the main reasons that function was taken from the Attorney General, as a member of the government, and given to an independent statutory officeholder, was concern that decisions with respect to the pursuit or discontinuance of prosecutions might be influenced by political considerations.

By contrast, decisions with respect to the pursuit of proceedings for contempt of parliament, and the outcome of those proceedings if commenced, may be determined by political considerations, rather than merely influenced, or be seen to be influenced, by them.

[15] A provision inserted to overcome the very significant constraint upon judicial review of a parliamentary warrant for imprisonment for contempt enunciated in the case of the *Sheriff of Middlesex* (1840) 11 Ad & E 273; 113 ER 419, applied by the High Court in *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162. See the Explanatory Memorandum to the Parliamentary Privileges Bill 1987 (Cth) (1163/87, Cat. No. 8741679).

[16] Although the resolutions of the Senate to which I have referred express the desirability of that course in proceedings by that House.

Disclosure

Persons charged with criminal offences are entitled to disclosure of all information and documents within the possession of the prosecution which could have a bearing on the case. In many jurisdictions that right, and its ambit, is enshrined in legislation.[17] By contrast, a person subjected to proceedings for contempt of parliament has no legal right to be given any documents or information relating to the allegations against him or her.

Pre-trial procedures

In most, if not all, jurisdictions, a person charged with a criminal offence has access to various procedures available prior to trial relating to the production of information or evidence relevant to the trial, including, in many jurisdictions,[18] a right to a committal hearing. So, for example, a summons can be issued by a court, at the request of a criminal defendant, compelling the production of a document or documents, or, in some limited circumstances, requiring a person to attend in order that their evidence might be taken on deposition prior to the trial.

By contrast, a person subjected to proceedings for contempt of parliament has no corresponding or equivalent rights or powers.

Hearing by an impartial tribunal

A person charged with a criminal offence must be tried by a judge, or a judge and jury, or a magistrate who is/are entirely impartial, without

[17] In Western Australia, for example, in the *Criminal Procedure Act 2004* (WA) ss 35, 42, 61 and the *Criminal Investigations Act 2006* (WA) s 117.
[18] But not Western Australia.

any personal interest in the outcome of the case, or personal knowledge of the events giving rise to the case.

By contrast, as I have already noted, a House deciding whether or not a person has committed a contempt is, in effect, the judge of its own cause, being at one and the same time the alleged victim, prosecutor, arbiter of guilt or innocence and sanction imposer. These characteristics of proceedings for contempt of parliament constitute a very serious departure from fundamental principles of procedural fairness which reflect contemporary community standards and expectations. I reiterate my earlier observation to the effect that such serious departures from fundamental principles of fairness cannot be justified by pointing to the fact that proceedings for contempt in the face of the court suffer the same defects.

The significance of the manner in which parliamentary proceedings for contempt depart from fundamental principles of fairness is underscored by the provisions of the International Covenant on Civil and Political Rights (**ICCPR**).[19] Article 14(1) of the ICCPR provides that in the determination of criminal charges against them 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. Clearly the

[19] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UN General Assembly 2200A (XXJ) (entered into force 23 March 1976). Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. The ICCPR has not been incorporated into Australian domestic law but domestic courts can still take the ICCPR into consideration when interpreting legislation or deciding questions on the common law. In November 2017, the UN Human Rights Committee expressed concerns about the 'gaps in the application of the [ICCPR] and … the lack of comprehensive incorporating legislation'. See Human Rights Committee, 'Concluding Observations on the sixth periodic report on Australia' (121st session, 16 October - 10 November 2017, agenda item 5) [C(5)].

current arrangements relating to punishment for contempt of parliament do not comply with the ICCPR.

Article 6 of the European Convention on Human Rights[20] provides a corresponding guarantee of trial by an independent impartial tribunal. Concern has been expressed in the United Kingdom that the European Court of Human Rights would quash any punishment imposed by a House of Parliament by reason of contravention of that Convention.[21] That was in view of the European Court of Human Rights having already asserted its jurisdiction to review parliamentary proceedings for contempt under Article 6 in *Demicoli v Malta*.[22]

The applicant in that case, Mr Demicoli, was a Maltese citizen and editor of a political satirical periodical titled 'NOT in the people's interest' (when translated to English). The Maltese House of Representatives passed a resolution that deemed an article published in the periodical to be a breach of privilege. A subsequent resolution required Mr Demicoli to appear before the House to state why he should not be declared guilty of breach of privilege. He was found guilty after a three day hearing before the House, and fined 250 Maltese liri. The European Court of Human Rights found that the House was exercising a judicial function in determining the applicant's guilt, and that the participation in the proceedings of the two members whose behaviour had been criticised in the impugned article constituted partiality of the adjudicating body.

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[20] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953).

[21] See, for example, House of Lords - House of Commons - Joint Committee on Parliamentary Privilege, *Joint Committee on Parliamentary Privilege - Report of Session 2013-14* (3 July 2013), 16-17.

[22] [1991] ECHR 13057/87.

Hearing procedure

The trial of a person charged with a criminal offence by a court must conform with established principles of procedural fairness. As I have noted, those principles include the right to be tried by an impartial tribunal, but also include the right to know the case alleged, and the right to present evidence and submissions in order to meet that case.

So, in a criminal trial, the prosecutor will be obliged to open the case by advising the court and the defendant what he or she is alleged to have done, or not done, and the nature of the evidence that will be called to make out the prosecution case. The defendant has the right to cross-examine prosecution witnesses, and at the close of the prosecution case, to submit to the court that there is no case to answer. If the court rules that there is a case to answer, the defendant then has the right to give evidence, and call other witnesses in defence of the charge.

By contrast, a person subjected to proceedings for contempt of parliament enjoys none of the same fundamental rights. Although it is the practice to call such persons before the bar of the House, where they are given the opportunity to explain themselves, that opportunity falls well short of the rights conferred upon a person tried for a criminal offence in a court. So, in the famous case of *The Queen v Richards; Ex parte Fitzpatrick and Browne*,[23] before the contemnors were called before the bar of the House, a committee of the House had recommended that they be punished for contempt, and the motion that they be punished for contempt was presented to the House by the

[23] (1955) 92 CLR 157.

Prime Minister of the day, Sir Robert Menzies. Although each had been called before the relevant committee, in substance their guilt had been determined before they were called before the bar of the House and given the opportunity to speak in their own defence. Although the resolutions of the Senate to which I have referred go some (but not all) of the way to redressing these deficiencies, they are non-binding resolutions of only one of the many Houses in our region.

Further, the effective determination of guilt prior to being given the opportunity to speak and raise a defence departs from Article 14(2) of the ICCPR which provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

The onus and standard of proof

In all criminal proceedings, the prosecution carry the onus of proving all matters necessary to sustain guilt to the highest standard known to the law - namely, beyond reasonable doubt. By contrast, in proceedings for contempt of parliament there is no real notion of an onus of proof, or a standard of proof - rather, the question will usually be resolved initially by a majority vote of the relevant privileges committee and, if the matter goes further, by a majority vote in the relevant House.

Penalty

All legislation creating an offence prescribes a maximum penalty.[24]

[24] And sometimes, especially in Western Australia, a minimum penalty.

By contrast, although some jurisdictions prescribe a maximum penalty for contempt of parliament,[25] that practice is by no means universal. As I have noted, the effect of s 1 of the *Parliamentary Privileges Act 1891* (WA) is that the penalty for contempt of the Western Australian Parliament is at large, perhaps constrained only by the date upon which parliament is prorogued.

Further, a court sentencing an offender for an offence will generally have a wide range of available sentencing options, including fines, community-based orders, suspended imprisonment (perhaps subject to compliance with conditions during the period of suspension) and imprisonment.

By contrast, although a parliament punishing for contempt will, unless constrained by statute, have the power to order imprisonment, doubt has been expressed with respect to the power of a parliament to impose a fine for contempt in the absence of express statutory authority,[26] and none of the other sentencing options available to a court are available to a parliament.

Appeals

A person convicted of a criminal offence in the jurisdictions represented at this conference will generally have at least one, and perhaps more opportunities to appeal against that conviction, and against any punishment imposed.

[25] For example, *Parliamentary Privileges Act 1987* (Cth) s 7.
[26] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 94.

By contrast, there is no appeal from a determination by a House of Parliament to the effect that a person is guilty of contempt, or from the punishment imposed by that House. Further, it is clear from the decision of the High Court in *The Queen v Richards; Ex parte Fitzpatrick and Browne*[27] that judicial review of proceedings for contempt of parliament will be strictly confined. In that case Dixon CJ observed that

> …it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment, the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.[28]

As I have noted, s 9 of the *Parliamentary Privileges Act 1987* (Cth) requires that a warrant committing a person to custody set out particulars of the matters determined to constitute the offence, thereby preventing the parliament from effectively immunising itself from any form of judicial review by issuing a warrant expressed in general terms. However, even when particulars of the offence are provided in the warrant, the extent of review by a court will be limited to the question of whether those particulars are, as a matter of law, capable of constituting a contempt. There is no scope for a court to review the

[27] (1955) 92 CLR 157.
[28] (1955) 92 CLR 157, 162.

parliament's conclusion that a person was guilty of the conduct particularised in the warrant, nor can the court review the fairness and justice of any penalty imposed by the parliament.

The significance of these departures from contemporary community expectations and standards is again underscored by Article 14(5) of the ICCPR which provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Clearly, the current arrangements relating to punishment for contempt of parliament do not conform to this standard.

Parole

Persons imprisoned for criminal offences will generally have the right to be considered for release on parole prior to the expiry of the term of their sentence. Although I have not undertaken an exhaustive analysis of the parole legislation in the various jurisdictions represented at this conference, I think it most unlikely that parole would be available to somebody imprisoned for contempt of parliament in any of those jurisdictions.[29]

The comparison - summary

This comparison shows that, at every single stage of the process relating to proceedings for contempt of parliament, the rights enjoyed

[29] Certainly parole is not available to a person imprisoned for contempt of parliament in Western Australia.

by a person the subject of such proceedings are manifestly and dramatically inferior to the rights enjoyed by a person charged with a criminal offence before a court. In a number of significant respects, proceedings for contempt of parliament depart very significantly from fundamental principles of fairness and justice, and depart equally significantly from contemporary community standards and expectations. The parliament, in effect, acts as the judge in its own cause, is not required to comply with basic standards of procedural fairness and is not subject to any meaningful review by a court. In a number of significant respects, the current procedures for dealing with contempt of parliament depart from minimum standards embodied in the ICCPR.

The question which this poses is whether there is, in truth, any justification for these significant departures from basic principles of fairness and contemporary community standards and expectations. That is the question I will now address.

Can this be justified?

From time to time, in both Australia and the United Kingdom, parliamentary committees have addressed the question of whether the continuance of procedures relating to contempt of parliament can be justified notwithstanding their departure from fundamental principles of fairness and justice. In this section of the paper, I will address the reasons given by some of those committees for concluding that the unjustifiable can, in fact, be justified, starting with Australia.

The 1984 Joint Select Committee on Parliamentary Privilege

The reasons given in 1984 by a Joint Select Committee of the Federal Parliament on Parliamentary Privilege (the **Committee**) for recommending that the penal jurisdiction of the Commonwealth Houses be retained have been conveniently summarised by Professor Enid Campbell.[30] I will deal with each in turn using the terms of her summary.

The Committee contended that the penal jurisdiction 'exists as the ultimate guarantee of parliament's independence and its free and effective working'.[31] The problem with this proposition is that there is no evidence that parliaments which have abandoned their penal jurisdiction[32] are any less independent, free or effective. Nor is there any reason to suppose that enforcement by courts of statutory provisions prohibiting acts which would constitute a contempt of parliament would be any less effective in preserving the rights of parliament than parliamentary processes. As the courts are generally regarded as the appropriate branch of government to enforce and protect rights and freedoms, one might ask rhetorically why the courts should not be regarded as appropriate protectors of the rights and freedoms of parliaments. At a time when the English Parliament was locked in a struggle for power with the monarch, and all judges were

[30] Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 192-193.
[31] Joint Select Committee on Parliamentary Privilege, *Final Report*, PP 219 (1984) [7.7].
[32] For example, New South Wales. The position in New South Wales is discussed in *Egan v Willis* (1998) 195 CLR 424.

appointed by the Crown, sensitivities with respect to parliamentary independence were understandable. But those days are long gone.[33]

Next, the Committee asserted that the courts' lack of 'acquired understanding of parliamentary life'[34] would make it difficult for a court to assess whether conduct alleged to be a contempt was such as to obstruct or impede parliament or its members in the discharge of their functions. This is, with respect, nonsense. Courts make decisions every day with respect to whether standards of conduct prescribed in areas of endeavour with which courts have no direct experience have been infringed. Where necessary, courts receive evidence with respect to specialised areas of activity beyond their expertise, and there is no reason why a court could not receive evidence with respect to parliamentary practice and the effect which particular conduct had upon parliamentary practices and procedures.

Next, the committee asserted that courts lacked the flexibility that Houses possess in the exercise of their penal jurisdiction because 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'.[35]

This is also nonsense. It suggests that parliamentarians who have been, in effect, investigator, prosecutor and judge of their own cause, and who are not subject to any meaningful form of review, are less

[33] See the discussion in Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 192.
[34] Joint Select Committee on Parliamentary Privilege *Final Report,* PP 219 (1984) [7.8].
[35] Joint Select Committee on Parliamentary Privilege *Final Report,* PP 219 (1984) [7.9].

likely to act harshly, capriciously or arbitrarily than an independent and impartial court subject to an appeal. The assertion is redolent with the extraordinary proposition that political considerations are more likely to produce a just outcome than an obligation to act impartially, independently and according to law on the basis of admissible evidence adduced in a procedurally fair hearing, at which a high standard of proof is required, and which is subject to full review by another independent tribunal. These propositions are, with respect, self-evidently preposterous.

Next, the committee asserted that even if prosecutions for contempt of parliament could not be initiated except on the instruction of a House, there would be potential for undesirable 'clashes between the courts and the parliament'[36] regarding what conduct was contemptuous.

Several points should be made in response to this proposition. First, the parliaments and the courts have quite separate roles to perform under our system of government, which includes a separation of powers with consequential checks and balances upon the improper use of power. Under our system of government, determinations with respect to guilt or innocence, and with respect to the imposition of penalty are the exclusive province of courts established under Chapter III of the Constitution of the Commonwealth.[37] Within that framework, there would only be a clash between a court and a

[36] Joint Select Committee on Parliamentary Privilege *Final Report*, PP 219 (1984) [7.11].

[37] See Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 205-206. Professor Campbell discusses that in *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, the High Court held that s 49 of the Constitution had the effect of conferring some judicial powers on the Federal Houses of Parliament (as an exception to the general rule under Chapter III). However, she argues that because that decision was prior to Australia signing the ICCPR, the High Court might now take the view that the conditions under which the Houses are permitted to exercise a penal jurisdiction are now much more limited.

parliament if the parliament took it upon itself to intrude into a function exclusively assigned to the courts.

Secondly, implicit in this proposition is again the assertion that a parliament is as well-equipped as a court to adjudicate upon guilt or innocence notwithstanding the many fundamental deficiencies in process which attend proceedings for contempt of parliament. The continuation of a system which contains those gross deficiencies cannot be justified by the prospect of occasional disagreement between the court and the parliament.

Finally, and perhaps the Committee saved the best until last, it asserted that transfer of the penal jurisdiction of the parliament to the courts would expose the courts to 'the odium that parliament sometimes attracts when it exercises that jurisdiction'.[38]

Again, several points can be made in response to this extraordinary proposition. First, the odium that parliaments attract when they exercise penal jurisdiction may well be due to the fact that they are acting as judges in their own cause, in proceedings which depart from fundamental principles of fairness and without any meaningful form of review. Secondly, judges and magistrates are not strangers to public controversy and are subjected to strident and sometimes outrageous criticisms very frequently.

Thirdly, and perhaps most importantly of all, one of the reasons why judges and magistrates are independent and are given security of tenure, is precisely so that their decisions will not be influenced, or be

[38] Joint Select Committee on Parliamentary Privilege *Final Report*, PP 219 (1984) [7.11].

seen to be influenced, by the prospect of public odium. By contrast, parliamentarians who rely upon a sometimes fickle electorate for their continuation in office are extremely vulnerable to influence by public opinion.

Accordingly, there is, with respect, nothing in the 1984 report of the Joint Select Committee which could possibly justify the unjustifiable.

Odgers' Australian Senate Practice

Odgers' Australian Senate Practice (**Odgers**) contains a section responding to criticisms of the current arrangements relating to contempt of parliament.[39] In response to the criticism that the conduct which can constitute a contempt is not defined or specified by a code, it is asserted that the 'enactment of s 4 of the *Parliamentary Privileges Act 1987* (Cth) and the specification by the Senate by resolution of the acts which may be treated as contempts have largely overcome this criticism'.[40] It will be clear from what I have already written that I do not agree. Section 4 of the Commonwealth Act is a statement of general principle which provides no certainty or prescription with respect to the conduct which falls within its terms. The list of matters identified by the Senate is not expressed to be exhaustive and in any event does not bind either the Senate or the House or, of course, any other House.

Next, it is asserted that it is impossible to specify with precision all acts which constitute contempts because it is the effect or tendency of

[39] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 89-90.
[40] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 89.

an act which constitutes the offence.[41] That is, with respect, just as unconvincing. Parliaments with the assistance of parliamentary counsel are adept at prescribing and defining vast ranges of conduct which constitute offences, including conduct which is prohibited because of its effect or tendency, an obvious example being the statutory offence of interference with the course of justice.[42]

Further, this assertion overlooks the fact that in a number of jurisdictions, parliaments have enacted criminal laws which cover much the same area of conduct as is covered by contempt of parliament.[43]

In response to the criticism that parliament acts as judge in its own cause, Odgers makes reference to courts punishing for contempt in the face of the court.[44] As I have already noted, the fact that there is another area of deficient practice provides no justification. Further, Odgers dismisses the fact that there is a right of appeal from a court convicting a person of contempt because 'the appeal is to another court'.[45] This entirely misses the point that if the 'other court' is not the court before which the contempt was committed, the right of appeal introduces an independent and impartial arbiter. In the same section it is asserted that 'there is just as effective an appeal in respect of a contempt of parliament, from the privileges committee to the whole

[41] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.
[42] *Criminal Code* (WA) ss 135, 143.
[43] See, for example, ss 55-61 of the *Criminal Code* (WA).
[44] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.
[45] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.

House'.[46] In a context in which the votes of a committee, and of the House, may each be dictated by party politics, this is nonsense.

In response to the criticism that by judging and punishing contempt of parliament the Houses are usurping a judicial function, it is asserted that 'the very premise of this criticism is questionable'.[47] That proposition is explained in the following passage:

> The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of improper obstruction of the political processes embodied in the legislature.[48]

Implicit in this passage are many of the propositions which underpinned the position adopted by the Joint Select Committee in 1984 - namely, the proposition that political constraints are more likely to produce proper outcomes than independence and impartiality, fairness of procedure, and completely independent review. That proposition is no less preposterous in the current version of Odgers than it was in 1984 when enunciated by the Joint Select Committee.

Finally, the criticism that persons accused of contempt of parliament do not enjoy the normal rights allowed by the law is accepted as valid in Odgers, but is accompanied by the assertion that:

[46] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.
[47] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.
[48] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.

> This criticism has been largely overcome in the Senate by the adoption of procedures for privilege inquiries and proceedings before the privileges committee.[49]

While those procedures are clearly an advance on the entirely unregulated procedures of the past, they apply only to the Senate and have not been adopted uniformly by other Houses of Parliaments. Nor can the procedures be equated to those applicable in a court. For example, one of the procedural provisions is to the effect that 'the committee shall ensure as far as possible'[50] that a person is present when evidence is given against that person. Of course, a court can ***only*** receive evidence of that character in the presence of the accused.

In another section of Odgers dealing with the question of whether the power to punish for contempt should be transferred to the courts,[51] a number of arguments against that proposition are advanced. The first is that the Houses of Parliament are more likely to be lenient than a court. I am not sure that argument would persuade Messrs Fitzpatrick, Browne and Easton, all of whom were imprisoned by a parliament acting as judge in its own cause. The notion that a partial adjudicator is likely to produce a fairer outcome than an impartial adjudicator is quite extraordinary.

Next, it is asserted that if Houses of Parliament were absolved of the responsibility for conviction and punishment they would be more inclined to send cases to the courts and more convictions might result.[52] However, if, as most have proposed, proceedings for

[49] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 90.
[50] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 788.
[51] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 91-93.
[52] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 91.

contempt could only be commenced with the approval of the relevant House, the Houses would retain complete control over the number and nature of cases in which proceedings were brought.

Next, it is asserted that the current powers enable a disorderly person to be removed from the galleries of the House in order to prevent the continuance of the offence, or a recalcitrant witness committed to custody not as punishment, but to compel the answering of the questions or the production of the documents.[53] However, there is no reason why these objectives cannot be achieved through a court. A person arrested for disorderly conduct in a House of Parliament and taken to a court would no doubt be refused bail if the court perceived any risk of the conduct being repeated in the near future. In relation to recalcitrant witnesses, it is quite common for courts to be given power to punish people who refuse to give evidence to administrative bodies like royal commissions or corruption investigations, and for those powers to be exercised for the purpose of compelling the provision of evidence. So, for example, in the exercise of those powers it is common for a court to provide that if a person purges their contempt by complying with the requirement to give evidence or produce documents, punishment will cease.

In the same section reference is also made to the occasional need for urgent action to prevent destruction of documents.[54] However, courts commonly grant injunctive relief in urgent situations in order to maintain the status quo or preserve evidence, and there is no reason why those powers could not be utilised in such a case.

[53] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 92.
[54] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 92.

Finally, reference is made to the difficulties which might arise dealing with contempts by members of a House if all jurisdiction to punish for contempt was transferred to a court.[55] That proposition has force, and should be accepted, provided that no punishment other than reprimand or suspension is imposed upon a member. If a fine or custodial sentence is to be imposed, in my view there is no reason why a member should not enjoy the same rights as other members of the community. However, it must be said that my main concern is with respect to the manner in which Houses of Parliament deal with non-members.

Again, with respect, I do not find any of the propositions advanced in the current version of Odgers by way of defence of the indefensible to be convincing.

The United Kingdom

In 2012 a consultation paper was published by the UK Parliament dealing with contempt,[56] considering in more detail options first considered in 1999, including legislation codifying the existing powers of the two Houses or, alternatively, creating criminal offences which would be enforced through the courts. In relation to the former option, the paper acknowledges that it would be extremely difficult to modify the procedures of a House to provide the kind of safeguards generally associated with contemporary due process.[57] I respectfully agree. In the context of the option of creating criminal offences

[55] Harry Evans (Ed), *Odgers' Australian Senate Practice*, 14th ed (2016) 93.
[56] United Kingdom Government, *Parliamentary Privilege* (Green Paper), Cm 8318 (April 2012).
[57] United Kingdom Government, *Parliamentary Privilege* (Green Paper), Cm 8318 (April 2012), 62-63.

enforced by the courts, it was contended that any attempt to create a statutory definition of contempt would result in courts having an element of discretion in determining what constitutes contempt of parliament which would not be compatible with the long-established position whereby it is for each House alone to decide what constitutes a contempt.[58] With respect, as I have already indicated, it is not clear to me why any legislative prescription of the conduct which constitutes a contempt of parliament would necessarily confer a discretion upon a court to any greater extent than any other provision defining criminal conduct. The process of determining whether an offence has been committed by applying the law to the facts established by admissible evidence is not properly described as the exercise of a discretion.

After the process of consultation commenced by the publication of the consultation paper, the Joint Committee on Parliamentary Privilege of the UK Parliament (the **UK Committee**) published a report in 2013.[59] As I have already discussed, that paper refers to the non-conformity of existing procedures with Article 6 of the European Convention on Human Rights, and in that context noted that a modern statute prescribing specific offences was more likely to satisfy the European Court of Human Rights, than what was described by one witness as a mix of '17th century cant and common law'.[60] However, the UK Committee rejected that recommendation on the basis that criminalising specific contempts,

[58] United Kingdom Government, *Parliamentary Privilege* (Green Paper), Cm 8318 (April 2012), 63-65.
[59] House of Lords - House of Commons - Joint Committee on Parliamentary Privilege, *Joint Committee on Parliamentary Privilege - Report of Session 2013-14* (3 July 2013) 16-17.
[60] Evidence given by Sir Malcolm Jack KCB, former Clerk of the House of Commons.

> would entail a radical shift of power between parliament and the courts. It would introduce delay. It would increase uncertainty about how contempts which were not covered by criminal statute could or should be dealt with, and remove the flexibility which is the chief advantage of the current system.[61]

No system is perfect, and some of the disadvantages attending criminalising specific contempts must be acknowledged. However, those disadvantages must be viewed in the context of a current system which falls manifestly short of conforming to contemporary standards of fairness and justice.

The UK Committee also recommended against legislating to confirm parliament's penal powers because it would invite the courts to examine proceedings in parliament which would again alter the balance of power between the two institutions.[62] However, in a federation with a written constitution, like Australia, it is, of course, commonplace for courts to rule legislation to be invalid because of non-compliance with constitutional or procedural requirements. It seems to me to be quite possible that institutional sensitivities may be greater in jurisdictions (like the UK) which have not had that experience. For my own part, I cannot see any reason why parliament should not be held to comply with the laws which it passes, by the courts if necessary.

Summary and conclusion

Any fair comparison of the substantive and procedural rights afforded to a person subject to proceedings for contempt of parliament, as

[61] House of Lords - House of Commons - Joint Committee on Parliamentary Privilege, *Joint Committee on Parliamentary Privilege - Report of Session 2013-14* (3 July 2013) 21.
[62] House of Lords - House of Commons - Joint Committee on Parliamentary Privilege, *Joint Committee on Parliamentary Privilege - Report of Session 2013-14* (3 July 2013) 21.

compared to a person charged with a criminal offence can only lead to the conclusion that the principles and procedures relating to proceedings for contempt of parliament are anachronistic and depart very substantially from fundamental principles of fairness and justice, and from contemporary community standards and expectations. It is my respectful view that the various justifications advanced for the continuance of this manifestly deficient state of affairs are unconvincing and, in some cases, spurious. Reform is needed, and will be facilitated by a rational and reasoned approach to the issues involved, freed from entirely unrealistic assumptions about the beneficial impact of political influence on the adjudication of guilt or innocence and the imposition of punishment.