PARLIAMENTARY PRIVILEGE IN QUEENSLAND

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The modern era of parliamentary privilege began with the establishment of parliamentary supremacy through the Bill of Rights 1688[1]. Although the concept of privilege had been known since the Middle Ages, the reality of the parliamentary experience had been that privilege was allowed only the extent to which the monarch had been prepared to suffer. Absolutist abuses reached their zenith during the Stuarts, and played a significant part in the outbreak of the English Civil War. The courts had been used as an instrument of royal domination and Art. 9 of the Bill of Rights was designed to ensure that the balance swung the other way.

Remarkably, it was not until the 19th century that the courts asserted their jurisdiction, culminating in an institutional clash between the courts and parliament in *Stockdale v Hansard* (1839) 9 Ad & El 1; (1839) 112 ER 1112[2]. In the intervening period, parliamentarians had abused privilege to perpetuate an oligarchy of their own, by operating above the common law and ousting the jurisdiction of the common law courts. The abuses and the underlying cause of the tensions between the courts and parliament were destroyed at a theoretical level in *Burdett v Abbott* (1811) 104 ER 501 although it took until the *Stockdale* crisis for a settlement to be implemented whereby each institution respected the other's constitutional role: it was for the courts to determine if a certain privilege existed and for the parliament to determine the occasion and manner of its exercise.

The *Stockdale* settlement was appropriate to the circumstances which existed at a specific time and place and with respect to the Westminster parliament which as a result of its historical development, is a unique institution. The question arises whether this settlement is still appropriate in different times, different circumstances, and after the sun has set on the British Empire. The Bill of Rights concepts and the *Stockdal*e settlement were received into Australian law.

Although a distinction was made with respect to the powers of the Westminster parliament and colonial assemblies, English parliamentary privilege principles survived the federation of the Australian colonies and at a federal level, the introduction of a written constitution heavily influenced by the American model of judicial oversight. The United States had, of course, gained independence from England by the time of Stockdale, but it is of interest to note that the Founders did not cut themselves off from the parliamentary heritage. Rather, with the exception of a slightly modified Art. 9 Bill of Rights, privilege was left to the common law and the courts were given an oversight role from the beginning, so that there was a hybrid structure which in some ways anticipated the Stockdale settlement. It is remarkable then that, having broken from the English system at a time when the English parliament was abusing parliamentary privilege to set itself up as a parliamentary oligarchy, the Americans were not immune from congressional abuses of privilege, notably during the mid-20th Century experiences of the Dies and McCarthy Committees. But there are similarities with the English experience, because the American courts were roused from an acquiescent

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attitude towards congressional power to one where they were required actively to challenge Congress so as to protect the fundamental rights of the individual citizen[3].

Australia has not experienced a comparable scenario where the courts had to intervene in an heroic way to champion the rights of the citizen. Although the Commonwealth Parliament and the Parliament of Western Australia were the last sophisticated jurisdictions[4] where the house itself has gaoled people[5] these cases occurred with little if any judicial fuss. Perhaps this is explicable because parliaments have been slow to use coercive powers in the modern Australian experience and consequently no instances of abuse have occurred.

It is important to pause to note one factor whose importance on one hand cannot easily be assessed but on the other is self-evident, is the role of the 'court of public opinion'. It is hard to imagine circumstances where regardless of the legal niceties, Tudor or Stuart absolutism, or the Whig oligarchy, would be tolerated today. That must be as a result of public opinion, which is part of the political dimension of the broader concept of parliamentary privilege.

The 'court of public opinion' seems to have been a nascent idea during the 17th Century, because Charles I issued pamphlets to the public at large, putting his side of the conflict with parliament when he dissolved Parliament in 1629. Jurgen Habermas[6] points to the summer of 1726 when, after political journalism began with the Tory purchase of the London Journal in1722, Swift published *Gulliver's Travels*, Pope published *Dunciad* and Gay published his *Fables*. Habermas says:-

> Thus raised to the status of an institution, the ongoing commentary on and criticism of the Crown's actions and Parliament's decisions transformed a public authority now being called before the forum of the public.

He concludes[7]:-

> [...] But by the turn of the nineteenth century, the public's involvement in the critical debate of political issues had become organized to such an extent that in the role of a permanent critical commentator it had definitively broken the exclusiveness of Parliament and evolved into the officially designated discussion partner of the delegate. Fox's speeches were made with the public in mind; 'they,' the subjects of public opinion, were no longer treated as people whom, like 'strangers', one could exclude from the deliberations. Step by step the absolutism of Parliament had to retreat before their sovereignty. Expressions like 'the sense of the people' or even 'vulgar' or 'common opinion' were no longer used. The term now was 'public opinion'; it was formed in public discussion after the public, through education and information, had been put in a position to arrive at a considered opinion. Hence Fox's maxim, 'to give the public the means of forming an opinion.'

A modern instance of the role of public opinion curbing parliamentary excesses can be seen in the Edward R Murrow broadcast *A Report on Senator Joseph R McCarthy* which was broadcast on CBS Television in the United States[8]. Murrow was critical of the way that Senator McCarthy conducted himself by 'the investigation, protected by immunity, and the half truth'. The broadcast went on to document a session before the committee which was investigating an academic who had suspected communist tendencies. One sees in the response from the witness the apprehension – real or contrived, it does not really matter - that the congressional investigation function had ancillary uses and was being used to scapegoat members of the public.

> Harris: I resent the tone of this Inquiry very much Mr Chairman. I resent it, not only because it is my neck, my public neck, that you are, I think, very skilfully trying to wring, but I say it because there are thousands of able and loyal employers in the Federal Government of the United States who have been properly cleared according to the laws and security practices of their agencies, as I was – unless the new regime says no; I was before.

Mr Murrow editorialised in the broadcast:

> No one familiar with the history of this country can deny that congressional committees are useful. It is necessary to investigate before legislating, but the line between investigating and persecuting is a very fine one and the junior Senator from Wisconsin has stepped over it repeatedly. His primary achievement has been in confusing the public mind, as between the internal and the external threats of Communism. We must not confuse dissent with disloyalty. We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law. We will not walk in fear, one of another. We will not be driven by fear into an age of unreason, if we dig deep in our history and our doctrine, and remember that we are not descended from fearful men -- not from men who feared to write, to speak, to associate and to defend causes that were, for the moment, unpopular.

That broadcast effectively terminated the political viability of the McCarthyist agenda of the House Un-American Activities Committee when the committee investigations had become excessive. At the same time, the United States courts were increasingly vigilant in restricting the prosecutions that were being brought for contempt of the committee. Both public opinion and judicial attitude had been far more accommodating of Congress' powers when the communist threat was first perceived in the years following World War II. Years before, when the so-called 'Hollywood 10' were prosecuted, an unsympathetic Time Magazine recorded[9]:

> Only a few high-priced lawyers maneuvering desperately stood last week between "the Hollywood ten" and jail. Two of the noisy leftist screenwriters and directors had been convicted of contempt of Congress, fined $1,000 each, sentenced to one-year jail terms for refusing to tell the House Un-American Activities Committee their political affiliations. Last week the Supreme Court decided, 6 to 2, not to hear their appeals.
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> While the court's action dealt only with Writers Dalton Trumbo and John Howard Lawson, it was equally decisive for the eight other members of the Hollywood ten indicted for the same offense. They had signed stipulations waiving jury trials and agreeing to be bound by the law as decided in the Trumbo-Lawson cases. Barring some unexpected legal reversal, all ten faced jail.
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> If any of them should be sent to the Federal Correctional Institution in Danbury, Conn., they would step into as odd a situation as any they ever conceived for a movie plot. One of the inmates at Danbury is New Jersey's pudgy, broken ex-Congressman J. Parnell Thomas, who is behind bars for padding his congressional payroll and pocketing the proceeds. It was he who presided over the committee that cited the Hollywood ten for contempt.

Although Congress retains its power to prosecute for contempts, it has for some time conferred the ordinary courts of law to deal with contempts under a criminal statute. With the notable exception of Queensland, the Westminster-style parliaments have essentially not chosen to do so. Furthermore, there has not been in the modern era since *Stockdale* any large scale prosecution of contempt matters, certainly nothing comparable with the McCarthy era in America. Chief Justice Warren in *Watkins v United States*[10] noted that the different English approach of using non-political, professional Royal Commissions which do not usually have coercive powers, rather than parliamentary committees, has avoided conflict and seen 'a remarkable restraint in the use by Parliament of its contempt power.'

The Queensland experience

In the Queensland context, the two instances where a criminal prosecution was instigated or contemplated have resulted in fiascos. In *R v Pugh*[11]the political and legal consequences of the failed prosecution required the intervention of the Colonial Secretary and the Law Officers at Westminster. In the Nuttall matter, the courts were not involved in this incident, as the Minister resigned his ministry. A decision was made not to proceed against him for contempt, and s 57 Criminal Code was repealed in a special sitting of Parliament. The Supreme Court was never called upon to adjudicate on any contested matters of privilege pursuant to the Criminal Code. The spectacle, as reported in Hansard and the newspapers, is unedifying and can only weaken the public's respect for Parliament and its members.

The *Criminal Code Amendment Act 2006* (Qld.) amended the Queensland Criminal Code by repealing ss 56 (disturbing the Legislature), 57 (giving false evidence before Parliament) and 58 (witnesses refusing to attend or give evidence before Parliament or parliamentary committee). The statute also inserts a new s 717 into the Criminal Code providing that after the commencement of the amending Act, 'a person can not be charged with, prosecuted for or further prosecuted for, or convicted of, an offence against section 56,57 or 58 or punished for doing or omitting to do an act that constituted an offence'. The section goes on to say that the amendment does not prevent a person being punished by the Legislative Assembly for contempt of Parliament as defined under the *Parliament of Queensland Act 2001.*

Section 57 Criminal Code made it an offence knowingly to give false answers to lawful and relevant questions asked by a parliamentary committee. The Parliament could direct the Attorney-General to commence a prosecution under the section. The provision does not seem to have been tested before the Courts.

The amendments were precipitated by an investigation by the Crime and Misconduct Commission ('CMC') into a complaint that a minister had committed an offence against s 57. The fact that the CMC was under its legislation able to assume the power to conduct a preliminary investigation demonstrates that a fundamental constitutional principle has apparently been abridged in Queensland, namely Article 9 Bill of Rights 1688.

The amendments and the investigation itself evidence unfortunate alterations to an otherwise sound legislative structure – indeed one which the contemporary Westminster parliament now advocates – were apparently made with little awareness of the significance of such a change.

The Nuttall Crisis

The amendments were precipitated by a crisis resulting from an investigation commenced by the Crime and Misconduct Commission ('CMC'). Following evidence given by the then Minister for Health, Hon Gordon Nuttall MP, before a parliamentary committee, the Leader of the Opposition took the unorthodox approach of writing to the Officer in Charge, Brisbane Central Police Station, requesting that the Queensland Police Service launch an investigation into whether the Minister had contravened s 57 Criminal Code by his evidence before the committee. The police referred the matter to the CMC, who launched an investigation. A notice was issued under the CMC Act directing the Director-General of the Department of Health to produce the documents given to the Minister for his appearance before the Committee. The questions, which were never judicially determined, then arose as to whether or not that directive and CMC investigation infringed parliamentary privilege, and whether s 57 infringed parliamentary privilege.

The CMC report

In December 2005 the CMC released a report of an investigation it conducted into the allegations. Various opinions from Senior Counsel and the Solicitor-General were obtained by the interested parties, including the Clerk of the Parliament and the CMC, all of which were published in the CMC report *Allegations concerning the Honourable Gordon Nuttall MP:report of a CMC investigation* which was presented to the Attorney-General[12]. Counsel for the CMC was asked whether s 57 Criminal Code breached parliamentary privilege. That was answered – uncontroversially, but at length - in the negative. They were also asked whether an investigation by the CMC would breach parliamentary privilege, and concluded that it would not, with the proviso that privilege 'would prevent the coercive questioning by the CMC of Mr Nuttall in respect of the evidence that he gave.' That question was answered in the negative, relying on the CMC Act. Counsel observed: 'That being so, it can be said

that one of the very reasons why the CMC exists is to investigate such a case as the present.'

They go on to advise:-

> The express references in the CMC Act to the Legislative Assembly as a unit of public administration and to claims to parliamentary privilege in relation to the exercise of various coercive powers in the course of a misconduct investigation indicate that that Parliament did not envisage that the mere coincidence of the subject matter of such an investigation with what might also be a breach of parliamentary privilege (relevantly, the giving of false evidence to a parliamentary committee) would prevent an investigation, though certain information relevant to that investigation might not be able to be coercively obtained (e.g. if it had been brought into existence for the purposes of a 'proceeding in Parliament').
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> It might additionally be observed of such a legislative scheme that it preserves the privilege of an individual member of parliament whose conduct in the course of a proceeding in Parliament relevantly, the giving of evidence to a committee hearing, may be under investigation by acknowledging that that member can not be forced to answer questions or produce privileged documents concerning the giving of that evidence while at the same time expressly creating an exception to article 9 by allowing a non parliamentary investigation into whether the evidence given was false. An analogous legislative scheme for the inquisitorial questioning of a proceeding in Parliament has been held not to impair the institutional integrity of a State Parliament or to contravene the implied guarantee of freedom of political discussion in a manner contrary to the Commonwealth Constitution.

The Government's response

The Queensland Government's response was to introduce the amending legislation already identified, and to repeal those provisions in the Criminal Code. The Queensland Parliament's Scrutiny of Legislation Committee addressed the bill in Alert Digest Issue No. 6 of 2006. That Committee identified another feature of the legislative scheme:

> The effects of the bill on fundamental legislative principles may be viewed positively. In terms of respect for individual rights, it means members and non-members are no longer subject to the additional possibility of prosecution through the courts for contempt of Parliament. While s.47 of the Parliament of Queensland Act precluded double punishment, there remained the possibility that a person could be acquitted in one forum but found guilty in the other. Now, members and non-members are subject only to the jurisdiction of the Assembly for contempt of Parliament.

The Second Reading Speech was given by the Attorney-General on 9 May 2006[13]. The Attorney noted that the Criminal Code provisions would be treated in the United Kingdom as breaches of the privileges of Parliament, and their inclusion in the Queensland Criminal Code appeared to have been in response to several decisions of the Privy Council in the 19th century which held that Parliament did not enjoy the power to punish for a contempt or the unconditional suspension of a member during the pleasure of the Assembly[14].

The point was made that since the 1978 enactment of s 40A *Constitution Act 1867* there was no doubt that the Queensland Parliament had the power to punish for contempt and that 'the original reasons for the inclusion of section 57 in the Criminal Code are no longer valid.' The Attorney went on to note that s 57 was 'inconsistent with a fundamental tenet of the Westminster system, embodied in section 8 of the *Parliament of Queensland Act 2001*.This tenet is that debates or proceedings in Parliament cannot be impeached or questioned in any Court or place out of the Parliament.' The reason that the Criminal Code provision was repealed was 'to ensure that the principle inherent in Article 9 of the Bill of Rights is preserved and reinforced.' As a statement of principle the Attorney concluded:

> For members, this confirms that Queensland's Parliament operates in the same way as the House of Commons, the Federal Houses of Parliament and other Australian States and Territories. Parliament has primacy and is responsible for disciplining its members. For non-members the position will be the same as for the Federal Houses of Parliament. Members and non-members will continue to be liable to be dealt with for contempt of Parliament under the Parliament of Queensland Act 2001. Members

> and non-members would be subject to the same sanctions to be imposed by parliament. Those sanctions are set out in the standing rules and orders of the Legislative Assembly. Sanctions include the imposition of a fine of up to $2,000.00. If a fine is not paid, the person involved can be imprisoned.

The Premier spoke during the debate on the Bill on 25 May 2006[15]. Mr Beattie noted that the Commonwealth did not have a provision similar to the Criminal Code provisions. He also observed that the Queensland Criminal Code as drafted by Sir Samuel Griffith had been adopted in Western Australia and Tasmania. The former had included s 57 in its entirety, but the Western Australian Crown Solicitor was said to have held the view that the provision applied only to non-members. Tasmania did not include the provision. The Premier noted that New South Wales and Victoria and the Australian Capital Territory did not have statutory provisions of similar effect. He observed:

> The reality is that we are absolutely consistent on this. Members of Parliament should have the ability to express their views, which is what the Parliament was designed to do. Find me one legislature in Australia that implement section 57 or section 58 the way those opposite want. These are antiquated pieces of legislation that were designed to protect the Parliament in an era that is different from today. They were never meant to apply to members. They were meant to apply to non-members who come here to disrupt the Parliament or its committees." [sic]

Article 9 Bill of Rights Abridged?

The point that was missed in all of this was that the CMC proceeded to investigate proceedings before Parliament in the Nuttall matter, which in itself was quite clearly a prima facie breach of Art. 9 Bill of Rights. The question of the validity of the legislation which permits such an investigation to occur is also a moot point, as the matter was never litigated. The crucial point is that if Art. 9 has in fact been abrogated by that legislation, then that abrogation was a radical change to an accepted constitutional principle apparently done without regard, sufficient or at all, to the underlying constitutional structures and balances which might be disturbed.

The jurisdiction of the then Criminal Justice Commission ('CJC') over elected officials – viz members of the Queensland Parliament, and councillors of Queensland local governments – was considered by the Parliamentary Criminal Justice Committee in 1997 in Report No. 39 – The CJC's jurisdiction over elected officials. It noted that the New South Wales Independent Commission Against Corruption ('ICAC') and the Western Australian Anti-Corruption Commission ('ACC') had wider jurisdictions over elected officials than the CJC, with respect to investigations of non-criminal behaviour of elected officials. These bodies are not responsible to Parliament in the conventional way, through ministerial responsibility to Parliament. Rather, the only supervision is by parliamentary committee and latterly in Queensland by a parliamentary commissioner.

It is armed with very significant coercive powers, including the power to examine witnesses and to compel testimony without the benefit of privilege against self-incrimination. Since the demise of Star Chamber in the17th Century, there has been no analogue in the Westminster tradition for a standing body which possesses such significant coercive powers over private and public citizens, especially in an organization outside the familiar structures of responsible government.

What is remarkable is an apparent lack of debate when the CJC/CMC legislation was first introduced and for that matter during the Nuttall controversy, about abridging Art 9, consideration of whether possible alternatives[16] existed or an awareness of the serious potential consequences of what was being contemplated. One might have expected these issues to have been raised and closely evaluated when the CJC legislation was first passed, or by the Privileges Committee or even the Scrutiny of Legislation Committee when the Criminal Code amendments were being examined. That does not seem to have occurred.

But the ham-fisted way in which the *Pugh* and Nuttall matters were approached should not detract from the sound conceptual basis for a codified privilege regime generally which also criminalises contempts and allows the courts to deal with them. The Commonwealth Parliament passed such legislation in response to the *Murphy* decisions, and the Westminster Parliament recognised that in the modern era there are sound reasons for following that approach, particularly now that human rights treaties may affect the way parliamentary privilege has previously operated.

In the Australian context, the present lack of uniformity amongst the states *inter se* and with the Commonwealth serves no purpose. Variations between the jurisdictions are merely as a result of the separate development of those jurisdictions, and now that the federation has been established for over 100 years a cohesive privilege structure, which reflects generally accepted modern constitutional theory and also recognises prevailing conditions, should be developed.

The Stockdale settlement has been so successful in establishing the peace between the courts and parliament, that the issue only ever seems to emerge unexpectedly or in times of crisis. The only significant challenge to the balance came from the judicial arm in the decisions in *R v Murphy* [17] but after the passage of Commonwealth declaratory legislation,[18] and notwithstanding some initial uncertainty[19] that seems now to have been successfully resolved[20]. There remains, however, the underlying tension between the courts and parliament which reveals itself from time to time: as McPherson JA put it in *Rowley v O'Chee* [2000] 1 Qd R 207; (1997) 150 ALR 199; (1997) 142 FLR 1, 'The conflict between legislature and judiciary that would then ensue might threaten to rival *Stockdale v Hansard* and *The Case of the Sheriff of Middlesex*. The potential for such conflict tends to appear remote, until the very day it occurs. One branch of government may not be unwilling to measure its strength against the other.'[21]

The main threat to the structural peace and stability comes from the so-called independent anti-corruption commissions which seem to be uniquely popular in Australia. Although Star Chamber was nominally a court, it was used as an instrument of coercive executive power. Since its demise in 17th Century, as part of the process of establishing the supremacy of the Westminster Parliament, there has been no analogue in the Westminster tradition for a standing body which possesses such significant coercive powers over private and public citizens, especially in an organization outside the familiar structures of responsible government.

These bodies are not responsible to Parliament in the conventional way, through Ministerial responsibility to Parliament. Rather, the only supervision is by parliamentary committee and latterly in Queensland by a parliamentary commissioner. The CJC has been prepared to litigate against other organs of government, including the Parliament of Queensland and its own parliamentary commissioner: *see Carruthers v Connolly* [1998] 1 Qd R 339; *CJC v Dick* [2000] QSC 272; on appeal [2001] QCA 218; *CJC v Nationwide News P/L* [1996] 2 Qd R 444; (1994) 74 A Crim R 569.

The crucial point is that if Art. 9 has in fact been abrogated by that legislation, then that abrogation was implicit and, it would seem, inadvertent. The question of whether its establishing legislation permits such a breach to occur remains a moot point, as the matter was never litigated.

Future conflicts

It may well be that Queensland and other Westminster-style legislatures will be forced in any event to reorganise the coercive aspects of privilege should they ever try to use them in the future. The Queensland Parliament's solution to the Nuttall crisis seems not to have been

well received in the court of public opinion, gauged by the press coverage. *The Courier-Mail* reported under the headline 'Labor uses its majority to shield Nuttall'. *The Weekend Australian* reported under the headline 'Beattie gets disgraced Minister off with apology.'[22]

The Queensland Opposition went to the media with the message that 'corruption' and 'cronyism' had been at work.[23] The Leader of the Opposition was reported as saying that the incident was 'trial by mates and not trial by jury' and that the Premier had 'today set in concrete two sets of laws – one set of laws for everyday Queenslanders and another set of laws for members of the Labor Party.' His deputy described the process as a 'kangaroo court'. The Leader of the Liberal Party said that Parliament should not act as judge and jury over alleged criminal wrongdoing and that 'we should all be equal before the law'.

While some of those comments are obviously partisan, they nonetheless underscore some of the difficulties that face a modern legislature dealing with contempts itself, especially with the modern requirements of procedural fairness and international human rights obligations. There is a political and legal imperative that justice not only has to be done but seen to be done.

In *Demicoli v Malta*[24] the European Court of Human Rights was approached by an applicant who had been charged, convicted and penalised for contempt by the Westminster-style Maltese House of Representatives. The Court found that the European Convention for the Protection of Human Rights and Fundamental Freedoms applied to the legislature and it had been breached, because the applicant had been denied a fair and independent trial, and that his right to a presumption of innocence had been infringed. It is hard to see why Articles 9 and 14 of the International Covenant on Civil and Political Rights ('ICCPR') would not apply *mutatis mutandis* in an Australian context.

In *Egan* the High Court was keen to keep out of political disputes and to limit its role to a purely legal one. There is, however, a palpable concern in the judgments to limit any potential reach of the House's powers to non-members, and to ensure that the old common law limitation of the powers of colonial parliaments to 'self defensive' measures rather than punitive ones was maintained[25] Kirby J in particular made two critical statements on the potential future direction of the law in Australia. Relevantly, with respect to the power of legislatures (or at least the Commonwealth Parliament) to punish for contempt, he observed[26]:-

> The second feature of the Australian Constitution referred to is the creation of a judicature in which is vested the judicial power of the Commonwealth including when exercised by State courts. In *Ex parte Fitzpatrick and Browne* this court held that neither the structure of the Constitution providing separately for the judicature, nor its provisions, required a reading down of s 49 of the Constitution defining the privileges of the two Houses of the Federal Parliament in terms of those of the House of Commons of the Parliament of the United Kingdom. That aspect of the decision *in Ex Parte Fitzpatrick and Browne* may one day require reconsideration. But it is not required in this case.

In a footnote, he continued the point:-

> The want of power on the part of a chamber to punish those in contempt of its orders has sometimes been explained by reference to the fact that punishment is, of its nature, judicial in character and therefore not apt to be implied as among the privileges of a legislature. See *Armstrong v. Budd* (1969) 71 SR(NSW) 386 at 393. The opposite conclusion was reached in the United States of America in an early case where the power of the Congress to punish for contempt so as to uphold its privileges was considered essential to their effectiveness. See *Kilbourn v. Thompson* 103 US168 (1880); *Jurney v. MacCracken* 294 US 125 at 152 (1935).

The Commonwealth statutory model which declares the operation of Art.9 Bill of Rights – s 16(3) *Parliamentary Privileges Act 1987* (Cth) has been effective domestically, and has been well received in the United Kingdom. It was clearly the model for ss 8 and 9 *Parliament of*

Queensland Act 2001. It is interesting to note, however, that the Commonwealth provision protects questioning or impeaching parliamentary proceedings in any 'court or tribunal' (which are terms defined in s 3 Act), while the Queensland provision speaks of any 'court or place out of the Assembly' and specifically declares that the section 'is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.' It has already been observed, however, that the weight of authority now suggests that there is no material difference between the two[27].

This restatement of fundamental principle sits uneasily with the provisions of the CMC legislation which prima facie brought Parliament within its jurisdiction. Allowing a commission or tribunal armed with coercive powers to examine proceedings in parliament without specific parliamentary authorisation is different to the situation experienced in New South Wales in the legislative scheme which was the subject of the *Arena* case. There, the Parliament specifically authorised an inquiry and effectively created a parliamentary commissioner who worked within the aegis of parliamentary privilege. The Westminster Parliament's Commissioner for Parliamentary Standards similarly works within parliamentary privilege, as the Commissioner is a parliamentary officer appointed by resolution of the House of Commons for a five year term[28].

It is unclear how the Western Australian and New South Wales analogues of the CMC would approach a similar situation as the Nuttall case. In terms of 'best practice' legislative drafting, the approach of Sir Samuel Griffith in drafting the Criminal Code provisions to include parliamentary offences was almost a century ahead of its time. Even though the terms of those provisions were probably driven more by the restricted jurisdiction of colonial parliaments than by contemporary law reform considerations Queensland had by quirk enjoyed 'best practice' legislative provisions that Westminster itself now proposes to adopt.

Both Houses of the Westminster parliament formed a joint committee which undertook a significant review of parliamentary privilege, which reported in 1999[29]. The committee was chaired by a law lord, Lord Nicholls of Birkenhead and heard submissions from the UK Westminster-style legislatures throughout the Commonwealth and the 'Parliamentarian' of the United States Congress, who performs a role similar to clerks of Westminster-style parliaments.

The important recommendations of the Committee included that parliamentary privilege should be codified and enacted into a statute, based on the Australian *Parliamentary Privileges Act 1987* (Cwlth). As part of that reform, the penal powers of parliament should be transferred to the law courts, with a limited jurisdiction being retained to arrest and detain for contempts in the face of the House.

The shift would, of course, transfer some power from parliament to the courts of law. The Committee observed[30]:-

> In the distant past each House claimed to be the sole exclusive judge of its own privileges and the extent of that privilege. This is no longer a live issue. In practice the courts already interpret the ambit of parliamentary privilege. The courts have interpreted article 9 many times in the last quarter of a century. Ever since *Stockdale v. Hansard* (1839) the courts have refused to accept that either House, by resolution, can determine the legal effect of its privileges. Never, since that case, has the House of Commons refused to admit the jurisdiction of the courts when matters of privilege arise in the course of court proceedings. Erskine May takes the view that, following this and other cases, the duty of the courts to define the limits of parliamentary privilege when cases come before the courts can no longer be disputed.

It was recommended also that the Act should clarify ancillary matters such as the enforcement of fines and the deletion of obsolete or anachronistic areas such as impeachment.

With respect to the ceding of the penal power of parliament, by way of approach it was thought that it was desirable in principle to retain a residual jurisdiction over members and non-members because parliament would not then be beholden to the courts and also because parliament is better placed to assess the degree of seriousness of a contempt[31].It was recommended that the machinery of criminalising contempt would be for the Attorney-General to initiate proceedings after being requested to do so by the presiding officer of either house acting on the advice of the privileges committee. Those committees would meet in private to avoid prejudicing any court proceedings[32]. The sanction would be a fine or imprisonment for up to three months. Importantly, the offence would apply to members and non-members. The Committee noted[33]:-

> We attach importance to the existence of a penal sanction for this type of contempt [wilfully failing to attend before the house or a committee or deliberately altering suppressing or destroying a document] although we expect this criminal offence would rarely, if ever, be committed. The circumstances should be extreme, when the evidence required was essential and all else had failed. Should such circumstances arise, fairness requires that the same penalties should be applicable for this offence whether it is committed by a non-member or a member. Members of the Commons are subject to disciplinary sanctions such as suspension and expulsion to which non-members are not subject, but we do not think this justifies excluding members from the scope of this criminal offence.

The immunity of parliamentary proceedings from outside examination by other organs of state, protected by Art. 9 Bill of Rights is such a fundamental tenet of Westminster-style parliaments (including the United States Congress) that it should not lightly be interfered with. The historical reasons underlying Art.9's creation might largely have passed from the collective memory of parliamentarians, but the protection of free speech in parliament was so hard won, and is so important for democratic government, that there should be compelling reasons for any interference at all. What has not been considered at all, it seems, is whether the addition of an organ of state such as the CMC will disturb the equilibrium which has been established by the *Stockdale v H*ansard settlement.

Rather than waiting for the next crisis to occur, and relying on a hurried and ill-considered ad hoc response, a coherent response should be developed by the Queensland and other Australian legislatures. The Commonwealth legislation does not provide for a referral of prosecutions to the courts, and expressly retains its criminal jurisdiction[34]. The Griffiths Criminal Code provisions which were repealed in Queensland provide a good starting point for codification of criminal offences concerning Parliaments which Australian legislatures should consider adopting.

Endnotes

1 (1688) 1 William & Mary Sess. 2 ch 2. See also S 16 *Parliamentary Privileges Act 1987* (Cth.);in force in Queensland pursuant to s 5 *Imperial Acts Application Act 1984*, which is repeated in modern syntax in s 8 *Parliament of Queensland Act 2001*(Q.) :-
'The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.'

2 See also *Howard v. Gossett* (1845) 10 QB 410; (1845) 116 ER 158; (1847) 6 StateTrNS 319; *Case of the Sheriff of Middlesex* (1840) 113 ER 419.

3 See e.g. *Watkins v. United States* (1957) 354 US 178

4 That is to say, out of the United Kingdom, the United States, Australia, New Zealand and Canada.

5 Fitzpatrick and Browne in the 1950's, and Brian Easton in the 1990's.

6 Habermas, Jurgen, The Structural Transformation of the Public Sphere (1992) 60.

7 ibid., 66.

8 Transcript accessed 19 April 2007 'www.lib.berkeley.edu/MRC/murrowmccarthy.html.'

9 Monday, Apr.24, 1950.

10 (1957) 354 US 178 at 192.
11 (1860-1868) 1 Qd. Sup. Ct. R. 63; see also Charles Bernays, *Queensland Politics 1859 - 1919* (1919) 25 et seq.; Beridale Keith, *Responsible Government in the Dominions* (1928)
12 See http://www.parliament.qld.gov.au/committees/view/publications/documents/other/Nuttall.pdf.
13 Hansard, 9 May 2006.
14 Presumably cases such as. *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225and *Doyle v Falconer* (1866) LR 1 PC 328; *Barton v. Taylor* (1886) 11 App Cas 197.
15 Hansard, 25 May 2006, p.2061.
16 Like, for instance, the UK model of the creation of a Parliamentary Commissioner for Standards.
17 (1986) 5 NSWLR 18; (1986) 64 ALR 498.
18 *Parliamentary Privileges Act 1987* (Cth.) and s 16 in particular.
19 *Laurance v. Katter* [2000] 1 Qd.R. 147; (1996) 141 ALR 447; special leave to appeal to the High Court of Australia granted in [1997] 15 Leg Rep SL1b but apparently never determined; *Rowley v O'Chee* [2000] 1 Qd R 207 ; (1997) 150 ALR 199 ; (1997) 142 FLR 1;
20 *Rann v. Olsen* [2000] SASC 83; (2000) 172 ALR 395; *Prebble v. Television New Zealand* ; *Pepper v. Hart* [1993] AC 593; *Egan v. Willis*; cf. *Erglis v. Buckley* [2004] QCA 223.
21 at Qd.R. 224. Special leave to appeal to the High Court of Australia was refused in (1998) 19 Leg Rep SL 4a
22 *The Weekend Australian*, Saturday 10 December 2005, page 6.
23 'Trial by mates riles Nats', *The Courier-Mail*, Saturday 10 December 2005, p 6.
24 (1990) European Court of Human Rights proceedings 33/1990/224/288.
25 New South Wales never introduced legislation dealing with parliamentary privilege for its state legislature, and still relies on common law principles.
26 at ALR 574.
27 See n.18 above.
28 House of Commons Standing Order 150; Votes and Proceedings of the House of Commons 26 June 2003; Mackay , Sir W. (ed.) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd Ed. LexisNexis Butterworths, 2004).
29 HL Paper 43-I; HC 214-I
30 para. 381-2
31 para. 304.
32 At para. 309.
33 At para. 311.
34 Section 3A *Parliamentary Privileges Act 1987* (Cth)