

Debate continues over Parliament's powers

Recent controversy about parliamentarians making allegations under the protection of parliamentary privilege has again raised the question about the powers Parliament needs to operate effectively.

Emeritus Professor Enid Campbell says that it's a question the Australian Parliament has been considering for the past 100 years.

The framers of Australia's Constitution envisaged that the Federal Parliament should have the power to determine for itself what powers, privileges and immunities it should possess. Until such time as Parliament was able to enact the appropriate laws, the two Houses of Parliament, its members and committees were to have the same powers, privileges and immunities that were possessed by the United Kingdom House of Commons at the time the Commonwealth of Australia was established. Section 49 of the Australian Constitution gave expression to that intent.

The powers available to the Federal Parliament by virtue of section 49 of the Constitution include the power:

- of each House to suspend members from the service of the House;
- of the Houses and their committees to require the attendance of persons before them to give evidence and to produce documents; and
- of the Houses to regulate their internal proceedings.

More than 80 years were to pass before the Federal Parliament enacted specific and comprehensive legislation on the subject of parliamentary powers and privileges. The *Parliamentary Privileges Act 1987* followed a parliamentary committee inquiry that reported on the issue in 1984.

"The Act of 1987 is a most important document," says Professor Enid Campbell, "in that it represents an attempt to reform the laws about parliamentary privileges, having regard to difficulties and uncertainties attending the laws."

The 1987 Act effected some major changes. It removed the power of the Houses to expel their members, as occurred in 1920 when Hugh Mahon, the Member for Kalgoorlie was expelled for making "seditious utterances". It

also reduced the punitive powers of the Houses, an issue highlighted in the 1955 jailing of Messrs Fitzpatrick and Browne by the House of Representatives for contempt of Parliament. At the same time, the 1987 Act clarified the power of the Parliament to impose fines.

"Prior to the enactment of the *Parliamentary Privileges Act 1987*," says Professor Campbell, "there was doubt about whether the Houses could impose monetary fines. The House of Commons had not imposed such penalties since the eighteenth century. Section 7 of the Act authorises the Houses to impose fines on those who commit parliamentary offences: in the case of natural persons, a fine not exceeding \$5,000; in the case of corporations, a fine not exceeding \$25,000."

According to Professor Campbell, there continue to be differences of opinion about whether Houses of Parliament need to have punitive powers to enable them to carry out their functions.

"Some have taken the view that the penal jurisdiction reposed in Houses of Parliament should be transferred to the ordinary courts of law," says Professor Campbell. "Their objection is principally that in exercising their penal jurisdiction, the Houses are acting as judges in their own cause.

"Those who support the maintenance of a parliamentary penal jurisdiction have, however, pointed out that it is a jurisdiction akin to that which superior courts of law themselves exercise when they impose penalties for contempt of court. If courts are considered to be the best judges of what conduct is prejudicial to the performance of their functions, it is argued, should not it also be accepted that the Houses of Parliament are the best judges of what conduct is prejudicial to the performance of parliamentary functions?"

Recently a parliamentary committee in the United Kingdom recommended that courts be given the jurisdiction to try offences that are now punishable as contempt of Parliament where the alleged offender is not a member of either House of Parliament. Professor Campbell believes that this recommendation may prompt reconsideration of the issue in Australia.

While recognising the important changes brought about by the 1987 Act, Professor Campbell notes that the legislation left some aspects of the law untouched. In particular, the *Parliamentary Privileges Act 1987* does not attempt to define or delimit the investigatory powers of the Houses and their committees. Those investigatory powers still derive from the powers and privileges of the House of Commons bestowed on the Australian Parliament by virtue of section 49 of the Constitution.

According to Professor Campbell, there is something to be said in favour of including within general legislation, such as the 1987 Act, provisions regarding the investigatory powers of the Houses and their committees. These include the power to:

- require the attendance of persons and production of documents;
- require the giving of evidence under oath or affirmation; and
- order the arrest of persons who have defied the summons to attend and have them brought before the House or the relevant parliamentary committee.

"Provisions of these kind are contained in the *Royal Commissions Act 1902* (Cwlth) and have been so included because, at common law, royal commissions have no coercive powers. Members of the public may not always appreciate that, legally, there is a distinction between inquiries by royal

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commissions and inquiries by Houses of Parliament and by parliamentary committees. A statute declaratory of the powers of the Houses of Parliament could well incorporate provisions to give statutory expression to powers which already exist under section 49 of the Constitution. There could, however, be differences of opinion about whether the grounds on which witnesses may decline to answer questions should be specified in legislation."

In this regard, Professor Campbell notes that the 1987 Act has not resolved the issue of whether Executive Government can properly object to a request for information from Parliament or its committees on the grounds that the provision of such information would be contrary to the public interest. Legislation that was introduced in 1994 in order to address this problem was not passed into law.

Another matter of concern is the protection that should be accorded to Members'

correspondence and records. The *Parliamentary Privileges Act 1987* provides limited protection. It does not prevent searches and seizures carried out under valid search warrants or authorised interceptions of telecommunications. In some circumstances, suggests Professor Campbell, Parliament may regard such activities as improper interference with the free performance of a parliamentarian's duties and, therefore, an offence against the House under the 1987 Act.

Vision in Hindsight

Vision in Hindsight: Parliament and the Constitution is a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The essays are published as research papers available on the Parliamentary Library's web site (www.aph.gov.au/library). A selection of the essays will be published by Federation Press in December 2001 under the title *Parliament, Powers and Processes: The Vision in Hindsight*.

With the agreement of the Parliamentary Library and essay contributors, for the past year *About the House* has been publishing

summaries and extracts from some of the *Vision in Hindsight* essays. The above article is the final in that series.

Enid Campbell is Emeritus Professor of Law, Monash University. A full copy of the essay by Professor Campbell, entitled 'Parliamentary Privileges' is available from the Parliamentary Library's web site at: www.aph.gov.au/library/pubs/rp/2000-01/01RP01.htm

For more information on the *Vision in Hindsight* project call Judy Hutchinson on (02) 6277 2512 or email: rdpl.publications@aph.gov.au

Norfolk Island health services in critical condition

Most medicines also cost far more than on the mainland, with the result that some patients simply do not buy the medicines doctors prescribe for them. Doctors report instances of asthmatics who only turn up for treatment when they are having a severe asthma attack. They say it is common for people not to buy cholesterol-lowering and other preventive medications because they are too expensive to sustain over a long period. Despite this, the hospital pharmacy makes a substantial profit each year.

As the inquiry progressed, several initiatives got under way and continuing improvements now seem likely, provided the Norfolk Island Government can ensure adequate funding.

Several of the most significant innovations have been provided through grants from the Commonwealth Department of Veterans' Affairs. Norfolk Island has a high proportion of war veterans among its elderly residents. An aged care clinical nurse consultant has been appointed to provide specialised nurse training and a coordinated range of services

to help the elderly to 'age in place'. A newly appointed physiotherapist is providing desperately needed services after a hiatus of four years. The RSL on Norfolk Island received departmental assistance in setting up a day care program for veterans and other elderly residents.

In another development, the Norfolk Island Government commissioned a health review by a team from Griffith University in Queensland. This team undertook base line studies of the population last year, and has the responsibility for preparing both a new health strategy and a plan to implement the changes it recommends. The university team shares the view of the External Territories Committee that wide-ranging community discussion, including input from both local and visiting health professionals, needs to accompany the change process. New ideas are much more likely to succeed when they have wide support as well as community pressure on the decision-makers who control the public purse.

A proposal for a drop-in community health centre, put forward by a group called CHAT (Community Health Awareness Team), already appears to have wide support within the community and the local Assembly. Another local initiative, an inexpensive step into e-health developed by a young locum using his own desk-top equipment, has recently been given the nod by the Island Assembly. It is being financed by a grant from the Commonwealth's *Networking the Nation* program. The simple tele-conferencing proposal is an adaptation of a scheme used to bring modern medicine to remote communities in the Himalayas. It has already demonstrated its huge potential to spare patients the expense and stress of travelling to the mainland to seek urgent specialist opinions.

For further information

Visit: www.aph.gov.au/house/committee/jscncet/report/norfolkhealth/index.htm
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