

**IMPRISONMENT FOR CONTEMPT:  
ARE THE PENAL POWERS OF PARLIAMENT  
COMPATIBLE WITH THE RULE OF LAW?**

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This thesis is presented for the Honours degree of Bachelor of Laws  
of Murdoch University 2014

I, Daniel Matthew Harrop, declare that this is my own account of my research.

17,302 words

“No man is punishable or can be lawfully made to suffer in body or goods  
except for a distinct breach of law established in the ordinary legal manner  
before the ordinary courts of the land.”

- A V Dicey

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Full name of degree: Bachelor of Laws with Honours

Thesis title: Imprisonment for Contempt: Are the Penal Powers of Parliament  
Compatible with the Rule of Law?

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Year: 2014

## Abstract

The rule of law is synonymous with political legitimacy. It ensures that citizens are protected from unpredictable and arbitrary interference. In his classical statement in the 19<sup>th</sup> century, A V Dicey declared that the rule of law embodies the notion that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”. This thesis considers whether the penal powers of Australian parliaments to imprison members of the public for contempt are compatible with this statement of the rule of law. It considers the historical development of the contempt power in the UK House of Commons at a time when the rule of law was not respected by the ruling monarch. It was a turbulent time when the UK Parliament acted also as a High Court of Parliament, exercising not only legislative but also judicial functions, a role not conferred on the Australian Parliament by the Constitution. This thesis contends that the penal powers offend the constitutionally entrenched separation of powers, a doctrine that protects the rule of law by ensuring that matters are heard only by independent and impartial tribunals, and that the power to imprison diminishes the implied freedom of political communication. It is argued that the procedures of parliaments and privilege committees often disregard the requirements of procedural fairness. The rule against bias cannot possibly be observed when a parliament determines matters of contempt, and there are serious procedural difficulties in according fair hearings to those that are accused of contempt. The thesis concludes that the penal powers of parliament are incompatible with the rule of law.

## Acknowledgements

To coffee for getting me going in the mornings;  
wine for keeping me cheerful through the many late nights;  
and Hamish the dog for being by my study buddy through it all.

Brett.

Lorraine.

George.

Paul.

Renee.

And all the wonderful people who have assisted in my development,  
both personal and professional, over the past six years.

# TABLE OF CONTENTS

<b>1</b>	<b>INTRODUCTION</b>	<b>1</b>
1.1	Defining contempt of parliament	4
1.2	The power to punish contempts	9
<b>2</b>	<b>THE CONTEMPT POWER IN HISTORICAL CONTEXT</b>	<b>13</b>
2.1	Protecting Parliament's sovereignty in early English history	14
2.2	The contempt power in the Australian historical context	22
2.3	Modern usage of the contempt power in Australia	28
<b>3</b>	<b>CONTEMPT AND THE CONSTITUTION</b>	<b>39</b>
3.1	The constitutional separation of powers	40
3.2	Reading down section 49 of the Constitution	49
3.3	The implied freedom of political communication	54
<b>4</b>	<b>CONTEMPT AND PROCEDURAL FAIRNESS</b>	<b>63</b>
4.1	The rule against bias	66
4.2	The hearing rule	71
<b>5</b>	<b>CONCLUSION</b>	<b>81</b>

# 1 INTRODUCTION

The rule of law is now universally accepted as central to political legitimacy.<sup>1</sup> Although the precise formulation of the rule of law is subject to much academic debate, it is generally agreed that the core concern of the doctrine is the protection of citizens from unpredictable and arbitrary interference.<sup>2</sup> Fundamental to any conception of the rule of law, amongst other things,<sup>3</sup> must be the existence of an independent and impartial judiciary<sup>4</sup> separate from the other arms of government,<sup>5</sup> and the observation of principles of natural justice.<sup>6</sup> Central to the argument presented in this thesis is the classical statement of A V Dicey on one particular aspect of the rule of law:

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.<sup>7</sup>

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<sup>1</sup> Brian J Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) 86 *Australian Law Journal* 175, 176, 188; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 1-3.

<sup>2</sup> Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 83.

<sup>3</sup> It is beyond the scope of this thesis to consider at any length the formulation of the rule of law. A good discussion of the debate between the formalist and substantive construction of the rule can be found in Zimmermann, above n 2, 83-102. For an introductory discussion of the many elements of the rule of law see Preston, above n 1.

<sup>4</sup> Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 216; John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 210; Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 27.

<sup>5</sup> Anthony Murray Gleeson, 'Courts and the Rule of Law' (Paper presented at Rule of Law Series, Melbourne University) 7 November 2001, 2.

<sup>6</sup> Raz, above n 4, 217.

<sup>7</sup> A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund Publishing, 8<sup>th</sup> ed, 1885, reprint 2001) 110.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

This thesis examines whether the penal powers of parliament to punish contempts offend this aspect of the rule of law as articulated by Dicey.

The penal powers of Australian legislative bodies are little known and little used. Despite this, their very existence should be a serious cause for concern in any society that is governed by the rule of law. It has been twenty years since an Australian legislature exercised its power of imprisonment.<sup>8</sup> Since then, academic discussion of the penal powers of parliament has been incredibly limited. One can only assume that the lack of commentary is a direct result of parliaments' contemporary reluctance to make use of the power. Significant contributions to the discussion have been made by respected commentators Anne Twomey,<sup>9</sup> Enid Campbell,<sup>10</sup> Gerard Carney<sup>11</sup> and Geoffrey Lindell.<sup>12</sup> This thesis seeks to build on those contributions to provide a comprehensive analysis of parliaments' power to imprison for contempt, using Dicey's conception of the rule of law as its analytical framework.

Chapter 2 examines the historical context of the contempt power. In Australia, the contempt power is inextricably linked to the powers of the United Kingdom House

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<sup>8</sup> The last person to be imprisoned for contempt was Brian Easton by the Legislative Council of Western Australia in 1995. See below 31-33.

<sup>9</sup> See Anne Twomey, 'Reconciling Contempt of Parliament with the Separation of Powers' (1997) 8 *Public Law Review* 88.

<sup>10</sup> See particularly Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) and Enid Campbell, 'Contempt of Parliament and the Implied Freedom of Political Communication' (1999) 10 *Public Law Review* 196.

<sup>11</sup> See Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect, 2000).

<sup>12</sup> See Geoffrey Lindell and Gerard Carney, 'Review of Procedures of the House of Representatives Relating to the Consideration of Privilege Matters and Procedural Fairness' (23 February 2007).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



of Commons. The historic conflicts between the House of Commons and the Crown, the courts and the House of Lords presented the underlying impetus for the powers of the House of Commons necessary to assert its independence and sovereignty. The constitutional landscape of the Australian Commonwealth safeguards the Commonwealth Parliament and State legislative bodies from the difficulties that the House of Commons encountered during its formative years.

Chapter 3 then assesses the interaction of the contempt power with the Constitution. There is an undesirable tension between the contempt power and the doctrine of separation of powers envisaged by the Constitution. Separation of legislative and judicial power is a fundamental concept of the rule of law. It is possible that the inconsistency could be overcome by reading down section 49 of the Constitution, which confers the powers of the parliament, contrary to the view taken by the High Court in *R v Richards; Ex parte Fitzpatrick and Browne*.<sup>13</sup> The contempt power also arguably offends the implied freedom of political communication outlined by the High Court in *Lange v Australian Broadcasting Corporation*<sup>14</sup> and subsequent decisions.

Chapter 4 considers whether the principles of natural justice, or procedural fairness, can be adequately observed by parliaments exercising a penal jurisdiction. Procedural fairness is vital to the concept of natural justice. Consideration is given

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<sup>13</sup> (1955) 92 CLR 157, 158 (Dixon CJ).

<sup>14</sup> (1997) 189 CLR 520.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

firstly to the rule against bias, that is, can a parliament and a committee of privilege be an independent and impartial tribunal? And secondly, to the hearing rule, that is, can a person accused of contempt be afforded a fair hearing?

This thesis considers the exercise of parliaments' penal jurisdiction only where the person accused of contempt is a member of the public. The investigation and punishment of contempts committed by a member of the parliament presents additional complexities. Whilst some of the arguments presented in this thesis could be equally applied to contempt by a member of parliament, others may not. The main focus is the penal powers of the Commonwealth Parliament. Where the powers of a State legislative body are similar, the arguments can likewise be applied. The differences between the Commonwealth and the State powers are outlined below in Part 1.2.

## **1.1 Defining contempt of parliament**

The widely accepted definition of 'contempt of parliament' is provided in *Erskine May's Parliamentary Practice*:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or

indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence.<sup>15</sup>

This definition is broadly reflected by section 4 of the *Parliamentary Privileges Act 1987* (Cth) which 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 a committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Given the broad nature of the contempt power and the parliaments' discretion in its usage, it is impossible to definitively list what constitutes a contempt.<sup>16</sup> In essence, the contempt power protects the functions of parliament and its members.<sup>17</sup> It is important to note that the contempt power is a creature of its own, and not merely an incidence of the privileges of parliament. Historical categorisation of contempts as breaches of privilege "led to the erroneous notion that each contempt is a violation of an immunity".<sup>18</sup> Whilst it is true that a breach of privilege will constitute a contempt,

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<sup>15</sup> Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (Lexis Nexis, 24<sup>th</sup> ed, 2011) 251.

<sup>16</sup> *Ibid.*

<sup>17</sup> John Waugh, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 29, 32.

<sup>18</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Commonwealth of Australia, 13<sup>th</sup> ed, 2012) 41.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

a contempt need not necessarily be a breach of privilege.<sup>19</sup> Where parliaments have provided examples of acts that may constitute contempts, they have always done so with the caveat that the list is not exhaustive and does not fetter the right of the parliament to declare a future act as a contempt even where there is no precedent.<sup>20</sup>

In 1988 the Australian Senate agreed to resolutions relating to parliamentary privilege and contempt matters,<sup>21</sup> in response to the recommendations contained in the Report of the 1984 Joint Select Committee on Parliamentary Privilege (**1984 Joint Select Committee**).<sup>22</sup> Draft guidelines in similar terms were also introduced to the House of Representatives, although to date no action has been taken to adopt any resolutions to indicate matters that may be treated as contempts.<sup>23</sup> The 1988 Senate Resolutions provide that the following acts may amount to contempt:

- interference with the senate;
- improper influence of senators;
- molestation of senators;
- disturbance of the Senate;
- service of writs;

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<sup>19</sup> B C Wright and P E Fowler (eds), *House of Representatives Practice* (Commonwealth of Australia, 6<sup>th</sup> ed, 2012) 731.

<sup>20</sup> See for example *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 6.

<sup>21</sup> *Ibid.*

<sup>22</sup> Joint Select Committee on Parliamentary Privilege, Parliament of Australia, *Final Report* (1984) (*1984 Joint Committee Report*).

<sup>23</sup> Wright, above n 19, 750. Hence the continuing relevance of the defined contempts provided in the 1999 UK Joint Committee Report.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

- false reports of proceedings;
- disobedience of orders;
- obstruction of orders;
- interference with witnesses;
- molestation of witnesses;
- offences by witnesses; and
- unauthorised disclosure of evidence.<sup>24</sup>

In 1999, the UK Joint Committee on Parliamentary Privilege (**1999 UK Joint Committee**) devised a useful guideline on acts which may constitute contempts, whilst stressing that the list is not exhaustive.<sup>25</sup> The Joint Committee concluded that the following acts could constitute contempts:

- interrupting or disturbing the proceedings of, or engaging in other misconduct in the presence of, the House or a committee;
- assaulting, threatening, obstructing or intimidating a member or officer of the House in the discharge of the member's or officer's duty;
- deliberately attempting to mislead the House or a committee (by way of statement, evidence or petition);
- deliberately publishing a false or misleading report of the proceedings of a House or a committee;

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<sup>24</sup> *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 6.

<sup>25</sup> Joint Committee on Parliamentary Privilege, Parliament of the United Kingdom, *Report* (1999) (*1999 UK Report*).

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

- removing, without authority, papers belonging to the House;
- falsifying or altering any papers belonging to the House or formally submitted to a committee of the House;
- deliberately altering, suppressing, concealing or destroying a paper required to be produced for the House or a committee;
- without reasonable excuse, failing to attend before the House or a committee after being summoned to do so;
- without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee;
- without reasonable excuse, disobeying a lawful order of the House or a committee;
- interfering with or obstructing a person who is carrying out a lawful order of the House or a committee;
- bribing or attempting to bribe a member to influence the member's conduct in respect of proceedings of the House or a Committee;
- bribing or attempting to bribe a witness;
- assaulting, threatening or disadvantaging a member, or a former member, on account of the member's conduct in Parliament; and
- divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House.<sup>26</sup>

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<sup>26</sup> Ibid [264]. There are additional contempts that have been omitted here relating specifically to members of parliament, and therefore not pertinent to the discussion in this thesis.

It is alarming, and an affront to the rule of law, that a person can be punished for an offence that is only defined in the most broad of terms. The lack of specificity creates great uncertainty in relation to what matters will constitute contempts. This, of course, has the potential to lead to arbitrariness. In general, houses and committees follow the precedents set by those before them.<sup>27</sup> However, there has been and remains a resistance to definitively list what constitutes a contempt.<sup>28</sup> The UK Joint Committee on Parliamentary Privilege declared that ‘the categories of conduct constituting contempt are not closed’,<sup>29</sup> paving the way for future conduct previously not considered to constitute contempt to later be found to constitute contempt.

## **1.2 The power to punish contempts**

The power to punish contempts varies across jurisdictions. Only the Legislative Assembly of the Australian Capital Territory has no punitive power to punish contempts.<sup>30</sup> Legislation in the Northern Territory expressly provides for judicial review of any warrant for imprisonment for contempt.<sup>31</sup> The powers of the New

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<sup>27</sup> J.A.G Griffith and Michael Ryle, *Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 1989) 85.

<sup>28</sup> See for example, 1984 Joint Committee Report; Legislative Council Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privileges and Contempts of Parliament, Parliament of Western Australia, *Report* (2009).

<sup>29</sup> 1999 UK Report, above n 25, [264].

<sup>30</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 24.

<sup>31</sup> *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 26.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

South Wales Parliament are extremely limited, being able only to impose penalties on witnesses that refuse to answer lawful questions.<sup>32</sup>

The contempt powers of the Victorian and South Australian Houses of Parliament are the same as those of the United Kingdom House of Commons at a specified date.<sup>33</sup> Their power to punish contempts derives from the adoption of the ‘privileges immunities and powers’ of the House of Commons.<sup>34</sup> The House of Commons (and the House of Lords) has for centuries been recognised as having the power to punish contempt by imprisonment.<sup>35</sup>

Queensland’s Legislative Assembly has “the same power to deal with a person for contempt of the Assembly as the Commons House of Parliament of the United Kingdom had at the establishment of the Commonwealth to deal with contempt of the Commons House”,<sup>36</sup> with some qualification. “Contempt” is defined similarly to section 4 of the *Parliamentary Privileges Act 1987*,<sup>37</sup> along with a note listing

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<sup>32</sup> *Parliamentary Evidence Act 1901* (NSW) s 11. The NSW Parliament also possesses limited powers in relation to members of the parliament. See *Egan v Willis* (1998) 195 CLR 424 for a detailed discussion of the operation of the contempt power in NSW.

<sup>33</sup> 21 July 1855. See *Constitution Act 1975* (Vic) s 19; *Constitution Act 1934* (SA) s 38.

<sup>34</sup> *Constitution Act 1975* (Vic) s 19(1) stipulates that the ‘privileges immunities and powers’ of the House of Commons on 21 July 1855, the date of Royal Assent to the Victorian Constitution, will apply.

<sup>35</sup> Enid Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press, 1966) 111.

<sup>36</sup> *Parliament of Queensland Act 2001* (Qld) s 39.

<sup>37</sup> *Ibid* s 37.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



examples of contempts.<sup>38</sup> In Queensland a person can only be imprisoned for contempt after first refusing to pay a fine within a reasonable time period.<sup>39</sup>

In both Western Australia and Tasmania, the parliaments' power to punish contempts is limited to certain offences defined by statute.<sup>40</sup> In Tasmania the parliament has only the power to imprison offenders.<sup>41</sup> In Western Australia, the parliament must first impose a fine and can then imprison an offender where the fine is not paid immediately.<sup>42</sup>

Both Houses of the Commonwealth Parliament were vested with wide powers similar to Victoria and South Australia.<sup>43</sup> Section 49 of the Constitution provides:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The scope of the power was narrowed by the enactment of the *Parliamentary Privileges Act 1987* (Cth). The power to punish contempt by defamation was

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<sup>38</sup> Queensland's interpretation rules mean that this note forms part of the text of the legislation; see *Ibid* s 7.

<sup>39</sup> *Ibid* s 39.

<sup>40</sup> *Parliamentary Privileges Act 1891* (WA) s 8; *Parliamentary Privileges Act 1858* (Tas) s 3.

<sup>41</sup> *Parliamentary Privileges Act 1858* (Tas) s 3; see also Enid Campbell, 'Adjudication of Parliamentary Offences' (2003) 22(2) *University of Queensland Law Journal* 173, 173.

<sup>42</sup> *Parliamentary Privileges Act 1891* (WA) s 8.

<sup>43</sup> *Constitution Act 1901* (Cth) s 49.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

removed, except where the defamation is done in the presence of either House or a committee of a House.<sup>44</sup> The power to imprison was expressly limited to a period not exceeding six months.<sup>45</sup> Section 4 sets out elements of an offence against a House (although does not seek to restrict what may constitute an offence) in the following terms:

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.

Finally, section 9 provides that any warrant committing a person to imprisonment must provide particulars of the offence. A warrant providing particulars of an offence is likely to be subject to judicial review.<sup>46</sup>

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<sup>44</sup> *Parliamentary Privileges Act 1987* (Cth) s 6.

<sup>45</sup> *Ibid* s 7.

<sup>46</sup> Greg Lindell, 'Parliamentary Inquiries' (1995) 20 *Melbourne University Law Review* 383, 413-418; Campbell, above n 10, 197.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

## 2 THE CONTEMPT POWER IN HISTORICAL CONTEXT

The powers of the House of Commons were won in a time when the United Kingdom was under the rule of men, not the rule of law; when the King still reigned supreme. It is true to say that the powers, rights and immunities of parliaments have been “jealously guarded” for centuries ever since.<sup>47</sup> For the House of Commons, which battled the House of Lords, the courts and the Crown for centuries to establish its own independence, this could perhaps be readily explained. However, when the same powers were adopted by the Australian Parliament and other colonial legislatures, the logic was is less clear. Since then, successive parliaments have been very reluctant to voluntarily relinquish any of these powers. In the United Kingdom the power to punish contempt was a “peculiar privilege” for centuries explained as being unique to the *lex et consuetudo parliamenti*.<sup>48</sup> However, absent the historical underpinning crucial to understanding the powers, rights and immunities of the House of Commons, it is more difficult to find a compelling argument for “jealously guarding” the contempt power in the Australian context.

This chapter places the contempt power in its early historical context to demonstrate that the compelling rationale for the power centuries ago is just not persuasive in the contemporary Australian context. Any argument on the historical significance of the contempt power must fail since the peculiarities necessitating the powers of the

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<sup>47</sup> Carney, above n 11, 162.

<sup>48</sup> *Kielly v Carson* (1842) 4 Moore PC 63, 89 (Parke B).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

House of Commons do not exist in the Australian constitutional landscape, which is governed by the rule of law, and so the wholesale adoption of the UK House of Commons “privileges powers and immunities”<sup>49</sup> by the constitutional drafters must be considered both undesirable and demonstrably erroneous.

Parliaments’ use of the contempt power in Australia demonstrates that the power is in no way essential to the legislative functions of parliament. Observations of the three instances since federation when a person has been imprisoned for contempt highlight that the contempt power is both “anachronistic and petty”.<sup>50</sup>

## **2.1 Protecting Parliament's sovereignty in early English history**

Given that the majority of Australian parliaments have derived their contempt powers from the House of Commons,<sup>51</sup> to some extent or other, it is important to examine the early history of the contempt powers in the context in which they developed. The privileges and powers of the House of Commons were developed in a time before the separation of powers was clearly delineated, at a time of great jurisdictional conflicts between the crown, the courts and the two houses of

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<sup>49</sup> *Constitution Act 1901* (Cth) s 49.

<sup>50</sup> Legislative Council Select Committee, Parliament of Western Australia, *Report of Privilege Concerning the Non-compliance by Brian Easton with the Order of the House of June 22, 1994* (1994) 16 (*1994 Easton Report*).

<sup>51</sup> Except New South Wales. See discussion of the contempt power in each jurisdiction above Part 1.2.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

parliament.<sup>52</sup> It is trite to say that Australia has never faced jurisdictional struggles to the same extent. The overwhelming complexity of early British constitutional history is beyond the scope of this thesis.<sup>53</sup> However, important principles can be distilled from the key decisions regarding the peculiarities that faced the House of Commons. When contrasted with the Australian experience, this historical context demonstrates the absurdity of retaining the contempt power for Australian legislatures.

The early assertion of punitive powers by the UK Parliament, and particularly the House of Commons, reinforced the Parliament's claim to independence from the Crown.<sup>54</sup> The impetus for protection was the need to counterbalance the supreme power and divinity of the Crown, and the intolerance of questioning or impeding the will of the King.<sup>55</sup> Interference by the Crown in legal affairs dates back to the "dooms" of the 6<sup>th</sup> century<sup>56</sup> and the prerogative of the Crown was absolute until the signing of the Magna Carta in 1215.<sup>57</sup> However, even the signing of the Magna Carta did not stop the Crown from asserting its supremacy over the Parliament for centuries to come.

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<sup>52</sup> Carney, above n 11, 159.

<sup>53</sup> For a comprehensive history see Frederic William Maitland, *The Constitutional History of England* (Cambridge University Press, 1908).

<sup>54</sup> Campbell, above n 10, 189.

<sup>55</sup> Ronald Goldfarb, 'The History of the Contempt Power' (1961) 1 *Washington University Law Review* 6, 18.

<sup>56</sup> Maitland, above n 53, 1.

<sup>57</sup> *Ibid* 15.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The beginning of the struggle to free the House of Commons from interference by the Crown can be traced back to the end of the 14<sup>th</sup> century.<sup>58</sup> In *Haxey's Case* in 1397,<sup>59</sup> Thomas Haxey, thought to be a clerical proctor of the House of Commons, was condemned to death by the Lords following the introduction and subsequent passage of a bill to which King Richard II took offence. The lords passed judgment on the basis that "anyone who stirred up the Commons to make such demands was a traitor".<sup>60</sup> This action by the Lords and the Crown infuriated the Commons, which began to assert its right to determine exclusively the exercise of its privileges.<sup>61</sup> This led to the famous proclamation by Mr Speaker Thorpe in 1452 that the "determination and knowledge of that privilege belongeth to the Parliament, and not to the justices".<sup>62</sup>

Despite Thorpe's proclamation, the powers and privileges of the House of Commons remained a point of contention through the reigns of Elizabeth I and James I.<sup>63</sup> In 1629 the Crown ordered the arrest of Sir John Eliot and two other members of the House of Commons for uttering seditious language during debate. When the matter was brought before the House of Lords, the Lords declared the arrest to be invalid as against the law and privilege of Parliament.<sup>64</sup> During the stand-off between the Parliament and the Crown, the courts became increasingly reluctant to involve

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<sup>58</sup> Carney, above n 11, 162; 1984 Joint Select Committee Report, above n 22, 24.

<sup>59</sup> Cited in M L Gwyer (ed), *Anson's Law and Custom of the Constitution: Vol 1 Parliament* (Oxford University Press, 5<sup>th</sup> ed, 1922) 166-7.

<sup>60</sup> Maitland, above n 53, 241.

<sup>61</sup> Carney, above n 11, 162.

<sup>62</sup> 5 Rot Parl 239-40; cited in Jack, above n 15, 283.

<sup>63</sup> Carney, above n 11, 162.

<sup>64</sup> *Eliot's Case* (1667-87) CJ 19, 25.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

themselves in the affairs of Parliament. In 1677 the Earl of Shaftsbury was imprisoned for committing “high contempts”. Upon an application for a writ of *habeas corpus* the Court of King’s Bench held that they could not impeach the decision of the Lords, as a superior court, on a committal for contempt.<sup>65</sup> However, not all courts took the same view as in the Earl of Shaftsbury’s case. In 1689 the House of Commons held two judges of the King’s Bench, Sir Francis Pemberton and Sir Thomas Jones, to be in contempt of parliament for their decision in the case of *Jay v Topham*.<sup>66</sup>

This position taken by the courts was made more tenable at the end of the 17<sup>th</sup> century with the passing of two significant acts of parliament. The first was the declaration of the *Bill of Rights 1689* (UK), which, amongst other things, declared the supremacy of the Parliament over the Crown.<sup>67</sup> Importantly this curtailed the interference of the Crown in parliamentary affairs. The second was the passage of the *Act of Settlement 1701* (UK). Crucially the tenure of judges was secured against dismissal at the prerogative of the Crown.<sup>68</sup> After this time a judge could only be removed by the Crown at the request of both Houses of Parliament.<sup>69</sup> Despite the courts now having more freedom in their decision making, the passage of these two

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<sup>65</sup> Jack, above n 15, 283.

<sup>66</sup> (1684) 12 St Tr 822. See Enid Campbell, ‘Judges at the Bar of Parliament’ (1999) 18 *Australian Bar Review* 131.

<sup>67</sup> Carney, above n 11, 163.

<sup>68</sup> *Act of Settlement 1701* (UK) s III.

<sup>69</sup> Campbell, above n 10, 192.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

acts did not completely resolve the struggle for power between the House of Commons and the Crown. This continued into the 19<sup>th</sup> century.<sup>70</sup>

It is essential to remember that during this time the United Kingdom Parliament acted also as a judicial body, known as the High Court of Parliament.<sup>71</sup> As a result of this status as a judicial body, the law of Parliament was argued to be distinct from the common law known to the regular courts. These arguments continued to be relied upon despite the House of Commons not having acted as a judicial body since the 16<sup>th</sup> century.<sup>72</sup> On that basis Sir Edward Coke opined in the early seventeenth century that the “judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti*”.<sup>73</sup> It was argued later by the Attorney General in *Stockdale v Hansard*<sup>74</sup> that the *lex parliamenti* was as distinct from the common law as that law which was administered in the equity, admiralty and ecclesiastical courts.<sup>75</sup> This recognition as a High Court of Parliament with an exclusive *lex parliamenti* led to the Parliament being vested with powers and privileges similar to the common law courts including the power to punish contempts.<sup>76</sup>

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<sup>70</sup> See J Goldsworthy, *Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999).

<sup>71</sup> Carney, above n 11, 163.

<sup>72</sup> G R Elton (ed), *The Tudor Constitution: Documents and Commentary* (Cambridge University Press, 1960) 229.

<sup>73</sup> Sir Edward Coke, *Fourth Part of the Institutes of the Laws of England* (E. and R. Brooke, 1797) 14.

<sup>74</sup> *Stockdale v Hansard* (1839) 112 ER 1112.

<sup>75</sup> *Ibid.*

<sup>76</sup> Carney, above n 11, 164.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



Despite this, the competing views around the role of the common law courts in relation to the Parliament's exercise of its powers and privileges continued into the nineteenth century. The view expressed by Sir Coke was taken up by De Grey CJ in *Brass Crosby's Case*<sup>77</sup> who held that "we cannot judge of the laws and privileges of the House [of Commons] because we have no knowledge of these laws and privileges".<sup>78</sup> These remarks were repeated by Lord Brougham LC in 1831, when his Lordship observed that "a court knows nothing judicially of what takes place in Parliament till what is done there becomes an act of the legislature".<sup>79</sup>

The settling of the relationship between the common law courts and the House of Commons began in the 19<sup>th</sup> century. As *Erskine May* provides:

It became clear that some of the earlier claims to jurisdiction made in the name of privileges by the House of Commons were untenable in a court of law; that the law of Parliament was part of the general law; that its principles were not beyond the judicial knowledge of the judges, and that the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive.<sup>80</sup>

To this end it is important to note that many of the concessions were made by the House of Commons, and not by the courts. A pivotal case was *Burdett v Abbot*<sup>81</sup> in 1810. Burdett, a member of the House of Commons, was adjudged (by the House) to be guilty of contempt for the publication of a scandalous paper. Mr Burdett brought

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<sup>77</sup> (1771) 95 ER 1005.

<sup>78</sup> *Brass Crosby's Case* (1771) 95 ER 1005, 1011.

<sup>79</sup> *Wellesley v Duke of Beaufort* (1831) 36 ER 538.

<sup>80</sup> Jack, above n 15, 287.

<sup>81</sup> (1810) 104 ER 554.

an action in trespass against the Speaker when his house was entered by force in execution of a warrant issued in the Speaker's name. *Erskine May* considers that the decision in *Burdett v Abbot* is significant in two ways, namely that:

[I]n the first place, the House of Commons did not resort to...committing for contempt counsel and others concerned in the prosecution of the Speaker. The House preferred voluntarily to submit one of its privileges to the jurisdiction of the courts. Secondly, following further dispute on the old battlegrounds of whether the law of Parliament was a particular law or part of the law of the land, and whether the courts were entitled (or indeed bound) to decide questions of privilege coming incidentally before them, the Speaker's action was wholly vindicated.<sup>82</sup>

The other elements fundamental to the settling of the relationship discussed by *Erskine May* can be found in the case of *Stockdale v Hansard*.<sup>83</sup> Messrs Hansard were the official printers of the House of Commons. They printed (on order of the House) a report written by an inspector of prisons, which was laid on the Table of the House. Mr Stockdale brought an action against Messrs Hansard for libel. Messrs Hansard, represented by the Attorney General, relied exclusively on the privileges of the House and its order to print. Lord Denman concluded that the House had exclusive jurisdiction over its own internal proceedings, but it was for the courts to determine whether or not a claim of privilege fell within that category.<sup>84</sup> His

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<sup>82</sup> Jack, above n 15, 287.

<sup>83</sup> (1839) 112 ER 1112.

<sup>84</sup> *Ibid* 1118.

Lordship also denied that the *lex parliamenti* was unknown to the common law judges.<sup>85</sup> Lord Coleridge observed that:

... whether directly arising or not, a court of law I conceive must take notice of the distinction between privilege and power; and where the act has not been done within the House (for of no act there done can any tribunal in my opinion take cognisance but the House itself) and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of law.<sup>86</sup>

As the powers of the Parliament became more settled, and less besieged by the Crown, the House of Commons became less aggressive in pressing its privileges through committal.<sup>87</sup> The House of Commons last committed for contempt in the late 19<sup>th</sup> century.<sup>88</sup> Charles Bradlaugh, a Member of the House, was restrained by a motion of the House from taking oath. The House further ordered the Serjeant to exclude Bradlaugh from the House. Bradlaugh sought a declaration from the court that the order of the House had been made *ultra vires*. The Court decided against Bradlaugh and held that the House of Commons has exclusive jurisdiction in relation to its internal affairs.<sup>89</sup>

It is clearly evident from even this brief synopsis of the formative years of the House of Commons that the contempt power developed in a unique and peculiar context. It

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<sup>85</sup> Ibid 1122.

<sup>86</sup> Ibid 1197.

<sup>87</sup> Griffith, above n 27, 91.

<sup>88</sup> Jack, above n 15, 291.

<sup>89</sup> *Bradlaugh v Gosset* (1884) 12 QBD 271.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

was developed during a time when the monarch still reigned supreme, and the rule of law had not been fully recognised. This context is incredibly significant, and cannot be overlooked in any debate surrounding the contempt power in the Australian context. As Carney points out:

Parliamentary privileges were Parliament's response to threats posed by the Crown and the courts, often at the instigation of the Crown, to the capacity of Parliament to function as the sovereign legislature. Parliament used its privileges to secure this independence, and the dignity of its sovereignty.<sup>90</sup>

Even writing 100 years ago Maitland observed that “their importance in the past has been great; their importance in the present we are apt, I think, to overrate”.<sup>91</sup> This observation resonates even better in the contemporary context, particularly in the Australian constitutional context.

## **2.2 The contempt power in the Australian historical context**

The earliest decisions from the Privy Council and from the British colonies make it abundantly clear that the contempt powers of the House of Commons were based on principles that have no application to other legislative bodies. It is for this reason, and with the support of these judgments, that it is contended that the contempt power never had, and certainly no longer has, any place in Australian legislatures. This argument can best be summarised by the findings of the US Supreme Court in the

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<sup>90</sup> Carney, above n 11, 165.

<sup>91</sup> Maitland, above n 53, 374.

case of *Kilbourn v Thompson*<sup>92</sup> when considering whether the US Congress had contempt powers like the House of Commons. The Court held that:

The powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States – a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election.<sup>93</sup>

In *Kielly v Carson*<sup>94</sup> the Privy Council, in deciding whether the House of Assembly of Newfoundland had the power to commit for contempt, held that legislatures of the British colonies were afforded “such [privileges] as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute”.<sup>95</sup> Colonial legislatures did not immediately inherit all of the powers and privileges of the House of Commons.<sup>96</sup> Baron Parke said:

“It is said... that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms a part of the

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<sup>92</sup> (1880) 103 US 168.

<sup>93</sup> *Kilbourn v Thompson* (1880) 103 US 168, 189.

<sup>94</sup> (1842) 4 Moore PC 63.

<sup>95</sup> *Ibid* 88.

<sup>96</sup> Carney, above n 11, 166.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

common law of the land, and according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishment for contempt being one.<sup>97</sup>

It is worth noting that the view of the Privy Council found relatively recent support in a decision of the Supreme Court of New South Wales. In *Armstrong v Budd*,<sup>98</sup> Herron CJ followed the decision in *Kielly v Carson*<sup>99</sup> in holding that the New South Wales Parliament did not have any inherent power to punish for contempt. His Honour relied on the High Court of Parliament argument to conclude that the House of Commons “is not a representative body with legislative functions, but derives its powers by virtue of ancient usage and prescription”.<sup>100</sup>

The accepted view quickly became that colonial legislatures had the inherent power to take protective, but not punitive, action. In *Fenton v Hampton*<sup>101</sup> the Privy Council declared invalid a decision of the Legislative Council of Van Diemen’s Land to commit the Comptroller-General at the Council’s pleasure. In delivering its decision, the Privy Council highlighted the distinction that the action was punitive, aimed at punishing the Comptroller-General.<sup>102</sup> Sir James Colville neatly summarised the

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<sup>97</sup> *Kielly v Carson* (1842) 4 Moore PC 63, 89.

<sup>98</sup> [1969] 1 NSWLR 649.

<sup>99</sup> (1842) 4 Moore PC 63.

<sup>100</sup> *Armstrong v Budd* [1969] 1 NSWLR 649, 653.

<sup>101</sup> (1858) 11 Moore PC 347.

<sup>102</sup> *Ibid* 349.

distinction between punitive and non-punitive powers in the later case of *Doyle v Falconer*:<sup>103</sup>

It is necessary to distinguish between a power to punish for contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation... There is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.

This important distinction has repeatedly found support, in the Privy Council,<sup>104</sup> the Supreme Court of New South Wales,<sup>105</sup> the High Court of Australia,<sup>106</sup> and the Supreme Court of Canada.<sup>107</sup>

Notwithstanding the Privy Council's declaration that colonial legislatures did not inherit contempt powers at common law, it found that privileges and powers could be enacted for the peace, order and good government of the colony.<sup>108</sup> During the 19<sup>th</sup> century it became accepted that legislatures could enact legislation providing a power to punish contempts.<sup>109</sup> Despite the historical peculiarities leading to the contempt powers of the House of Commons, the majority of the Australian colonies

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<sup>103</sup> (1866) Law Rep 1 PC 328.

<sup>104</sup> *Barton v Taylor* (1885) 11 AC 197, 203.

<sup>105</sup> *Armstrong v Budd* [1969] 1 NSW 649; *Egan v Willis* (1996) 40 NSWLR 650, 667-9.

<sup>106</sup> *Willis v Perry* (1912) 13 CLR 592.

<sup>107</sup> *Landers v Woodworth* (1878) 2 SCR 158.

<sup>108</sup> *Doyle v Falconer* (1866) Law Rep 1 PC 328, 341.

<sup>109</sup> Carney, above n 11, 167.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

enacted privileges legislation.<sup>110</sup> Particularly since the time of federation in 1901, and in the case of the Commonwealth Parliament, the historical peculiarities relating to the House of Commons have never existed in Australia. The Commonwealth Parliament has never acted as a judicial body, separation of legislative and judicial power is constitutionally secured, and the independence of judges is ensured by the *Judiciary Act 1903* (Cth).

Unlike the troubled history between the Courts and the House of Commons in the United Kingdom, the judiciary and the legislatures in Australia have had a relatively sound relationship with regards to parliamentary privileges and powers. The privileges and powers of Parliament have for the most part avoided scrutiny of the courts. This to a large extent is due to the courts declaration on its role in relation to matters of parliamentary privilege. The seminal case is *R v Richards; Ex parte Fitzpatrick and Browne*.<sup>111</sup> The High Court had to consider a grant of writs of habeas corpus in relation to warrants of imprisonment issued by the Speaker of the Legislative Assembly. Chief Justice Dixon, in delivering the decision of the Court, said that the case "is one of considerable importance, but we think its difficulty is not equal to its importance".<sup>112</sup> In explaining the role of the courts in matters concerning parliamentary privilege, Dixon CJ enunciated the test, which remains unchallenged in the High Court to the present day:

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<sup>110</sup> The exception being New South Wales, the Parliament of which has never had the power to punish contempts. See the discussion above Part 1.2.

<sup>111</sup> (1955) 92 CLR 157. The facts of the case are discussed below 29-30.

<sup>112</sup> Ibid 161 (Dixon CJ).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



Stated shortly, it is this: 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.<sup>113</sup>

This test, the High Court held, had been determined conclusively by the established authority of the Privy Council in *Dill v Murphy*<sup>114</sup> and *Speaker of the Legislative Assembly of Victoria v Glass*.<sup>115</sup>

The Court took the view that section 49 of the Constitution was expressed in "unequivocal terms"<sup>116</sup> as bestowing upon Commonwealth Parliament all of the powers, privileges and immunities of the House of Commons,<sup>117</sup> further holding that "the words are incapable of a restricted meaning".<sup>118</sup> Any argument that the contempt powers conflicted with the constitutional separation of powers were quickly shut down by Dixon CJ:

Perhaps, one might even say, scientifically – they belong to the judicial sphere. But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.<sup>119</sup>

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<sup>113</sup> Ibid 162 (Dixon CJ).

<sup>114</sup> (1864) 15 ER 784.

<sup>115</sup> (1871) LR 3 PC App 560.

<sup>116</sup> *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167 (Dixon CJ).

<sup>117</sup> Ibid 164 (Dixon CJ).

<sup>118</sup> Ibid 165 (Dixon CJ).

<sup>119</sup> Ibid 167 (Dixon CJ).

There is a strong argument that the High Court erred in taking this approach. The separation of powers issue is discussed further below in Part 3.1. Kirby J in *Egan v Willis*<sup>120</sup> suggested that the reasoning in *R v Richards; Ex parte Fitzpatrick and Browne* must be open to reconsideration.<sup>121</sup> However, to date the issue has not come back before the High Court for reconsideration. Two Supreme Court decisions, *Slipper v Magistrates Court of the ACT*<sup>122</sup> and *Criminal Justice Commission v Nationwide News*<sup>123</sup> indicate that the position in *R v Richards; Ex parte Fitzpatrick and Browne* remains the approach taken by the judiciary to this day. Whilst Kirby J has indicated that a modern High Court may take a different approach to the court as constituted at the time of *R v Richards; Ex parte Fitzpatrick and Browne*, it appears that, given the Parliament's sparing use of the contempt power, the issue is unlikely to come before the High Court in the near future. As such, it is imperative that the Commonwealth Parliament, in light of this historical context of the contempt power and its uncomfortable position with the rule of law in Australia, should move to abolish the power to imprison without waiting on any invalidating decision from the High Court.

### **2.3 Modern usage of the contempt power in Australia**

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<sup>120</sup> (1998) 195 CLR 424.

<sup>121</sup> *Egan v Willis* (1998) 195 CLR 424, 494.

<sup>122</sup> [2014] ACTSC 85.

<sup>123</sup> [1996] 2 Qd R 444.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

Although parliamentary privileges committees continue to investigate alleged contempts and breaches of privilege on a regular basis, penalties are seldom imposed.<sup>124</sup> The Senate Privileges Committee has in its history made only 12 findings that a contempt had been committed.<sup>125</sup> Out of those 12 occasions, only twice was a penalty imposed, once in 1971 and once in 2001.<sup>126</sup> In the 1971 case a newspaper published the findings of a draft committee report. The Committee found that the publication constituted a breach of privilege and recommended that the editor and publisher be reprimanded.<sup>127</sup> The Report was adopted by the Senate and the relevant persons attended the Senate and were reprimanded. In the 2001 case The Australian newspaper was found to have published evidence received *in camera* by a Senate committee.<sup>128</sup> The Senate administered a “serious reprimand” to Nationwide News Pty Ltd.<sup>129</sup> In the other 10 cases where a contempt finding was made, the Senate imposed no penalty.<sup>130</sup>

The House of Representatives Committee of Privileges and Members’ Interests has made a finding of contempt on 16 occasions.<sup>131</sup> Of those 16 occasions, a penalty was only imposed in relation to three. Generally, the House of Representatives (and

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<sup>124</sup> Campbell, above n 10, 206.

<sup>125</sup> Evans, above n 18, 84-5.

<sup>126</sup> Ibid 85.

<sup>127</sup> Senate Committee of Privilege, Parliament of Australia, *1<sup>st</sup> Report: Report upon Articles in the Sunday Australian and the Sunday Review of 2 May 1971* (1971).

<sup>128</sup> Senate Committee of Privilege, Parliament of Australia, *99<sup>th</sup> Report: Possible Unauthorised Disclosure of a Submission to the Parliamentary Joint Committee on Corporations and Securities* (2001) 18.

<sup>129</sup> Ibid 19.

<sup>130</sup> Evans, above n 18, 85.

<sup>131</sup> Wright, above n 19, 866-913.

indeed all legislatures with contempt powers) have preferred to merely record that an act was in fact a contempt, and in limited circumstances have taken the additional step of reprimanding or admonishing the offender.<sup>132</sup> Parliament has often said that to do otherwise would be a waste of time of the House and likely “offend the dignity of the House”.<sup>133</sup> In only two instances has the House of Representatives reprimanded for contempt. In 1965 the publishers of the *Canberra Times* and ten other newspapers were found in contempt and reprimanded for publishing an advertisement containing a photograph of the House in session.<sup>134</sup> In 2007 Ms Harriett Swift was found in contempt of the House for deliberately misrepresenting a Member by producing and distributing documents fabricating the Member’s letterhead and signature. The House formally reprimanded Ms Swift.<sup>135</sup>

The only time that the Commonwealth Parliament has committed individuals to prison for contempt of Parliament was in the Bankstown Observer matter.<sup>136</sup> The case is significant as it led to the only High Court decision that considers the contempt powers of the Commonwealth Parliament.<sup>137</sup> The Hon Charles Morgan MHR, took issue with a newspaper article in the Bankstown Observer which

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<sup>132</sup> Campbell, above n 10, 203.

<sup>133</sup> 1984 Joint Committee Report, above n 22, 1.

<sup>134</sup> House of Representatives Committee of Privileges, Parliament of Australia, *Report of the Committee of Privileges Relating to an Advertisement in the Canberra Times and other Australian Newspapers on 18<sup>th</sup> August 1965* (1965) 14-6.

<sup>135</sup> House of Representatives Standing Committee of Privileges, Parliament of Australia, *Report on Allegations of Documents Fraudulently and Inaccurately Written and Issued in a Member’s Name* (2007) 12.

<sup>136</sup> House of Representatives Standing Committee of Privileges, Parliament of Australia, *Special Report from the Standing Committee of Privileges Relating to an Article Published in the Bankstown Observer on Thursday 28<sup>th</sup> April 1955* (1955).

<sup>137</sup> The significance of the High Court decision in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 has been discussed above 24-7.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

implicated him in an "immigration racket" and declared him unfit to be a member of the House if the allegations were true.<sup>138</sup> In the Chamber the Member argued that the article was intended to blackmail and intimidate.<sup>139</sup> The House debated the matter and resolved that it should be referred to the Committee of Privileges.<sup>140</sup> The Committee heard from Mr Fitzpatrick, proprietor of the newspaper, and Mr Browne, author of the articles, who both agreed that they had no evidence to support the allegations raised in the articles.<sup>141</sup> The Committee adjudged the two men guilty of contempt, and a motion was passed in the House that both men should appear at the bar of Parliament.<sup>142</sup> Mr Fitzpatrick "offered a humble apology",<sup>143</sup> whereas Mr Browne asserted his rights to a fair trial and made references to Adolf Hitler and the Star Chamber.<sup>144</sup> Following a lengthy debate, including a proposed amendment to fine the two men, which was defeated, the House moved that Mr Fitzpatrick and Mr Browne be imprisoned until 10 September 1955.<sup>145</sup> Unsurprisingly the decision of the House to imprison Mr Fitzpatrick and Mr Browne led to widespread condemnation, not least of all by the press.<sup>146</sup>

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<sup>138</sup> Harry Evans, 'Fitzpatrick and Browne: Imprisonment by a House of the Parliament' (2009) *Papers on Parliament No. 52*, 3.

<sup>139</sup> *Ibid.*

<sup>140</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1955, 352-5.

<sup>141</sup> Evans, above n 138, 4.

<sup>142</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1955, 1630.

<sup>143</sup> Evans, above n 138, 4.

<sup>144</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1955, 1625-7.

<sup>145</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1955, 1627-64.

<sup>146</sup> See for example 'The Gaoling of Browne and Fitzpatrick', *Sydney Morning Herald* (Sydney) 11 June 1955, 2.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The Western Australian Parliament has twice exercised its power to imprison for contempt. The first case was when the Legislative Assembly imprisoned newspaper editor John Drayton to imprisonment in Fremantle Gaol for a fortnight.<sup>147</sup> The Kalgoorlie Sun newspaper published articles that were highly critical of a government minister's handling of a gold mining lease. The articles accused the minister, amongst other things, of having "robbed the prospector to fatten the capitalist".<sup>148</sup> A Select Committee was established to "take immediate steps to prove [Mr Drayton's] innocence or guilt", and to "find out if possible the reason for the malicious libels".<sup>149</sup> Mr Drayton was called to appear before the Committee, which he did, however he refused to give evidence on the basis that he could only offer hearsay evidence.<sup>150</sup> The Committee reported the non-compliance to the Premier and the Legislative Assembly, and a resolution was passed that Mr Drayton would be fined 50 pounds.<sup>151</sup> When Mr Drayton failed to pay the fine immediately – despite explaining that he was "without means, owing to circumstances over which [he had] no control"<sup>152</sup> – the Legislative Assembly passed a motion committing him to prison.<sup>153</sup> Mr Drayton was pardoned and released on 8 December 1904,<sup>154</sup> with a majority of the Legislative Assembly agreeing that he had been sufficiently punished.<sup>155</sup>

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<sup>147</sup> Heather Goodwin, Arran Steward and Melville Thomas, 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25 *Western Australian Law Review* 187, 192.

<sup>148</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 November 1904, 947-8.

<sup>149</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 October 1904, 623-5.

<sup>150</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 November 1904, 944.

<sup>151</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 November 1904, 1063.

<sup>152</sup> D Black (ed), *The House on the Hill* (Parliament of Western Australia, 1991) 394.

<sup>153</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 1904, 1170.

<sup>154</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 December 1904, 1714-5.

<sup>155</sup> Goodwin, above n 147, 192.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The second - and much more recent - Western Australian example was the Brian Easton matter in 1995. In 1992 Mr Easton presented a petition that was tabled in the Legislative Council that “went beyond the normal range of petitions and accused a number of people of criminal misbehaviour...perjury and corruption”.<sup>156</sup> A Select Committee was established to investigate whether there had been a breach of privilege. The Committee recommended that “the House adjudge Easton guilty of a breach of privilege of the House; and Easton be required to apologise in writing to the House for having petitioned the House in a misleading manner”.<sup>157</sup> No action was taken on the report of the committee until 1994. The Legislative Council drafted the following letter of apology and demanded that Mr Easton sign the apology by 5 July 1994:

To the President and Members of the Legislative Council in Parliament assembled: I, Brian Mahon Easton, in answer to an order of the Legislative Council made on 22 June 1994 hereby make my apology to the Legislative Council and respectfully request that I be released from any further penalty that I may otherwise incur.<sup>158</sup>

Easton refused to apologise. The majority of the Select Committee recommended that Easton should be imprisoned for his failure to apologise, a contempt in itself.<sup>159</sup> In minority the Hon Mark Neville MLC said that “imprisonment would be a harsh penalty and a censure by the House for failure to comply... is the most appropriate

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<sup>156</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 10 November 1992, 6383.

<sup>157</sup> Legislative Council Select Committee, Parliament of Western Australia, *Report of Privilege Concerning the Petition of Brian Easton* (1992) 68.

<sup>158</sup> 1994 Easton Report, above n 50, 19.

<sup>159</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 9 August 1994, 2835-6.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

available remedy”.<sup>160</sup> The Hon Kim Chance MLC, also in dissent from the majority said:

Regardless of the circumstances, imprisonment should not be an option available to this, or any, House of Parliament. It is possible that the exercise of committal powers for this offence would generally be regarded as anachronistic and petty.<sup>161</sup>

Despite these sensible recommendations by the Members in minority, the majority (voting along party lines) recommended that Mr Easton be imprisoned to be released “any time after Mr Easton has spent seven days in custody”.<sup>162</sup> The motion passed and Mr Easton was arrested and imprisoned in Casuarina Prison for seven days.<sup>163</sup> Indeed, the decision to imprison for refusing to apologise was, as the Hon Kim Chance MLC said, “petty and anachronistic”. Unsurprisingly the affair led to widespread condemnation and public outrage. Inside the Parliament the Leader of the Opposition, the Hon Jim McGinty MLA, said that he found the imprisonment of a person “without any right to be heard... to be quite horrific” and vowed that a Labor government would transfer the contempt powers to the courts.<sup>164</sup> It is disappointing that the Labor government once elected never followed through with this promise. The Easton affair is a clear example of how the contempt power demonstrably offends the supremacy of the rule of law.

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<sup>160</sup> 1994 Easton Report, above n 50, 16.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* 17.

<sup>163</sup> Goodwin, above n 147, 196.

<sup>164</sup> S O’Malley, ‘McGinty Pledge on Contempt Law’, *The West Australian* (Perth) 21 December 1994, 10.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



Contempt powers have been used in other states and territories to varying degrees, but no other Parliament has taken the severe step of imprisoning a member of the public since federation. The Legislative Assembly of Victoria came close to imprisoning two newspaper publishers shortly before federation in 1899. Reporters from the newspapers had reported on evidence given by witnesses appearing before a parliamentary committee that was open to the public and the media.<sup>165</sup> The investigating committee ordered the imprisonment of the two publishers, finding that the reports were intended to unduly influence the committee.<sup>166</sup> Ultimately the two publishers apologised to the Parliament, and the warrants for imprisonment were dropped.<sup>167</sup>

Despite the limited recourse to imprisoning members of the public for contempt, it remains a very real power. As long as the power to imprison remains an option for parliaments, the potential for its use should not be ignored.<sup>168</sup> Parliaments have generally avoided much scrutiny of their powers to punish contempts by exercising the power only rarely and with extreme caution. Both the House of Representatives<sup>169</sup> and the Senate<sup>170</sup> of the Commonwealth Parliament have a stated policy of using the contempt power as seldom as possible. But of course, the parliaments' resolve to use the imprisonment power only as an extreme last resort does not mean that the draconian power should remain available. It is true that no

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<sup>165</sup> Waugh, above n 17, 40.

<sup>166</sup> See review of the case in 1999 UK Report, above n 25, 264.

<sup>167</sup> Waugh, above n 17, 40.

<sup>168</sup> *Ibid* 30.

<sup>169</sup> Wright, above n 19, 777.

<sup>170</sup> Evans, above n 18, 88.

person has been imprisoned for contempt of parliament in Australia since Brian Easton in 1995. However, that should not be a reason for overlooking reform. So long as the power remains, the supremacy of the rule of law in Australia is threatened.

Reform has been considered in more recent times in a number of jurisdictions. At the Commonwealth level, the most comprehensive review of Parliament's penal jurisdiction was undertaken by the 1984 Joint Select Committee. The Committee found that the Commonwealth Parliament should retain its penal jurisdiction and that there should be "no substantive changes made to the law of contempt".<sup>171</sup> However, the Committee resolved that the penal jurisdiction should be exercised sparingly, recommending:

That each House should exercise its penal jurisdiction in any event as sparingly as possible and only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members its committees or its officers from improper obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its committees.<sup>172</sup>

Although this recommendation appears to be generally followed by the House, it was never implemented in any formal way. What's more, whilst the House still retains the power to imprison, it may still be used. There has been no other comprehensive review of the Commonwealth Parliament's contempt power in more recent times.

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<sup>171</sup> 1984 Joint Committee Report, above n 22, 1.

<sup>172</sup> *Ibid.*

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

From time to time committees have recommended the abolition of the imprisonment power. In 2009 a Select Committee of the Western Australian Legislative Council recommended that "the power of the Western Australian Parliament to imprison be abolished, save that the Parliament should retain power to detain temporarily persons misconducting themselves".<sup>173</sup> In making its recommendation the Committee said that "the sanction of imprisonment in the present day is no longer necessary or appropriate to uphold the privileges of Parliament"<sup>174</sup> and further that "imprisonment should be available only to a court of law".<sup>175</sup> This recommendation was unfortunately never implemented. Earlier this year a differently constituted Standing Committee of the Legislative Council reported that it "does not support the abolition of the Council's power to imprison" and "sees no compelling reason" to do so.<sup>176</sup> This contrasting opinion highlights the fickle nature of parliamentary committees and the danger in relying on non-binding resolutions as opposed to a legislative abolition of the imprisonment power. Abolition of the power to imprison was also supported by the UK House of Commons Committee of Privileges in 1977,<sup>177</sup> and the UK Joint Committee on Parliamentary Privilege in 1999.<sup>178</sup> To date the UK Parliament has not implemented the recommendations of these two committees.

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<sup>173</sup> 2009 WA Contempt Report, above n 28, 23.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Legislative Council Standing Committee on Procedure and Privilege, Legislative Parliament of Western Australia, *Review of the Report of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament* (2014) 14 (2014 WA Powers and Penalties Report).

<sup>177</sup> House of Commons Select Committee of Privileges, Parliament of the United Kingdom, *Recommendations of the Select Committee on Parliamentary Privilege* (1977) (1977 UK Report).

<sup>178</sup> 1999 UK Report, above n 25, 324.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

It should be apparent from this chapter that the power to imprison for contempt is unjustified in the Australian context and offensive to Dicey's conception of the rule of law. The contempt powers of the House of Commons were developed as a result of the "peculiar" nature of the UK Parliament acting as a High Court of Parliament exercising judicial functions, and owes a lot to the conflict between Parliament and the courts and the Crown. This has never been an issue for Australian legislative bodies. The early Privy Council decisions make it clear that the power to imprison was never intended for the colonial legislatures. The usage of the imprisonment power in Australia causes serious concern, highlighting an inappropriate use of a "petty and anachronistic" power. The historical evolution of the penal powers of parliaments demonstrates that the power is contradictory to the rule of law.

### 3 CONTEMPT AND THE CONSTITUTION

Imprisonment is an extreme step resulting in the removal of fundamental personal liberties. It has been classically regarded, and for great reason, that the power to imprison should be exercised only by an independent judiciary.<sup>179</sup> Since Federation the Australian Constitution has enshrined the doctrine of the separation of judicial power, ensuring that judicial power is exercised only by an independent judiciary and free from the arbitrary decision making of the executive and the legislature.<sup>180</sup>

How, then, in a constitutional system devoted to the doctrine of the separation of powers and the supremacy of the rule of law, can the Parliament still be empowered to exercise a penal jurisdiction? This chapter considers the argument that the contempt power is entirely inconsistent with the constitutional separation powers, and thus incompatible with the rule of law. Judicial power should be exercised only by courts established by Chapter III of the Constitution, and on that basis the jurisdiction to punish contempts ought to be transferred. It then considers how section 49 of the Constitution should be interpreted, arguing that it should be read down so that the powers of the Commonwealth Parliament can only be valid to the extent that they are necessary in supporting the legislative functions of the Parliament. Finally, it considers the more novel interaction of the contempt power with the implied freedom of political communication.

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<sup>179</sup> Dicey, above n 7, 110.

<sup>180</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Street v Queensland Bar Association* (1989) 168 CLR 461; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

### 3.1 The constitutional separation of powers

When a parliament imprisons a member of the public for committing a contempt, it performs a function that has traditionally been understood to be an exclusive function of the courts of law.<sup>181</sup> This exercise by a parliament of the power to imprison would seem, on its face, to be at odds with the constitutionally entrenched separation of powers and the rule of law. The separation of judicial power, according to Deane J, is the most important constitutionally implied guarantee, ensuring that citizens can be subjected to judicial power only by the courts of law.<sup>182</sup> This separation of judicial and executive power ensures that the rule of law prevails over the arbitrary decisions of rule-makers, a most fundamental principle of the rule of law.<sup>183</sup> This section considers whether the contempt powers offend the doctrine of separation of powers and, if so, why we should be concerned.

#### 3.1.1 Separation of powers in the Australian Constitution

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<sup>181</sup> Dicey, above n 7, 110; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 1. There are noted exceptions to this generalisation, which will be articulated more comprehensively in this section.

<sup>182</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J).

<sup>183</sup> Dicey, above n 7, 110.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The Australian Constitution implies a separation of judicial and legislative power.<sup>184</sup>

The structural basis for the separation of judicial power was entrenched in Chapter III of the Constitution. Section 71 provides that:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction...

Although the separation is not explicitly prescribed in the text of the Constitution, it was implied from the beginning of federation. Quick and Garran in their 1901 treatise wrote that the Constitution:

Vests the legislative, executive and judicial powers respectively in distinct organs; and, though no specific definition of these powers is attempted, it is conceived that the distinction is peremptory, and that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional.<sup>185</sup>

Whether the founders of the Constitution intended a doctrine of separation of powers is unclear.<sup>186</sup> However, the separation of powers featured heavily in the early decisions of the High Court,<sup>187</sup> and by 1910 respected constitutional commentator W H Moore commented that "between the legislative and executive power on the one hand and judicial power on the other, there is a great cleavage".<sup>188</sup>

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<sup>184</sup> Peter Gerangelos (ed), *Winterton's Australian Federal Constitutional Law* (Lawbook Co., 3<sup>rd</sup> ed, 2013) 1208.

<sup>185</sup> J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720.

<sup>186</sup> Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96, 102.

<sup>187</sup> See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

<sup>188</sup> W H Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 2<sup>nd</sup> ed, 1910) 96-7. D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

In the contemporary context the fundamental importance of the doctrine of the separation of powers should not be understated. In *Street v Queensland Bar Association*<sup>189</sup> Deane J said that:

The Constitution contains a significant number of express or implied guarantees of rights and immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch III (s 71).<sup>190</sup>

In *Polyukhovich v Commonwealth*<sup>191</sup> Deane J opined that:

The Constitution is structured upon the doctrine of separation of judicial from legislative and executive powers. Chapter III gives effect to that doctrine in so far as the vesting and exercise of judicial power are concerned. Its provisions constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested".<sup>192</sup>

...

Accordingly, the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power.<sup>193</sup>

Further judicial support for the separation of power was found in *Attorney-General (Cth) v Breckler*,<sup>194</sup> where Kirby J said that:

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<sup>189</sup> (1989) 168 CLR 461.

<sup>190</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J).

<sup>191</sup> (1991) 172 CLR 501.

<sup>192</sup> See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

<sup>193</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 606-7.

<sup>194</sup> (1999) 197 CLR 83.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



The wisdom, particularly in a federation (indeed in any modern society), of separating the judicial power so that it “cannot be usurped or infringed by the executive or the legislature”<sup>195</sup> remains as true today as it was when the Constitution was adopted. The importance of maintaining the separation of the judicial power and protecting it from attempts to undermine or alter the constitutional scheme set up by Ch III,<sup>196</sup> demands continuing vigilance on the part of the courts.<sup>197</sup>

There are recognised exceptions to the doctrine of the separation of powers. The most common of these exceptions is executive detention, for example in relation to foreign aliens.<sup>198</sup> Imprisonment for contempt of parliament has long been held to be an exception to the doctrine. The leading authority considering the exceptions to the separation of powers is the High Court decision of *Chu Kheng Lim v Minister for Immigration*,<sup>199</sup> where it was said that:

There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth...

The exceptions referred to were the gaoling of the accused persons pending trial, detaining those suffering from mental or infectious illnesses, punishment for contempt of Parliament....<sup>200</sup>

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<sup>195</sup> *Liyana v The Queen* [1967] 1 AC 259, 289.

<sup>196</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 115.

<sup>197</sup> *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 125.

<sup>198</sup> Gerangelos, above n 184, 1242.

<sup>199</sup> (1992) 176 CLR 1.

<sup>200</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26 (Brennan, Deane and Dawson JJ).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

It remains unclear what the rationale of the Court was in establishing punishment for contempt of parliament as an exception to the constitutional requirement for judicial power to be exercised only by Chapter III courts. No reason was provided in *Chu Kheng Lim v Minister for Immigration*, save for to note that it is a recognised exception. Since that decision, the High Court has consistently recognised contempt of parliament as an exception.<sup>201</sup> In *Polyukhovich v Commonwealth* Deane J explained the impetus for the exception in the following terms:

The first exception relates to the power of each of the Houses of Parliament to punish for contempt or breach of privilege... [which] flows from the provisions of s 49 of the Constitution which, unlike s 51, were not expressly made subject to Ch III.<sup>202</sup>

This reasoning appears to be flawed. The correct approach to interpreting section 49 of the Constitution is discussed further below in Part 3.2. In *Egan v Willis*<sup>203</sup> Kirby J, referring to the separation of powers issue raised in argument in *R v Richards; Ex parte Fitzpatrick and Browne*,<sup>204</sup> commented that this aspect of the decision "may one day require reconsideration".<sup>205</sup> Whilst the opportunity for reconsideration by the High Court has not arisen, it is clear that the exception is illogical and inconsistent with the rule of law.

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<sup>201</sup> See *Kruger & Ors v Commonwealth* (1997) 146 ALR 126, 192 (Gaudron J); *Re Woolley & Anor; Ex parte Applicants M276/2003* (2004) 210 ALR 369, [50] (Gleeson J); *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 468 (Gummow and Hayne JJ); *South Australia v Totani* [2010] HCA 39, [382] (Heydon J).

<sup>202</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 626-7 (Deane J).

<sup>203</sup> (1998) 158 CLR 527.

<sup>204</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 95 CLR 156.

<sup>205</sup> *Egan v Willis* (1998) 158 CLR 527.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

### 3.1.2 *The (il)logic of the contempt of parliament exception*

Generally speaking exceptions to the exclusive exercise of judicial power are justified on the basis that the resulting detention is not punitive in character or intended to punish the detained person. In *Chu Kheng Lim v Minister for Immigration* their Honours held that “the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing guilt”.<sup>206</sup> On that basis, it has been held that detention which is not punishment for an offence is not an exercise of judicial power. In *Al-Kateb v Godwin*<sup>207</sup> executive detention of refugees and asylum seekers under the *Migration Act 1958* (Cth) was found not to “impinge upon the separation of powers required by the Constitution” as “immigration detention is not detention for an offence”.<sup>208</sup>

Conversely to the scenario in *Al-Kateb v Godwin*, imprisonment for contempt of parliament is blatantly punitive in nature and designed to punish the perpetrator. To that extent, the categorisation of the Commonwealth Parliament's contempt powers as an exception to the doctrine of separation of powers is somewhat mystifying. Traditionally, the High Court has expressed time and time again a great reluctance to

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<sup>206</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

<sup>207</sup> (2004) 219 CLR 562.

<sup>208</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 650-1 (Hayne J). See also *Behrooz v Department of Immigration* (2004) 219 CLR 486, 499 (Gleeson CJ).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

allow non-judicial bodies to adjudge and punish criminal guilt.<sup>209</sup> The other exceptions referred to in *Chu Kheng Lim v Minister for Immigration* and the cases that followed permitted executive detention only where that detention is non-punitive in nature. The only other departure from that general rule, allowing a non-judicial body to exercise a punitive jurisdiction, is the power for military tribunals to enforce military discipline, in some circumstances, but not all.<sup>210</sup> The rationale for the military exception is “largely pragmatic and based on historical and practical considerations”.<sup>211</sup> The military power requires different considerations to the contempt power of Parliament. Suffice it to say for the purposes of this thesis that the military power exception is also not without its difficulties. Decisions on the military power highlight “considerable divergence of view among the judges”.<sup>212</sup> The attempt to remove the military tribunal from the military command structure was invalidated by the Court as it required the Australian Military Court to exercise the judicial power of the Commonwealth without complying with the Chapter III constitutional requirements.<sup>213</sup> The High Court has since confirmed that there must be a system of review within the military command for the military power to remain valid.<sup>214</sup> The difficulty of the Court in justifying the military power exception, albeit on different grounds to the contempt power, provides further weight to the fact that the High Court, and the Constitution, strive to maintain a robust separation of judicial power.

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<sup>209</sup> See generally *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffiths CJ); *Commissioner of Taxation (Cth) v Munro* (1926) 38 CLR 153, 173 (Isaacs J); *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 413, 422 (Starke J); *Harris v Caladine* (1991) 172 CLR 84, 174 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *South Australia v Totani* [2010] HCA 39, [382].

<sup>210</sup> See *R v Bevan, Ex parte Elias and Gordon* (1942) 66 CLR 452.

<sup>211</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627 (Deane J).

<sup>212</sup> Leslie Zines, *The High Court and the Constitution* (Butterworths, 4<sup>th</sup> ed, 1997) 272.

<sup>213</sup> *Lane v Morrison* (2009) 239 CLR 230.

<sup>214</sup> *Nicholas v Commonwealth* (2011) 244 CLR 66.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

### 3.1.3 *The power to imprison: legislative or judicial in nature?*

Another important, but easily answered, question is whether or not the power to imprison is legislative or judicial in nature. The necessity of asking this question, the answer to which on its face ought to seem trite, is the reasoning of the High Court in *R v Richards; Ex parte Fitzpatrick and Browne*.<sup>215</sup> The Court took the view that the contempt power does not offend the doctrine of the separation of powers as it is a legislative power, not a judicial power. Dixon CJ said:

... [t]hroughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential, or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically – perhaps, one might even say, scientifically – they belong to the judicial sphere.<sup>216</sup>

It would seem that the Court made a fundamental, and highly regrettable, error of law on this point. His Honour classifies the contempt power as “*not strictly judicial but as belonging to the legislature*”. Although the power may arguably *belong* to the legislature, it is clear that, in any event, the power exercised ought to be categorised as judicial power. The “many authorities” his Honour refers to are presumably the early decisions of the House of Lords and Privy Council that I considered

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<sup>215</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 95 CLR 156.

<sup>216</sup> *Ibid* 167 (Dixon CJ).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

extensively above.<sup>217</sup> If that is the case, then the High Court completely failed to appreciate the underlying historical context so vitally important to the contempt powers as incidentally belonging to the High Court of Parliament, a *judicial* organ.

The contempt power is clearly a judicial power for, where Parliament imprisons a member of the public for contempt of Parliament, it "performs the duties of prosecutor, judge and gaoler".<sup>218</sup> The decision that the contempt power ought properly be characterised as legislative in nature must be erroneous. Chief Justice Dixon was correct in saying that "theoretically...[the contempt power]...belongs to the judicial sphere".<sup>219</sup> But more than just theoretically, the contempt power should in practice be exercisable only by a Chapter III Court. To find otherwise is to diminish the supremacy of the rule of law embodied in the constitutional separation of powers. If the court had have undertaken a more detailed examination of the contempt powers in its historical context, it ought to have decided that the Commonwealth Legislative Assembly's power to imprison offends the doctrine of the separation of powers. Anne Twomey has suggested that the Court:

"[m]ight have concluded that the power to punish people for defamatory words about members of Parliament was not essential for the protection of Parliament or its legislative functions, and being punitive in nature it was a judicial power which could not be appropriately exercised by a legislative body".<sup>220</sup>

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<sup>217</sup> See above Part 2.1.

<sup>218</sup> Joint Select Committee on Procedure in Cases of Privilege, Parliament of Australia, *Progress Report* (1908) 4 (*1908 Privilege Report*).

<sup>219</sup> *R v Richards; ex parte Fitzpatrick and Browne* (1955) 95 CLR 156, 167 (Dixon CJ).

<sup>220</sup> Twomey, above n 9, 98.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The High Court has consistently held that determination of guilt and the imposition of criminal punishment is an exercise of judicial power.<sup>221</sup> This judicial power should be exercised only by a Chapter III court. There is no logical basis for the contempt power of parliaments being an exception to the doctrine of the separation of powers.

### 3.2 Reading down section 49 of the Constitution

In *R v Richards; Ex parte Fitzpatrick and Browne*<sup>222</sup> the High Court in upholding the validity of the Commonwealth Legislative Assembly's contempt powers held that:

a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words [in section 49], which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.<sup>223</sup>

To the contrary it would have been entirely appropriate for the High Court to have adopted an approach to the interpretation of section 49 of the Constitution that supports the doctrine of the separation of powers and upholds the rule of law. Section 49 should be read down so that only those powers that are necessary to support the

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<sup>221</sup> See for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Commissioner of Taxation (Cth) v Munro* (1926) 38 CLR 153, 173 (Isaacs J); *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 413, 422 (Starke J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258; *South Australia v Totani* [2010] HCA 39, [382].

<sup>222</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

<sup>223</sup> *Ibid* 167 [Dixon CJ].

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

legislative functions of the parliament remain.<sup>224</sup> This approach would constitutionally invalidate the Parliament's power to imprison members of the public as punishment for committing a contempt, but retain the power to temporarily detain.

Any consideration of the correct approach to interpreting section 49 of the Constitution must begin by placing the provision in its context. Section 49 provides that:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of the Parliament and of its members and committees, at the establishment of the Commonwealth.

The flaws associated with the wholesale adoption of the powers, privileges and immunities of the UK House of Commons in section 49 of the Constitution have been discussed extensively above.<sup>225</sup> Those arguments need not be repeated here. Interestingly, the prospect of the Commonwealth Parliament exercising judicial power in punishing contempts was not discussed at all at the Constitutional Conventions.<sup>226</sup> This is despite many of the delegates expressing concerns in relation to the broad power being given to the Parliament by the text of section 49.<sup>227</sup> Left unaltered, the "powers" of the UK House of Commons as at 1901 were extensive. The determination of what constituted a contempt was completely unfettered, as was

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<sup>224</sup> Twomey, above n 9, 88.

<sup>225</sup> See above, Chapter 2.

<sup>226</sup> Twomey, above n 9, 93.

<sup>227</sup> See *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1 April 1891, 585-6 (Wrixon, Douglas, Sir Downer); and *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 256 (Reid).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



recognised by the 1984 Joint Select Committee.<sup>228</sup> To that extent, the Commonwealth Parliament would be left with powers that it would otherwise be constitutionally prohibited from exercising.<sup>229</sup> This would include the power to adjudge criminal guilt and impose punishments. As discussed in the preceding section, this offends the constitutionally entrenched separation of judicial power.<sup>230</sup>

The structure of the Constitution supports the reading down of section 49 to invalidate the contempt power. Chapter I of the Constitution, titled “The Parliament”, outlines the legislative power. Unlike the House of Commons, which traditionally operated as a part of the High Court of Parliament with both legislative and judicial functions,<sup>231</sup> the Australian Parliament was not given judicial functions. This view was articulately opined by Forster J in *Attorney-General (Cth) v MacFarlane*:<sup>232</sup>

...The power to act as a ‘grand inquest’ or ‘grand inquisitor’ is, when properly understood, a function of the House of Commons and not a power. The House [of Commons] has a legislative function and has an inquisitorial function. ..This inquisitorial function does not depend in any way upon the legislative function and could and does operate quite independently of it...It is true to say that the House of Commons had in 1900 these two functions, legislative and inquisitorial, it seems plain to me that the only function committed by the Imperial Parliament to the Commonwealth Parliament was the legislative function and not the inquisitorial function.<sup>233</sup>

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<sup>228</sup> 1984 Joint Select Committee Report, above n 22, [3.21]-[3.24].

<sup>229</sup> Twomey, above n 9, 94.

<sup>230</sup> See above part 3.1. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

<sup>231</sup> Carney, above n 11, 89; *Kielly v Carson* (1842) 4 Moore PC 63, 89.

<sup>232</sup> (1971) 18 FLR 150.

<sup>233</sup> *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150, 157. See also *Aboriginal Legal Service of Western Australia Inc v Western Australia* (1993) 9 WAR 297.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The exercise of judicial power was granted exclusively to the courts set out in Chapter III of the Constitution. Given this separation of legislative and judicial power, section 49, which is found in Chapter I outlining the legislative power, should be read down to invalidate the contempt power as it is an exercise of judicial power that is reserved for Chapter III courts.

Whether or not section 49 ought to be read down depends on the method of constitutional interpretation. The methods of constitutional interpretation are numerous and a cause of great disagreement.<sup>234</sup> Arguably the best approach to constitutional interpretation is “one that makes sense of its text, structure, historical meaning and intended purposes understood as an integrated whole”.<sup>235</sup> A discussion of approaches to constitutional interpretation would merit a thesis in itself. It is sufficient for the purposes of this thesis to say that the High Court’s decision in *R v Richards; Ex parte Fitzpatrick and Browne*<sup>236</sup> placed too high an emphasis on the text of the Constitution alone<sup>237</sup> without giving due consideration to the Constitution’s structure and contemporary context. It seems axiomatic that to read section 49 in isolation is a fragmented and undesirable approach to contemporary constitutional interpretation. As Laurence Tribe has commented:

To be worthy of the label, any “interpretation” of a constitutional term or provision must at least seriously address the entire text out of which a particular fragment has been selected for interpretation, and must at least take seriously the architecture of the institutions that the text

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<sup>234</sup> See generally Gerangelos, above n 184, 1358-1475.

<sup>235</sup> Ibid 1359.

<sup>236</sup> (1955) 92 CLR 157.

<sup>237</sup> Presumably influenced by the interpretation approach in the oft-cited decision of *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

defines...Read in isolation, most of the Constitution's provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government for a nation of states.<sup>238</sup>

If a structural view of the Constitution was evaluated, the entrenched separation of powers must necessarily lead to a reading down of section 49 of the Constitution.

If section 49 was read down in the manner suggested, the Commonwealth Parliament would still retain the powers to support its legislative functions. This would necessarily include the power to detain a person (on a temporary basis) who, for example, is disrupting proceedings or obstructing the work of the Parliament or a committee.<sup>239</sup> However, it would invalidate the power of the Parliament to imprison for contempt as it offends the doctrine of the separation of powers so fundamental to the rule of law. Such an interpretation would then be consistent with the approach taken by the High Court in the last three decades - post the decision in *R v Richards; Ex parte Fitzpatrick and Browne*<sup>240</sup> - in relation to the powers of military tribunals,<sup>241</sup> where the Court has found a balance that ensures the exercise of power by military powers remains consistent with the doctrine of the separation of powers.

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<sup>238</sup> Laurence Tribe, 'Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation' (1995) 108 *Harvard Law Review* 1221, 1235.

<sup>239</sup> Twomey, above n 9, 97.

<sup>240</sup> (1955) 92 CLR 157.

<sup>241</sup> See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

### 3.3 The implied freedom of political communication

An argument that parliaments' power to imprison for contempt should be invalidated by virtue of the constitutionally implied freedom of political communication is not, admittedly, an easy one to make. It appears that the argument has only been articulated academically on one occasion in 1999 by Professor Enid Campbell.<sup>242</sup> Whilst there is merit in the arguments put forward by Professor Campbell, the High Court's application of the implied freedom since its original conception in the *Nationwide News Pty Ltd v Willis*<sup>243</sup> and *Australian Capital Television v Commonwealth*<sup>244</sup> has been incredibly conservative. In fact, until the High Court invalidated New South Wales political donation laws last year in *Unions New South Wales v State of New South Wales*,<sup>245</sup> a law had not been invalidated on the basis of the implied freedom since 1992.<sup>246</sup> The implied freedom has made a resurgence in the High Court in the last couple of years,<sup>247</sup> giving greater relevance to the argument presented in this part. However, the extent of the operation of the implied freedom remains unclear. It is a real possibility that, if tested in a case before the High Court, the implied freedom *could* be used to invalidate the Commonwealth Parliament's power to imprison for contempt.<sup>248</sup> In any event, the argument taken in totality with

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<sup>242</sup> Campbell, above n 10, 196.

<sup>243</sup> (1992) 177 CLR 1.

<sup>244</sup> (1992) 177 CLR 106.

<sup>245</sup> [2013] HCA 58.

<sup>246</sup> Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 *University of Queensland Law Journal* 59, 66.

<sup>247</sup> See *Unions New South Wales v State of New South Wales* [2013] HCA 58; *Monis v The Queen* [2013] HCA 4; *Attorney General for the State of South Australia v Corporation of the City of Adelaide* [2013] HCA 3; *Tajjour v State of New South Wales* [2014] HCA 35.

<sup>248</sup> Campbell, above n 10, 208.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

the other constitutional difficulties discussed above, can only lend further support to an argument that the power to imprison is inconsistent with the Constitution and the rule of law.

### 3.3.1 *Content of the implied freedom*

Freedom of political communication was first implied into the Constitution by the High Court in 1992. In two consecutive decisions, the High Court began its “implied rights revolution”<sup>249</sup> and became “embroiled in controversy”<sup>250</sup> when it held on both occasions that the Constitution provided impliedly for a freedom of political communication. In *Nationwide News Pty Ltd v Willis*<sup>251</sup> legislation proscribing words that were calculated to bring the Australian Industrial Relations Commission into disrepute was declared to be invalid. In *Australian Capital Television v Commonwealth*,<sup>252</sup> handed down simultaneously, the Court invalidated legislation prohibiting political advertising on radio and television during election periods. In invalidating the laws, the majority of the High Court, albeit taking different roads to get there, came to a conclusion that the constitutional system of representative and

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<sup>249</sup> Nicholas Aroney, “The Implied Rights Revolution – Balancing Means and Ends?” in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (2009) 173.

<sup>250</sup> Gerangelos, above n 184, 974.

<sup>251</sup> (1992) 177 CLR 1.

<sup>252</sup> *Ibid.*

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

responsible government impliedly gives the electorate the freedom to discuss political issues.<sup>253</sup> Justice Brennan said:

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential (as the European Court of Human Rights recognised in *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153 at 178): it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments. Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy.<sup>254</sup>

Chief Justice Mason made a similar finding in *Australian Capital Television v Commonwealth*:

Absent such freedom of communication, representative government would fail to achieve its purpose of government of the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, to be truly representative... the *raison d'être* of freedom of communication in relation to public affairs and political discussion is to enhance the political process...thus making representative government more efficacious.<sup>255</sup>

The different opinions of the justices of the High Court in the early freedom of political communication cases created deep divisions, with strong dissenting judgments in the few years following.<sup>256</sup>

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<sup>253</sup> Crilly, above n 246, 61.

<sup>254</sup> *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 47.

<sup>255</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139.

<sup>256</sup> See *Theopanos v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Pty Ltd* (1994); *Cunliffe v Commonwealth* (1994) 182 CLR 272.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

It was not until the 1997 decision in *Lange v Australian Broadcasting Corporation*<sup>257</sup> that the High Court unanimously held that the Australian Constitution implied a freedom of political communication. The Court held that the freedom comes not from the concept of “representative and responsible government” per se,<sup>258</sup> but from the structure and text of the Constitution.<sup>259</sup> Commentators have argued that the reliance on the text and structure of the Constitution to support the implied freedom is unsustainable.<sup>260</sup> However, it remains the dominant rationale for the implied freedom of political communication. The formulation of a two-stage test of validity under the implied freedom was enunciated by the Court in the following terms:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?<sup>261</sup>

The *Lange* test was modified slightly in *Coleman v Power*.<sup>262</sup> The second limb of the test was reformulated to read:

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<sup>257</sup> (1997) 189 CLR 520.

<sup>258</sup> As was the majority argument in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1.

<sup>259</sup> Specifically the requirement for members of parliament to be elected by the people in sections 7 and 24, the need for a referendum to amend the Constitution in section 128, and the requirement for Ministers to be drawn from the legislature in section 64.

<sup>260</sup> Dan Meagher, ‘What is ‘Political Communication’? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438, 442; Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668, 696-9.

<sup>261</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

<sup>262</sup> (2004) 220 CLR 1.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

Is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?<sup>263</sup>

The *Lange/Coleman* test remains the current test in Australian Constitutional law. However, the formula has not been seamlessly applied,<sup>264</sup> and has attracted strong criticism in the High Court from time to time.<sup>265</sup> It is important to note that the freedom of political communication is a limitation on legislative power only, it is not a source of individual rights.<sup>266</sup>

### 3.3.2 Does the implied freedom constrain parliaments' contempt powers?

If the implied freedom can be applied to the penal powers of parliaments to imprison for contempt, the *Lange/Coleman* test will certainly be relevant in the context of the Commonwealth House of Representatives and Senate. In *Theopanos v Herald & Weekly Times Ltd*<sup>267</sup> it was held that the implied freedom also applies to the common law,<sup>268</sup> which means that the implied freedom can be applied to those state legislatures which have contempt powers akin to those of the House of Commons

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<sup>263</sup> Ibid 32 (McHugh J).

<sup>264</sup> See in particular the six separate judgments produced in each of *Coleman v Power* (2004) 220 CLR 1 and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

<sup>265</sup> Perhaps the biggest critic has been Callinan J. See his judgments in *Roberts v Bass* (2002) 212 CLR 1, 101-2; *Coleman v Power* (2004) 220 CLR 1, 109; and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 293.

<sup>266</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

<sup>267</sup> (1994) 182 CLR 104.

<sup>268</sup> Ibid 128.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



without any statutory limitation.<sup>269</sup> Freedom of political communication has also been found by the High Court to be an implied term of State constitutions.<sup>270</sup> This could act to limit the contempt powers in those legislatures where the contempt powers are derived from the State constitutions or legislative enactments.<sup>271</sup> Theoretically then, the implied freedom of political communication can operate to limit contempt powers in all Australian legislatures. However, the High Court is yet to decide whether the implied freedom constrains the powers and privileges of parliaments.<sup>272</sup>

The Commonwealth Parliament has already, to a limited extent, constrained its own power to punish contempt where the alleged contempt involved political communication. The *Parliamentary Privileges Act 1987* (Cth) removed the power to punish libels as contempts. Section 6 provides that:

(1) Words or acts shall not be taken to be an offence against a House by reason only that those words are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or Committee.

The caveat provided by subsection 6(2) means that defamation or criticism made inside the parliament or before a parliamentary committee can still be considered a contempt and punished under section 7. These penalties include imprisonment not

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<sup>269</sup> Victoria and South Australia.

<sup>270</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232-3.

<sup>271</sup> Queensland, Western Australia and Tasmania.

<sup>272</sup> Campbell, above n 10, 207.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

exceeding six months,<sup>273</sup> or a fine not exceeding \$5000 for a natural person or \$25,000 for a corporation.<sup>274</sup> Other contempts, such as interference and disturbance offences listed as contempts in the Senate Resolutions,<sup>275</sup> could be seen to inhibit freedom of political communication. It is difficult to say conclusively, as the High Court has never attempted to provide a definition of "political communication".<sup>276</sup> However, it would appear that the contempt powers could be used to curtail political communication in the sense of criticism of the House, a committee or a member.

If the *Parliamentary Privileges Act 1987* (Cth) and the common law curtail political communication, could the High Court invalidate the law on the basis of the implied freedom? It is clear that the implied freedom limits legislative power in relation to criminal offences.<sup>277</sup> Surely, then, any legislative or common law provision providing a penal sanction should be afforded the constitutional protection of the implied freedom of political communication. Professor Campbell has argued that there "seems to be no reason why the powers of Parliaments to make laws respecting the powers, privileges and immunities of their Houses, committees and members should not be subject to the same constraint".<sup>278</sup> So long as the *Lange/Coleman* test is satisfied, any laws of Parliament providing penal sanctions should be subject to the implied freedom. The first limb of the *Lange/Coleman* test, "does the law effectively burden freedom of communication about government or political matters, either in its

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<sup>273</sup> *Parliamentary Privileges Act 1987* (Cth) s 7(1).

<sup>274</sup> *Ibid* s 7(5).

<sup>275</sup> *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 6.

<sup>276</sup> Meagher, above n 260, 439.

<sup>277</sup> See *Levy v Victoria* (1997) 189 CLR 579.

<sup>278</sup> Campbell, above n 10, 200.

terms, operation or effect?"<sup>279</sup> can clearly be answered in the affirmative in relation to parliaments' contempt powers. Where an Australian parliament has exercised the power to imprison, it has been because of a defamatory or critical publication in relation to the parliament or a member.<sup>280</sup>

The second limb of the *Lange/Coleman* test asks whether the law is "reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government..."<sup>281</sup> It is difficult to see how imprisonment for contempt of parliament could possibly be considered as "reasonably appropriate and adapted". The judgment of Sir Colville in *Doyle v Falconer* highlighted:<sup>282</sup>

It is necessary to distinguish between a power to punish for contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation... There is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.

If the "legitimate end" of the contempt power is the self-preservation of parliament, as is often cited, then the power to imprison is not a necessity. The restriction on political communication coupled with the threat of imprisonment is arguably an

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<sup>279</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

<sup>280</sup> See above Part 2.3.

<sup>281</sup> *Coleman v Power* (2004) 220 CLR 1, 32 (McHugh J).

<sup>282</sup> (1866) Law Rep 1 PC 328.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

impermissible curtailment of the constitutionally implied freedom under the *Lange/Coleman* test.<sup>283</sup>

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<sup>283</sup> Campbell, above n 10, 200.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

## 4 CONTEMPT AND PROCEDURAL FAIRNESS

The duty to accord natural justice, or procedural fairness, is in modern times universally accepted and arguably the most important principle of administrative law.<sup>284</sup> Aside from this, it is also a fundamental aspect of the rule of law.<sup>285</sup> Justice Mason in *Kioa v West*<sup>286</sup> put the obligation in the following terms:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.<sup>287</sup>

It is true to say that a determination of contempt of parliament is not an administrative decision, and any House of Parliament or Committee would not therefore be strictly bound to comply with the rules of procedural fairness that would otherwise apply to administrative bodies and tribunals.<sup>288</sup> However, the principles of natural justice still ought to be applied by committees of privilege.<sup>289</sup> As French CJ has recently asserted, "the norms of procedural fairness reach well beyond the confines of the courtroom... They are important societal values applicable to any form of official decision-making which can affect individual interests".<sup>290</sup> In

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<sup>284</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 683.

<sup>285</sup> Raz, above n 4, 217.

<sup>286</sup> (1985) 159 CLR 550.

<sup>287</sup> *Ibid* 584 (Mason J).

<sup>288</sup> Lindell and Carney Review, above n 12, 1.

<sup>289</sup> Robyn McClelland and Robina Jaffray, 'Natural Justice Issues for Parliamentary Committees', (Paper presented at ANZACATT Professional Development Seminar for Parliamentary Officers, Wellington) January 2005, 2-3.

<sup>290</sup> Robert French, 'Procedural Fairness: Indispensable to Justice?', (Paper presented at Sir Anthony Mason Lecture, University of Melbourne Law School) 7 October 2010, 1.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

*Ainsworth v Criminal Justice Commission*<sup>291</sup> the High Court noted the wide reach of procedural fairness:

It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may "destroy, defeat or prejudice a person's rights, interests, or legitimate expectations" ... thus, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise.<sup>292</sup>

To that extent, then, the need for committees of privilege to afford procedural fairness is "based not on legality but on legitimacy".<sup>293</sup>

In recent years committees of privilege at both the Federal and State level have reported the importance of ensuring procedural fairness for those accused of contempts.<sup>294</sup> Both the House of Representatives<sup>295</sup> and the Senate,<sup>296</sup> along with other Australian legislative bodies,<sup>297</sup> now seek to ensure that the principles of natural justice and procedural fairness are observed, to the extent possible, in contempt proceedings.

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<sup>291</sup> (1992) 175 CLR 564.

<sup>292</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [24] (Mason J).

<sup>293</sup> Roger Macknay and Julie Falck, 'Oversight as it Intersects with Parliament', (Paper presented at Australasian Study of Parliament Group (WA Chapter) Annual Conference, Perth) 4 October 2013, 10.

<sup>294</sup> See for example, House of Representatives Standing Committee on Privilege and Members Interests, Parliament of Australia of Australia, *Review of the Procedures of the Committee* (2008) 7-8 (2008 *Procedures Report*); Legislative Assembly Procedure and Privileges Committee, Parliament of Western Australia, *Procedural Fairness and Powers of the House* (2010) 5.

<sup>295</sup> Wright, above n 19, 771.

<sup>296</sup> Evans, above n 18, 79.

<sup>297</sup> See for example the 2014 WA Powers and Penalties Report, above n 176; Ethics Committee, Queensland Parliament, *Matters of Privilege referred by the Speaker on 26 May 2011 and 18 August 2011 (Report No. 118)* (2011); Parliament of Victoria, *Appearing Before a Parliamentary Committee: Guidelines for the Rights and Responsibilities of Witnesses* (2008).

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

Despite these endeavours, it is doubtful that any Australian legislative body or committee of privilege could possibly accord true procedural fairness to a person accused of contempt. Respected academics Professors Lindell and Carney, in their comprehensive review of privilege matters and procedural fairness undertaken for the House of Representatives in 2007,<sup>298</sup> concluded that "it was not possible for the House or its Privileges Committee to accord procedural fairness to those accused of serious contempt at the level which contemporary standards of justice require".<sup>299</sup> Following that review, and a report from the Committee of Privileges and Members' Interests,<sup>300</sup> the House of Representatives adopted procedures for the examination of witnesses.<sup>301</sup> While these procedures, and similarly the procedures adopted by the Senate in the 1988 resolutions,<sup>302</sup> go some way to providing better procedural fairness outcomes for those accused of contempts, it remains the case that they cannot meet the standard that the community standards now expect.

This chapter considers the shortcomings of the procedure for dealing with contempts in relation to procedural fairness. The procedure will be assessed against the two traditional elements of procedural fairness – the rule against bias (*nemo debet esse iudex in propria sua causa*) and the hearing rule (*audi alteram partem*).<sup>303</sup> In relation

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<sup>298</sup> Lindell and Carney Review, above n 12.

<sup>299</sup> Ibid 2.

<sup>300</sup> 2008 Procedures Report, above n 294.

<sup>301</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12890-1.

<sup>302</sup> *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*.

<sup>303</sup> Creyke, above n 284, 684.

to the rule against bias, it will be contended that neither a legislative body nor a committee of privilege can possibly be an independent and impartial tribunal when dealing with matters of contempt. Further, the procedure is likely to fall foul of Australia's obligations under Article 14 of the *International Covenant on Civil and Political Rights 1976*. In relation to the hearing rule, it will be contended that the procedures in relation to contempt deny an accused person the full right to be heard. The denial of procedural fairness offends the supremacy of the rule of law.<sup>304</sup>

#### 4.1 The rule against bias

The rule against bias was famously formulated by Coke CJ in *Dr Boneham's Case*<sup>305</sup> as the Latin maxim *quia aliquis non debet esse iudex in propria causa*,<sup>306</sup> which can be understood to mean that “decision making must be and be seen to be impartial”.<sup>307</sup> To accord procedural fairness and uphold the rule against bias, any contempt determination must then be free from both actual and perceived bias. As Lord Hewart CJ held in *R v Sussex Justices; Ex parte McCarthy*,<sup>308</sup> “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.<sup>309</sup> It is difficult to see how a legislature, in considering and deciding an allegation of contempt, can be free certainly of perceived bias, but also quite likely actual bias.

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<sup>304</sup> Raz, above n 4, 217.

<sup>305</sup> (1610) 8 Co Rep 113b.

<sup>306</sup> *Ibid* 118.

<sup>307</sup> Creyke, above n 284, 684.

<sup>308</sup> [1924] 1 KB 256.

<sup>309</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*



An apprehension of bias will arise where “a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide”.<sup>310</sup> The test for reasonable apprehension of bias can otherwise be characterised in these terms:

Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds.<sup>311</sup>

In *Webb v R*<sup>312</sup> Deane J said that there are at least four distinct categories of bias disqualification:

The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside of, the proceedings, gives rise to an apprehension of bias. The third category is disqualification by association. It will often overlap with the first (eg, a case where a dependent spouse or child has a direct pecuniary interest in the proceedings) and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or

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<sup>310</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>311</sup> *R v Commonwealth Conciliation and Arbitration Commission; Ex parte the Angliss Group* (1969) 122 CLR 546, 553-4.

<sup>312</sup> (1994) 181 CLR 41.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

otherwise involved in, the proceedings. The fourth is disqualification by extraneous information.<sup>313</sup>

It is difficult to envisage how the public could have any confidence in a privilege committee, or a House, appearing to be an independent and impartial tribunal in dealing with an allegation of contempt.

Lindell and Carney have noted that “obviously, complete impartiality is not possible where members of the House adjudge an allegation of contempt against their own House”.<sup>314</sup> This is obvious given that, when a legislative body considers any allegation of contempt, it “performs the duties of prosecutor, judge and gaoler”.<sup>315</sup> Regardless, the parliaments could still act to ensure independence and impartiality to the extent that it is possible. Presently, neither the House of Representatives nor the Senate have adopted any binding rules on the issue of bias. The Senate Resolutions<sup>316</sup> are completely silent on the issue. Similarly, the House of Representatives procedures do not address the situations in which a member of the committee of privileges should be excluded from participating in a case of alleged contempt. Although it may be standard practice for a member to exclude herself or himself where there is a potential conflict,<sup>317</sup> it is bewildering that there is no formal resolution outlining a protocol for the exclusion of committee members in situations

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<sup>313</sup> Ibid 74.

<sup>314</sup> Lindell and Carney Review, above n 12, 19.

<sup>315</sup> 1908 Privilege Report, above n 218, 4.

<sup>316</sup> *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*.

<sup>317</sup> See Senate Committee of Privileges, Parliament of Australia, *Report on Committee’s Work Since Passage of Privilege Resolutions of 25 February 1988* (1991) 42-6.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

where there is a reasonable apprehension of bias.<sup>318</sup> The only justification provided for this unofficial policy of self-recusal is lack of concern in regards to bias in comparable jurisdictions.<sup>319</sup> This justification is not persuasive.

The importance of the rule against bias is strengthened by Australia's obligations under the *International Covenant on Civil and Political Rights 1976*, to which Australia is a signatory.<sup>320</sup> Article 14(1) relevantly states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

It is arguable that the current procedure of both the House of Representatives and the Senate in dealing with matters of contempt violates the right to an independent and impartial tribunal guaranteed by Article 14. A comparison may be drawn from the well-known decision of the European Court of Human Rights in *Demicoli v Malta*.<sup>321</sup> In that case, it was held that the Maltese House of Representatives violated Article 6(1) of the *European Convention on Human Rights 1950* by failing to provide an independent and impartial tribunal to determine the allegations of contempt levelled against Mr Demicoli.<sup>322</sup> The Court found that Mr Demicoli's contempt proceedings were criminal proceedings (despite Malta's Constitutional Court declaring that they

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<sup>318</sup> Lindell and Carney Review, above n 12, 20.

<sup>319</sup> Ibid 19.

<sup>320</sup> Entry into force for Australia 13 November 1980.

<sup>321</sup> [1991] 1 EHRR 47.

<sup>322</sup> Article 6(1) *European Convention on Human Rights 1950* is comparable to Article 14(1) *International Covenant on Civil and Political Rights 1976*.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

were not),<sup>323</sup> that “the House of Representatives undoubtedly exercised a judicial function in determining the applicant’s guilt”,<sup>324</sup> and that consequently Mr Demicoli ought to have been afforded the protections under Article 6.<sup>325</sup> Although the Australian Parliament’s contempt procedure’s compliance with Article 14 of the *International Covenant on Civil and Political Rights 1976* is unlikely to ever be scrutinised judicially, it should be treated as a serious concern that the Federal Parliament is likely breaching an international convention aimed at protecting basic human rights.

Even supposing it is possible to eliminate apprehended bias in a committee of privilege, which is dubious, the problem is further exacerbated in that the committee does not make any final determination. The decision to impose any penalty, including in the most serious case imprisonment, can only be made by the legislature, which is not bound by the recommendations of the committee of privilege.<sup>326</sup> This cannot possibly be consistent with the rule against bias. As Professor Pitt-Cobbett noted as far back as 1908:

A political assembly has never been, and never will be, capable of exercising judicial functions with that calmness and impartiality which are essential to their proper discharge... Trial by an interested tribunal must always be foreign to British ideas of justice.<sup>327</sup>

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<sup>323</sup> *Demicoli v Malta* [1991] 1 EHRR 47, 58-9.

<sup>324</sup> *Ibid* 61.

<sup>325</sup> *Ibid* 62.

<sup>326</sup> In the House of Representatives see: Wright, above n 19, 774; in the Senate see Evans, above n 18, 91.

<sup>327</sup> 1908 Privilege Report, above n 218, 691.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

This procedure for dealing with allegations of contempt cannot possibly be consistent with the rule against bias, not only a fundamental principle of administrative law but also an obligation under international law and key to the rule of law.

## 4.2 The hearing rule

The second limb of procedural fairness, the hearing rule, was classically stated by Mason J in *Kioa v West*:<sup>328</sup>

...when an order is to be made which will deprive a person of some right or interest or legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>329</sup>

Rights in that context include personal liberty and proprietary rights,<sup>330</sup> both of which can be affected by contempt proceedings where a penalty of imprisonment or fine is imposed respectively. The required content to fulfil the hearing rule will necessarily depend on the circumstances of the case.<sup>331</sup> As Tucker LJ stated in *Russell v Duke of Norfolk*:<sup>332</sup>

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the

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<sup>328</sup> (1985) 159 CLR 550.

<sup>329</sup> *Ibid* 582 (Mason J).

<sup>330</sup> *Ibid*.

<sup>331</sup> *Creyke*, above n 284, 759.

<sup>332</sup> [1949] 1 All ER 109.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth...But, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.<sup>333</sup>

The requirements for procedural fairness are greatest in relation to judicial decisions, where “curial standards of procedural fairness will apply to the fullest extent”.<sup>334</sup> As has already been extensively argued above, it must be found that a parliament making a determination in relation to contempt is acting judicially. In light of this, high standards of procedural fairness ought to be applied. However, as Lindell and Carney have observed, the great range of penalties available to a legislature in relation to contempt could lead to differing procedural fairness requirements, relative to the severity of the punishment.<sup>335</sup> Arguably, the highest standards should apply in relation to all contempt proceedings as the imposition of the severest penalties is available in all cases. As it was put in the 1984 Joint Select Committee Report:

It is a very serious matter for anyone whose conduct attracts the attention of one of the Houses and is brought before its Privileges Committee. Accordingly, the onus is on the Houses to accord to him the fairest of hearings, and the most complete opportunity to defend himself.<sup>336</sup>

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<sup>333</sup> *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118. Further judgments adopting a similar approach have been provided in *Board of Education v Rice* [1911] AC 179, 182 (Lord Loreburn LC); *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 503 (Kitto J); *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 513 (Aickin J); and *Kioa v West* (1985) 159 CLR 550, 614 (Brennan J).

<sup>334</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 69 (Gleeson CJ and Hayne J).

<sup>335</sup> Lindell and Carney Review, above n 12, 12.

<sup>336</sup> 1984 Joint Select Committee Report, above n 22, [7.51].

As outlined above, the content of the hearing rule will vary from case to case, depending on the nature of the power being exercised.<sup>337</sup> In the case of contempt proceedings, procedural fairness ought to arguably include:

- notice of the hearing and any adverse allegations, and a right to respond to those allegations;<sup>338</sup>
- disclosure of any 'credible, relevant or significant' evidence;<sup>339</sup>
- adequate time to prepare a case;<sup>340</sup>
- the right to have the decision based on an evidential foundation;<sup>341</sup>
- the right to be represented by counsel;<sup>342</sup> and
- an opportunity to cross-examine witnesses.<sup>343</sup>

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<sup>337</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [24] (Mason J).

<sup>338</sup> See *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296. The right to respond to all adverse evidence was discussed in *Annetts v McCann* (1990) 170 CLR 596, 601 (Mason CJ, Deane and McHugh JJ). Discussion of the particulars that must be made known was discussed in *Johnson v Miller* (1937) 59 CLR 467, 489 (Dixon J) and *Kanda v Government of Malaya* [1962] AC 322, 337 (Denning LJ); and *R v Pharmacy Board of Victoria; Ex parte Broberg* [1983] 1 VR 211, 215 (O'Bryan J).

<sup>339</sup> See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *Wight v Pearce* (2007) 157 FCR 485.

<sup>340</sup> See *Ansell v Wells* (1982) 43 ALR 41, 62 (Lockhart J); *R v Thames Magistrates' Court; Ex parte Polemis* [1974] 1 WLR 1371, 1375 (Lord Widgery CJ); *Sales v Minister for Immigration and Multicultural Affairs* [2006] FCA 1807.

<sup>341</sup> See *Mahon v Air New Zealand* [1984] AC 808, 820-821 (Lord Diplock).

<sup>342</sup> See *Cains v Jenkins* (1979) 28 ALR 219, 230 (Sweeney and St John JJ); *R v Visiting Justice at Pentridge Prison; Ex parte Walker* [1975] VR 883; *Appellant WABZ v Minister for Immigration and Multicultural Affairs* (2004) 204 ALR 687.

<sup>343</sup> See *Hurt v Rossall* (1982) 43 ALR 252, 258-9 (Fox J); *Finch v Goldstein* (1981) 36 ALR 287, 304ff.

The current practice of both the House of Representatives and the Senate fails to meet these standards in procedural fairness. Following Lindell and Carney's Report,<sup>344</sup> the House of Representatives did take positive steps forward, adopting the majority of the report's recommendations in the formal procedures of the House.<sup>345</sup> However, the new guideline procedures have largely brought the House of Representatives procedure into line with that of the Senate, which themselves have significant procedural fairness deficiencies. Despite the Commonwealth Parliament's purported attempt to accord the "fairest of hearings", the current procedures still fall short of the standard required by the hearing rule. The next sections address what should be regarded as the most significant deficiencies and those that, for the most part, are unable of being adequately remedied. These arguments naturally present the strongest impetus for removing the penal jurisdiction of parliaments on the basis that it is incompatible with the rule of law.

#### *4.2.1 Adequate notice and reasonable time to respond*

It is fundamental to notions of procedural fairness that a person should know the case against her or him in order to be able to defend her or himself. In *Kanda v Government of Malaya*<sup>346</sup> Denning LJ said that "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to

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<sup>344</sup> Lindell and Carney Review, above n 12.

<sup>345</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009*.

<sup>346</sup> [1962] AC 322.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?



know the case which is made against him”.<sup>347</sup> It is difficult for a committee of privilege to comply with this requirement given the very nature of the functions of a parliamentary committee. Contempt proceedings may begin inquisitorial and later become adversarial if enough evidence is gathered to proceed with specific allegations of contempt.<sup>348</sup> The specific non-disclosure of information in investigative proceedings was outlined by the High Court in *Nationwide Companies and Securities Commission v News Corporation Ltd*:<sup>349</sup>

It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.<sup>350</sup>

This may alleviate an investigative body of strict compliance with the rules of procedural fairness. However, generally an investigative body will do no more than investigate an allegation. The powers of privilege committees extends much further. As Lindell and Carney point out:

No other institution of government has the power to investigate an allegation of contempt as well as effectively charge those alleged to be responsible, try the charge, and impose a penal sanction.<sup>351</sup>

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<sup>347</sup> *Kanda v Government of Malaya* [1962] AC 322, 337. See the similar statement in *Johnson v Miller* (1937) 59 CLR 467, 489 (Dixon J).

<sup>348</sup> Lindell and Carney Review, above n 12, 2-3.

<sup>349</sup> (1984) 156 CLR 296.

<sup>350</sup> *Nationwide Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 323-4 ((Mason, Wilson and Dawson JJ).

<sup>351</sup> Lindell and Carney Review, above n 12, 3.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

It is for precisely this reason that the notice of allegation must be specifically adequate to allow the accused to respond.

The current procedural rules of both the House of Representatives and the Senate are slightly different in relation to the adequacy of the notice. The House of Representatives procedure states:

Any person who is the subject of proposed investigation by the committee must be notified in advance of the specific nature of the allegations made against them, preferably formulated as a specific charge, or if this is not possible, of the general nature of the issues being investigated, in order to allow them to respond.<sup>352</sup>

The Senate procedure states:

A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the committee and relevant to the committee's inquiry, against the person, and the particulars of any evidence which has been given in respect of the person.<sup>353</sup>

The important point is that the current procedure allows the committees to state only the "general nature of the issues" in the case of the House of Representatives, and only "allegations known to the committee" in the case of the Senate. This cannot provide "adequate content...in sufficient particularity to enable the person affected to know the case they have to meet".<sup>354</sup>

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<sup>352</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009*, Appendix 1, para (1).

<sup>353</sup> *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 2(1).

<sup>354</sup> Creyke, above n 284, 764.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

The procedures relating to the time to respond are also inadequate. Where a committee of privilege levels specific allegations of contempt against a person, that person should be given a reasonable time to respond to the allegations.<sup>355</sup> The current formulation in the procedural rules of both Houses is too ambiguous. The rules provide that “the committee shall extend to that person all reasonable opportunity and time to respond to such allegations...”<sup>356</sup> The House of Representatives did not implement Lindell and Carney’s recommendation “that specific provision be made for witnesses appearing before a Privileges Committee to be afforded a reasonable period of notice for which to prepare their evidence”,<sup>357</sup> instead following the procedure of the Senate. An accused “must have an opportunity quietly to consider the allegations against him and, if necessary, to obtain material to rebut them”.<sup>358</sup> The current formulation does not express the rights that ought to be afforded to ensure procedural fairness.

#### 4.2.2 *The rules of evidence*

Committees of privilege are not bound by the rules of evidence.<sup>359</sup> This again reflects the fact that parliamentary committees are generally inquisitorial bodies. To that

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<sup>355</sup> Lindell and Carney Review, above n 12, 22; 1984 Joint Committee Report, above n 22, [7.66].

<sup>356</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009*, Appendix 1, para (2); *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 2(2).

<sup>357</sup> Lindell and Carney Review, above n 12, 22.

<sup>358</sup> *Ansell v Wells* (1982) 43 ALR 41, 62 (Lockhart J).

<sup>359</sup> Wright, above n 19, 772.

extent, the guidance of Lord Diplock in *Mahon v Air New Zealand*<sup>360</sup> is considered instructive:

The first rule is that the person making a finding in the exercise of [an investigative] jurisdiction must base his decision upon evidence that has some probative value... The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the findings being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.<sup>361</sup>

The obvious distinction is that his Lordship was referring specifically to investigative bodies in their usual sense. A committee of privilege considering a matter of contempt is acting in a judicial manner.<sup>362</sup> For that reason, “greater regard should be given to the risks entailed in any departure from those rules [of evidence] the more adversarial the Committee’s proceedings become”.<sup>363</sup>

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<sup>360</sup> [1984] AC 808.

<sup>361</sup> *Mahon v Air New Zealand* [1984] AC 801, 820-1 (Lord Diplock).

<sup>362</sup> Twomey, above n 9, 98.

<sup>363</sup> Lindell and Carney Review, above n 12, 25.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

### 4.2.3 *Representation by counsel*

The right to be represented by legal counsel is not absolutely recognised by either the House of Representatives or the Senate.<sup>364</sup> The procedural rules of both Houses state that:

A person appearing before the committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.<sup>365</sup>

This provision only provides that an accused can be *accompanied* by counsel, and consult counsel throughout the proceedings. It does not necessarily confer any right of representation whereby counsel can speak on behalf of the accused. Aside from that provision, a committee “may authorise” the examination of witnesses by counsel.<sup>366</sup> Representation is then effectively at the discretion of the committee, and limited to examination of witnesses.

The general principles of the requirement of legal representation were stated in *Cains v Jenkins*:<sup>367</sup>

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<sup>364</sup> Ibid 28.

<sup>365</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009*, Appendix 1, para (4); *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 2(4).

<sup>366</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009*, Appendix 1, para (9); *Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988*, Art 2(9).

<sup>367</sup> (1979) 28 ALR 219.

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

On the authorities there is no absolute right to representation even where livelihood is at stake. But that is not to say that in all cases a tribunal can refuse it with impunity. The seriousness of the matter and the complexity of the issues, factual or legal, may be such that refusal would offend natural justice principles.<sup>368</sup>

The seriousness of contempt proceedings is evident in the potential penalties, including imprisonment. It is unfathomable to think that a person who could be imprisoned could be denied legal representation. Likewise, there is no argument against legal representation that has any merit. The 1984 Joint Select Committee rejected arguments that legal representation would lead to “endless complexity, technicality, and to great protraction in hearing times”.<sup>369</sup> In any event, it is surely offensive to any Western notion of justice and antithetical to the rule of law that considerations of “complexity and technicality” would be given more weight than a person’s right to defend her or himself from potential imprisonment.

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<sup>368</sup> *Cains v Jenkins* (1979) 28 ALR 219, 230 (Sweeney and St John JJ).

<sup>369</sup> 1984 Joint Committee Report, above n 22, [7.62].

D Harrop (2014) *Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?*

## 5 CONCLUSION

A V Dicey wrote in the 19<sup>th</sup> century that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”.<sup>370</sup> This proposition became a fundamental element of Dicey’s classical statement of the rule of law, a doctrine now synonymous with political legitimacy.<sup>371</sup> In democratic societies, the rule of law is the notional ideal of a fair and good society. It follows, then, that any society operating inconsistently with the rule of law should aspire to eradicate those inconsistencies.

The penal powers of Australian legislative bodies continue to undermine the supremacy of the rule of law. Section 49 of the Constitution, along with the *Parliamentary Privileges Act 1987* (Cth), are being used to allow the Commonwealth Parliament to exercise a penal jurisdiction, in clear conflict with the rule of law. This thesis has sought to identify the key issues with the penal powers of parliament to answer the question, are the penal powers of parliament compatible with the rule of law? It should be evident at this stage that the answer to that question is that clearly they are not.

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<sup>370</sup> Dicey, above n 7, 110.

<sup>371</sup> Preston, above n 1, 176, 188; Tamanaha, above n 1, 1-3.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

In *R v Richards; Ex parte Fitzpatrick and Browne*<sup>372</sup> the High Court justified the penal power of the House of Representatives on the basis that the power had throughout history been regarded as “proper incidents of the legislative function”.<sup>373</sup> If this were the case, then perhaps the penal powers would not offend the rule of law to the extent that they do. However, as discussed comprehensively in chapter 2, this is simply not the case. The penal powers formed part of the *lex parliamenti* at the time the House of Commons was exercising judicial functions as part of the High Court of Parliament.<sup>374</sup> The Australian High Court should have found that the principles leading to the powers and privileges of the House of Commons have no application to the Australian Parliament, as the US Supreme Court did in *Kilbourn v Thompson*.<sup>375</sup> As the Australian Parliament exercises only legislative functions, it is a clear breach of the rule of law for either house to perform “the duties of prosecutor, judge and gaoler”<sup>376</sup> in determining allegations of contempt of parliament.

The penal powers of parliament offend the Constitution. In *Street v Queensland Bar Association*<sup>377</sup> Deane J said that the guarantee that citizens can only be subject to judicial power exercised by Chapter III courts is the most important right in the Constitution.<sup>378</sup> This ensures that citizens have matters determined by a independent

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<sup>372</sup> (1955) 95 CLR 156.

<sup>373</sup> Ibid 167 (Dixon CJ).

<sup>374</sup> *Kielly v Carson* (1842) 4 Moore PC 63, 89 (Parke B).

<sup>375</sup> (1880) 103 US 168, 189.

<sup>376</sup> 1908 Privilege Report, above n 218, 4.

<sup>377</sup> (1989) 168 CLR 461.

<sup>378</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461, 521.



and impartial tribunal, essential to Dicey's formulation of the rule of law.<sup>379</sup> Allowing the contempt power to remain an exception to the separation of powers is illogical. Section 49 of the Constitution should be read down to allow the Commonwealth Parliament to exercise only those powers that are fundamental to the maintenance of its legislative functions, and consistent with the constitutional separation of powers.<sup>380</sup> If section 49 was read down in the manner suggested, it would also ensure that the powers of the Commonwealth Parliament do not contravene the implied freedom of political communication as set out in the *Lange/Coleman* test.<sup>381</sup>

Another core feature of the rule of law is the observation of principles of natural justice, or procedural fairness.<sup>382</sup> The current procedures of the Commonwealth Parliament, and other Australian parliaments, fall short of the required standard. In relation to the rule against bias, "complete impartiality is not possible where members of the House adjudge an allegation of contempt against their own House".<sup>383</sup> This difficulty cannot be overcome by the implementation of any special procedures. As regards the hearing rule, the procedures of the House of Representatives and the Senate have in recent years been modified in an effort to

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<sup>379</sup> Dicey, above n 7, 110.

<sup>380</sup> Twomey, above n 7, 110.

<sup>381</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567; *Coleman v Power* (2004) 220 CLR 1, 32.

<sup>382</sup> Raz, above n 4, 217.

<sup>383</sup> Lindell and Carney Review, above n 12, 19.

D Harrop (2014) Imprisonment for Contempt: Are the Penal Powers of Parliament Compatible with the Rule of Law?

provide better procedural fairness outcomes for those accused of contempt.<sup>384</sup> However, there remain significant issues, particularly in relation to notice and time to respond, application of the rules of evidence, and the right to representation by counsel.

The penal powers of parliament are inconsistent with the rule of law, that much is certain. What then ought to be done about it, is another question in and of itself. A common suggestion in the literature is that the penal power should be transferred to the courts.<sup>385</sup> That proposal warrants deeper consideration. That is a discussion for another time. As Professor Campbell has said:

It is one thing to acknowledge that breaches of privilege and contempt of Parliament ought to be punished, another to say who ought to determine whether an occasion has arisen for the application of penal sanctions.<sup>386</sup>

Whilst there is little doubt that contempts should not go unpunished, it is clearly the case that the current system for that punishment is antithetical to the rule of law. Any reform to the penal powers of parliament should ensure consistency with the rule of law as classically stated by Dicey. The transfer of the penal jurisdiction of parliament to the courts could best achieve this aim.

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<sup>384</sup> *Procedures of the Committee and the House in Relation to Consideration of Privilege Matters and Procedural Fairness 2009; Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988.*

<sup>385</sup> 2009 WA Contempt Report, above n 28, 23; 1977 UK Report, above n 177; 199 UK Report, above n 25, 324; Carney, above n 11, 194-5.

<sup>386</sup> Campbell, above n 35. 213.

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