

Supplementary Memorandum from Daniel Greenberg, Counsel for Domestic Legislation, Office of Speaker's Counsel, House of Commons (SCC0030)

Comparison between Proposed Draft Legislation and Australian Parliamentary Privileges Act 1987

Introduction

1. The Committee requested a memorandum supplementary to my memorandum of 23 October 2019, identifying key differences between the draft clause attached to my first memorandum (“the Draft Clause”) and the Australian Parliamentary Privileges Act 1987 (“the Australian Act”), in respect of the punishment of contempt.
2. There are two principal differences.

Scope of provision

3. The Australian Act applies the power to impose penalties to any “offence against the House”, which is defined to include “a breach of the privileges or immunities, or a contempt, of a House or of the members or committees” (s.3), and refined (s.4) so as to apply only 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”.
4. The Draft Clause focuses on the single issue of failure to comply with a summons to attend a Commons Select Committee (including failure to attend, and failure to answer questions or provide information or documents).
5. Failure to attend Select Committees is the specific problem to which the Committee’s attention has been drawn, and it seems wise to limit the remedy to the known problem.

Judicial involvement

6. The Australian Act allows (s.7) the House itself to impose a sentence of imprisonment or a fine up to a specified maximum, with enforcement through the courts.
7. The Draft Clause provides for penalties to be imposed by the High Court, on a reference certified by the Speaker, as if for a contempt of court. The same range of penalties as for contempt of court would be available in respect of contempt of Parliament.
8. The proposed use of the High Court is to provide the new system of punishment with an authority that it would lack if the House imposed its own punishments—
 - (a) High Court judges are in general seen as fair and impartial.
 - (b) The House would not be an independent and impartial tribunal for the purposes of Article 6 of the European Convention on Human Rights; and there would be a lack of natural justice (and therefore an unfairness for Article 6 purposes) in the House determining liability for, and the extent of, a punishment for a contempt against itself.
 - (c) Article 6 apart, it is unlikely that there would be general public acceptance of fines or sentences of imprisonment imposed by the House itself, for a range of reputational reasons.
 - (d) A system relying on High Court judges to determine whether to impose a penalty, and if so what penalty, would be more likely to command a desirable level of respect and trust.

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