

Supplementary Memorandum from Sir Malcolm Jack KCB, Former Clerk of the House (SCC0022)

Introduction

1. At the oral evidence session on 22 October, 2019 Sir Christopher Chope asked, through the Chair, if I could help the Committee to consider how it could adopt the Australian Parliamentary Privileges Act 1987 and suggest any changes to it if the Committee were minded to recommend the statutory route.
2. Drafting of statute is best undertaken by parliamentary counsel so my approach to the request is to suggest to the Committee how I consider the provisions of the Australian Act can be applied but leave the actual drafting of a new statute to counsel. In the drafting process, there would doubtless be modifications to the Australian Act's provisions to make any proposed statute compliant with UK existing law and practice.
3. I have concentrated, as requested, by considering provisions of the Australian Act which may be adopted but there may also be other provisions which the Committee considers it should make in proposing legislation or additions to the Standing Orders of the House. While the Australian Act provides protection for witnesses, the important human rights matter of giving an individual, who feels libelled by proceedings in Parliament, the right to put his or her case to the House or a Committee is dealt with in Standing Orders and not in the Act itself. The Committee may consider that that would also be the best way of dealing with individual grievances in the UK Parliament as well.
4. As I said in my original memorandum, the Joint Committee on Parliamentary Privilege 1998-99, after exhaustive deliberation, set out the benefits of a Privileges Act. My suggestion is that that the Committee should examine the Australian Act in the context of the principal recommendations of the Joint Committee for codification.
5. I will therefore turn in this memorandum to considering the principal recommendations for codification by the Joint Committee and how far they are provided for by the terms of the Australian Act. I then set out a table of the Australian Act as adopted/adapted or not in an Annexe. I attach a copy of the Act itself for reference.

Principal Recommendations of the Joint Committee on Parliamentary Privilege 1998-99

6. The general point made by the Joint Committee, that a Privileges Act should set out a clear, accessible code which the public could understand is certainly provided for by the unambiguous, modern language of the Australian Act.
7. The main recommendations made by the Joint Committee for inclusion in statute were:
 - (1) Clearer definition of the terms of Article 9 of the Bill of Rights 1689 including 'Proceedings in Parliament', 'Place out of Parliament' and the scope of questioning;

- (2) Parliament's control of its own affairs (exclusive cognisance) should be made clear;
- (3) Contempt should be defined;
- (4) Penalties for contempt set out in such a Code should maintain flexibility by stating principles;
- (5) Certain other privileges such as freedom from arrest clarified;
- (6) An updated version of the Parliamentary Privileges Act 1840 be made.

I will consider each of these recommendations in turn in paragraph 8 below in the context of the Australian Act and then provide a table showing adaption of the whole Act.

Application of key recommendations from the Joint Committee to the Australian Privileges Act

8. (1) Clarification of the terms of the Bill of Rights is set out in Section 16 of the Australian Privileges Act. Both the words spoken and the acts done in the course of, or for the purposes of, or incidental to, the transacting of the business of the House or a Committee are set out in detail. The 'place out of Parliament' is defined as the courts and tribunals where questioning of proceedings, including parliamentary documents, is made unlawful. There is a provision allowing for reference to parliamentary material for the purpose of interpretation of statute (following the UK precedent of *Pepper v. Hart*) which is standard practice in the UK courts. Section 16 of the Act therefore clearly defines the key terms in the Bill of Rights 1689, on proceedings, place out of Parliament and the scope of questioning, as recommended by the Joint Committee. *It should be adopted.*

(2) The powers, privileges and immunities of Parliament are defined in Section 5 of the Australian Privileges Act by reference to the Australian Constitution which in turn refers to be those rights and immunities enjoyed by the UK House of Commons. The Act itself implies that the Australian Houses have control of their affairs – in Sections 11, 12, 13, 14, 16 and 17 - but to meet the recommendation of the Joint Committee a section specifically spelling out the UK Houses' control of their own affairs would need to be inserted in any proposed UK legislation on the lines *that both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle – or depart from – their own codes of procedure.*¹

(3) & (4) In Section 4 of the Australian Act the essential element of contempt is defined rather than attempting to define offences as such. Given the numerous historical example of contempts, that seems a very commendable approach. ² *It should be adopted.* Penalties are set out in Section 7 which, with adaptations depending on degree of fines and the question of imprisonment which the Committee would deem appropriate, *should be adapted.*

(5) Members' and Officers' immunities from arrest and court attendance are dealt with in Section 14 of the Act and are clearly confined to civil cases. *It should be adopted.*

(6) This is not a matter covered in the Australian Act so would need separate provisions as the Committee considers appropriate.

¹ Erskine May, 25th Edition p. 217

² For a catalogue of matters which have been considered contempts, see Erskine May op. cit. p 289ff.

Annexe

Table dealing with adoption/adaptation/deletion of Australian Act by Section

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| <p><i>Section 1 Short title</i> Replace with UK usage <i>Section 2 Commencement</i> Replace with UK usage <i>Section 3 Interpretation</i> Replace with UK usage <i>Section 3 A Application of Criminal Code</i> Delete <i>Section 4 Essential element of offences</i> Adopt <i>Section 5 Powers, privileges & immunities</i> Delete. Provide for as in paragraph 8 (2) above <i>Section 6 Contempts by defamation</i> Delete <i>Section 7 Penalties</i> Adapt as modified in light of decisions on fines, imprisonment etc <i>Section 8 Expulsion of Members</i> Delete <i>Section 9 Resolutions, Warrants for committal</i> Adopt <i>Section 10 Reports of proceedings</i> Delete <i>Section 11 Publication of tabled papers</i> Adopt</p> | <p><i>Section 12 Protection of Witnesses</i> Adapt as modified by decision on penalties <i>Section 13 Unauthorised disclosure of evidence</i> Adopt <i>Section 14 Immunities for arrest and attendance before courts</i> Adopt <i>Section 15 Application of laws to Parliament House</i> Delete <i>Section 16 Parliamentary privilege in court proceedings</i> Adopt <i>Section 17 Certificates relating to proceedings</i> Adapt with necessary modification</p> |
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NB As stated in paragraph 2 above drafting of adopted/adapted provisions in a statute will need to take account of UK law and practice.

24 October 2019