The Table

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The Journal of The Society of Clerks-at-the-Table in Commonwealth Parliaments

EDITORIAL

Two notable statutes are marked in this edition of *The Table*: the Parliament Act 1911 and the Australian Parliamentary Privileges Act 1987. It is fair to say that both statutes are unique—certainly at the time of passing—and have changed the landscape in their respective Parliaments. It is perhaps also notable that the core provisions of the Acts have not been amended (the Parliament Act 1949 notwithstanding). Rhodri Walters, the Reading Clerk in the House of Lords, reflects on the effects of the Parliament Acts over the last century, covering in particular their effects on governments' legislative programmes. Bernard Wright, Clerk of the Australian House of Representatives, writes about the gestation of the Parliamentary Privileges Act 1987 and how it has worked in practice.

In addition to those articles marking particularly significant statutes, Charles Robert, a Principal Clerk of the Canadian Senate, and David Taylor, a Law Clerk to a Justice of the Supreme Court of Canada, take an in-depth look at the development of parliamentary privilege in the provincial legislative assemblies of Canada. Their scholarly article examines from the inception of privilege following confederation to the present day, via numerous statutes, court cases and claims of privilege.

A similarly long-term look at parliamentary privilege is taken by Sir Malcolm Jack, former Clerk of the UK House of Commons. His article examines the principles underlying privilege and its application in modern parliaments, and concludes that it must, in the words of Walter Bagehot, be both a dignified and an efficient part of the constitution.

The final article in this edition is co-authored by officers of the Secondary Legislation Scrutiny Committee in the House of Lords: Kate Lawrence, Jane White and Paul Bristow. They write about a new type of delegated legislation: Public Bodies Orders. The Public Bodies Act 2011 created significant Henry VIII powers for ministers to abolish, merge or amend the constitution of numerous public bodies, many established by statute and with high-profile functions. In response to widespread unease about the scale of these powers, Parliament introduced a new mechanism to ensure enhanced scrutiny. The authors recount how the Orders have proceeded so far.

The comparative study details legislatures' mechanisms for dealing with complaints about members' conduct. Although regimes differ across the Commonwealth, the phenomenon common to all is that of increased public (and particularly media) interest in members' conduct, and the resultant need to ensure regimes are appropriate to maintain public trust.

In addition there is the usual interesting miscellany of short notes and other items. As always, the editor is very grateful to all contributors, and hopes this edition makes for thoughtful reading.

MEMBERS OF THE SOCIETY

New South Wales Legislative Assembly

Consequent upon a restructure of the Department of the Legislative Assembly, on 1 July 2011 the Clerks-Assistant positions were re-designated and incumbents rotated in new positions as follows—

Leslie Gonye, Clerk-Assistant, Table and Serjeant-at-Arms; and
Ronda Miller, Clerk-Assistant, Committees and Corporate.

On 6 November 2011 **Ronda Miller** was appointed Clerk of the Legislative Assembly.

It was with regret that the death on 23 June 2011 of **Ronald Edward Alexander Ward** who, from 1 February 1974 until his retirement on 18 February 1981, was the 14th Clerk of the Legislative Assembly, was announced.

Ron Ward joined the staff of the Legislative Assembly on 13 May 1940. In 1941 he joined the Royal Australian Air Force and as a Warrant Officer undertook a flight training course at Temora in New South Wales. He saw action as a pilot in the Pacific and Papua New Guinea.

After World War II he returned to the Legislative Assembly where he held most positions on the staff. He was briefly the Serjeant-at-Arms in 1956 before being appointed Second Clerk-Assistant on 1 July 1956 and then Clerk-Assistant on 1 January 1967. He also had a three-month attachment to the House of Commons in 1971.

On Friday 4 November 2011 **Russell Grove** retired as the 17th Clerk of the New South Wales Legislative Assembly, after a career of more than 40 years with the Legislative Assembly. Some of the key dates in Russell's career were—

15 February 1971: joined the staff as Assistant Parliamentary Officer, Bills;
1 February 1974: appointed Parliamentary Officer—Table;

19 February 1981: appointed to serve at the Table as Second Clerk-Assistant;

15 October 1984: appointed Clerk-Assistant (March 1989 redesignated Deputy Clerk);

8 September 1990: appointed Clerk of the Legislative Assembly.

He served 21 years, one month and 26 days as Clerk of the Legislative Assembly, making him the longest serving Clerk.

During his career he endured: 2,168 sittings consisting of nearly 20,000 hours; eight Speakers; 12 Premiers; eight Leaders of the House; and the four Clerks preceding him. As with any long-serving parliamentary officer Russell got to witness many changes to both the parliamentary precinct and the way the Parliament operates.

From 1984 Mr Grove also held the position of Honorary Secretary, Commonwealth Parliamentary Association (New South Wales). In that capacity many members and staff past and present of other jurisdictions would have made acquaintances with him. From 1986 Mr Grove has been a regular attendee at annual Commonwealth Parliamentary Association Conferences and the annual meetings of the Society of Clerks-at-the-Table. Mr Grove was made an honorary life member of the CPA (NSW Branch) in November 2011.

In 2001 Mr Grove was elected to the inaugural executive of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT), holding the office of Secretary-Treasurer until 2004, and more lately has been the returning officer for the association. He is a member of the Australasian Study of Parliament Group and has been the chair of the NSW Chapter. Mr Grove has been a prolific contributor to a wide range of local, national and international conferences and seminars: presenting papers; being a panellist; chairing sessions; and offering considered comments and views from the floor. He has had extensive involvement in training and development activities to enhance the capacity of a number of legislatures, including in 1996 when invited as an expert advisor on the establishment of the Palestinian Legislative Council.

Mr Grove has built up an extensive network of relationships in all areas of his work and around the world. As Clerk he made it policy to provide prompt responses to queries and requests from other parliaments, and in doing so enhanced the profile and reputation of the Legislative Assembly around Australia and the world.

In acknowledgement of Mr Grove's career he received honorary life membership of ANZACATT at its annual meeting in January 2012. He has also been awarded life membership of the Society of Clerks-at-the-Table in

Commonwealth Parliaments, the Association of Clerks at the Table in Canada and the American Society of Legislative Clerks and Secretaries. Also in recognition of his service he received the New South Wales Public Service Medal in 2000 and was made a Fellow of the Institute of Public Administration Australia in 2011. He has also been awarded the long-service medal for 40 years' service in the NSW public sector.

Despite Mr Grove's solid work schedule, he found time to be an active member of Rotary International. For his services to Rotary he was made a Paul Harris Fellow in 1997.

There were many tributes and functions to mark the occasion of Russell's retirement. Russell's last sitting day was Thursday 20 October and as is tradition the Speaker made some remarks about the retiring Clerk upon which the Premier moved the following motion—

"That:

(1) The Speaker's remarks with reference to Mr Russell David Grove, on his retirement from the position of Clerk of the Legislative Assembly, be entered in the Votes and Proceedings.

(2) Mr Grove's 40 years distinguished service to the Legislative Assembly, including a record 21 years as Clerk of the House, be noted.

(3) In recognition of his meritorious service and on the occasion of the retirement of Mr Russell David Grove, this House extends him the honorary title Clerk Emeritus."

As the Leader of the House dubbed the day "Russell Grove Day" the House devoted all morning to debating the motion, in which 21 other members spoke in support. Proceedings were interrupted for an hour and a quarter for the Speaker to host a morning tea for all members and parliamentary staff, with Russell's wife Frances and daughter Sarah-Jane in attendance to celebrate the occasion.

In Russell's last week there was a formal farewell lunch attended by over 300 guests, including the Governor and many interstate colleagues. At the lunch Russell was presented with his farewell gifts of a black opal (being the state gem stone) and a book of documents and photographs recording his career. There was also an informal barbeque lunch for Assembly staff to say farewell to Russell and on his last day the senior officers of the Assembly had a more intimate lunch with Russell and Frances.

New South Wales Legislative Council

On 8 October 2011 **David Blunt** was appointed Clerk of the Parliaments and Clerk of the Legislative Council.

On 22 November 2011 **Steven Reynolds** was appointed Deputy Clerk of the Legislative Council.

Lynn Lovelock, Clerk of the Parliaments and Clerk of the Legislative Council, retired on 7 October 2011. On 16 September 2011, the House's last sitting day before Ms Lovelock's retirement, the Leader of the Government moved that the House express its appreciation for the distinguished service to the Legislative Council and the State of New South Wales by Ms Lovelock. Members of the House spoke in support of the motion and expressed their thanks to Ms Lovelock for the diligent way in which she discharged her duties, upholding the traditions of impartiality and confidentiality expected of the Clerk. Members also spoke of the many achievements of Ms Lovelock during her 25 years of service with the Legislative Council, a period coinciding with great change and modernisation for the House. The motion was unanimously agreed to, members expressing their support for the motion by standing acclamation.

Following the adjournment of the House, a farewell lunch in the retiring Clerk's honour was held in the Strangers' Dining Room. Her Excellency the Governor of New South Wales attended, along with the Presiding Officers, former Presidents, fellow clerks from Parliaments in Australia, former members, current members, statutory officer holders and Lynn's colleagues from the NSW Parliament.

Tasmania House of Assembly

Heather Thurstans retired from the position of Second Clerk-Assistant on 26 October 2011.

Laura Ross was appointed to the position of Second Clerk-Assistant on 7 November 2011.

Victoria Legislative Council

In August 2011 the Council's two Assistant Clerks again rotated positions with **Dr Stephen Redenbach** returning to the role of Assistant Clerk—House and Usher of the Black Rod, and **Mr Andrew Young** becoming Assistant Clerk—Committees.

Alberta Legislative Assembly

Manager of House Proceedings, **Micheline Gravel**, passed away unexpectedly in April 2011. Ms Gravel had been with the Assembly for 12 years.

British Columbia Legislative Assembly

On 2 June 2011 the House passed a resolution appointing **Craig James** Clerk of the Legislative Assembly of British Columbia (Mr James was formerly Clerk Assistant and Clerk of Committees). Mr James succeeded **E George MacMinn, OBC, QC**, who will serve as Clerk Consultant for 24 months. Mr MacMinn joined the Legislative Assembly in 1957 and was appointed Clerk in 1993. He is the longest-serving table officer in the Commonwealth. **Kate Ryan-Lloyd** (formerly Clerk Assistant and Acting Clerk of Committees) was appointed Deputy Clerk of the Legislative Assembly and Clerk of Committees. All the appointments were effective on 1 September 2011.

Also in 2011, **Ian Izard**, Law Clerk and Clerk Assistant, and **Robert Vaive**, Clerk Assistant, both announced their retirements from the Legislative Assembly of British Columbia.

Mr Izard was appointed Law Clerk and Clerk Assistant in 1977 and appointed Queen's Counsel in 2003. He was the President of the Association of Clerks-at-the-Table in 1991–92 and served twice as President of the Canadian Association of Parliamentary Counsel and Law Clerks (1989–90 and 2007–08).

Mr Vaive joined the Legislative Assembly of British Columbia in 1994 as a Clerk Assistant, having previously worked at the House of Commons and the Saskatchewan Legislature. Mr Vaive served as President of the Canadian Association of Clerks-at-the-Table in 1997–98.

Manitoba Legislative Assembly

Rick Yarish was appointed Deputy Clerk on 4 April 2011. Rick served as Clerk Assistant/Clerk of Committees prior to his appointment as Deputy Clerk.

Andrea Signorelli was appointed Clerk Assistant/Clerk of Committees on 12 September 2011.

United Kingdom House of Commons

Sir Malcolm Jack KCB retired as Clerk of the House and Chief Executive on 30 September 2011. He was succeeded by **Sir Robert Rogers KCB**. **David Natzler** succeeded Robert Rogers as Clerk Assistant; **Jacqy Sharpe**

succeeded David Natzler as Clerk of Legislation; **Andrew Kennon** succeeded Jacqy Sharpe as Clerk of Committees; and **Paul Evans** was promoted to Clerk of the Table Office to replace Andrew Kennon.

Sir Malcolm's successor as Clerk of the House, Sir Robert Rogers, writes of him:

I met Malcolm on my first day at the House in 1972. In those days he had a beard; with his elegant and slightly sardonic manner he could have stepped out of the court of the first Elizabeth.

Time moved on; I grew a beard and he shaved his off, and over the next 39 years we worked closely together, either in the same office or—on several occasions ending in October 2011—with me following him into a post he was leaving.

His scholarship, reflected in his writings on philosophy, found particular expression in the Clerk of the House element of the dual role of Clerk and Chief Executive. He was an authority on parliamentary privilege, and was ready to speak out publicly if he saw the House being put at a disadvantage.

Malcolm rightly took great pleasure in his editorship of the 24th edition of *Erskine May*, a fitting achievement for one who always treasured our relations with sister Commonwealth Parliaments, and especially those in Africa.

His scholarship made Malcolm an outstanding clerk; but he also had the decisiveness necessary for a chief executive. From his appointment in 2006 he saw the Commons administration through great change. The recommendations of Sir Kevin Tebbit's review of the management and services of the House were challenging, but Malcolm saw immediately that the challenges had to be tackled; and it was his persuasion and energy that ensured that major change took place, to the benefit of the House and its services.

There is a fund of stories about Malcolm. As clerk of the Agriculture Committee ("the most elegant man ever to wear Wellington boots") the committee's coach became stuck in the mud. The members pushed; Malcolm stayed elegantly on board. Malcolm sought to soothe a member complaining of physical pain (having shut his hand in a filing cabinet) by remarking that metaphysical pain was far worse. Then there is "Jack's Law": mentioning the name of a person ensures the latter's appearance; and the speed of the appearance is in direct relation to the strength of the insult.

We will remember those stories, but much more his kindness and consideration to so many, and his lovely sense of humour. His 44 years' distinguished service culminated in a well-deserved knighthood, and he and his partner Robert have our very best wishes for the future.

United Kingdom House of Lords

Sir Michael Pownall retired as Clerk of the Parliaments on 15 April 2011. He was succeeded by **David Beamish**. **Ed Ollard** replaced David Beamish as Clerk Assistant.

Sir Michael's successor as Clerk of the Parliaments, David Beamish, writes:

Michael Pownall began his House of Lords career in the Judicial Office in 1971. In 2009, as Clerk of the Parliaments, it fell to him to oversee the disappearance of that office as part of the transfer of the House's role as final court of appeal to the new Supreme Court. It was typical of his devotion to the House that he made a point of being at the Table in the chamber for the final judicial sitting in September 2009.

After four years in the Judicial Office, Michael moved on to hold a wide range of posts in the House of Lords. One of those was private secretary to the Leader of the House of Lords and Government Chief Whip, a post customarily filled by a clerk on loan to the Government, which Michael held between 1980 and 1983. In that role Michael served first Lord Soames and then the first woman Leader of the House, Baroness Young. In paying tribute to Michael on his retirement, the Leader, Lord Strathclyde, noted that he was "known to have distinguished himself during that period by bravely drawing our minimum intervals [between stages of bills] to the attention of the then Prime Minister, Mrs Thatcher". According to Michael, it was a short conversation!

Michael went on to serve as Establishment Officer (nowadays "Director of Human Resources") and Secretary to the Chairman of Committees (1983–88), Principal Clerk of Private Bills (1988–90), Principal Clerk of Committees (1991–95), Clerk of the Journals (1995–97), Reading Clerk (1997–2003) and Clerk Assistant before his appointment as Clerk of the Parliaments in succession to Sir Paul Hayter in 2007.

Both as Principal Clerk of Private Bills and Principal Clerk of Committees, Michael also acted as Clerk of the House of Lords Overseas Office, and in that capacity will have become well known to Commonwealth and other overseas colleagues. In 1986 he and I both served as Liaison Officers when the Commonwealth Parliamentary Conference was held in London.

One of Michael's first roles as Principal Clerk of Committees was to act as clerk of a rather introspective-sounding Select Committee on the Committee Work of the House. That committee, chaired by the late Earl Jellicoe, laid the foundations for a broadening and strengthening of the role of House of Lords select committees, which has continued ever since. An immediate consequence was the establishment of the Delegated Powers Scrutiny Committee (now the Delegated Powers and Regulatory Reform Committee), which rapidly became

an influential and respected body, scrutinising provisions in bills creating ministerial powers in a way which had not previously been done in either House.

As Reading Clerk it fell to Michael to read out the letters patent and writs of summons of new members introduced to the House. Soon after his appointment a change of government led to large numbers of new appointments, and during his 6½ years in post he officiated in almost 300 introduction ceremonies. Happily for him, in 1999 the ceremony of introduction for peers was reviewed and shortened so that thereafter he had to read out only the letters patent and not the writ of summons.

Michael's tenure as Clerk of the Parliaments saw a successful project to refurbish most of Millbank House, which was re-occupied in October 2011, a few months after his retirement (and is now the workplace of nearly half the staff of the House), and the first coalition government since the Second World War—a change which had a significant impact on the way the House worked, but which was smoothly handled under his leadership.

But his time as Clerk of the Parliaments was particularly marked by tough challenges arising from allegations about member behaviour, beginning in January 2009 when four members were accused by the *Sunday Times* of being willing to accept "cash for amendments", and soon followed by widespread allegations of abuse by members of the scheme for reimbursing expenses. It fell to Michael to investigate most of those allegations. The Leader of the House at the time, Baroness Royall of Blaisdon, noted when paying tribute to him on his retirement that at times "that work led to him being attacked and criticised in public, in the media and, indeed, by the media". Her successor as Leader of the House, Lord Strathclyde, said "These have been testing times for the House—times which placed unprecedented demand on the Clerk of the Parliaments' judgment, integrity and resilience. I am confident that I speak for the whole House when I say that in more dispiriting moments it was a great solace to know with absolute and distinctive certainty that Mr Pownall would not be found wanting on any of these counts." The Liberal Democrat Leader, Lord McNally, put it thus: "The phrase that comes to mind is courage under fire, because that is what he showed. Because he showed courage under fire, he was able to give steady advice to the various party leaders. Like the Leader of the House, I believe that when this period in the House is looked back on, although it will be seen as a period of turmoil and of some distress, it will also be seen as a period of genuine reform when we put our House in order, and we did so under the wise guidance of Michael Pownall." That reform included the introduction in 2010 of a new system of financial support for members and a new system for dealing with complaints. As Lord Strathclyde put it,

"Michael leaves behind a more resilient institution—one equipped with a new Code of Conduct for Members, an independent Commissioner for Standards and a simpler and more transparent system of financial support for Members. He leaves behind a legacy that I am sure will stand the test of time."

Perhaps the most notable, but by no means unexpected, feature of the tributes paid to Michael on his retirement was the evident affection in which he was held throughout the House. As Lord Strathclyde put it, "He is not only respected and admired but held in sincere and lasting affection around the House and at all levels of the administration". His colleagues were delighted when his contribution was recognised by the award of a KCB in the 2011 Birthday Honours.

Members and colleagues all looked forward to Michael being able to take advantage of retirement to spend more time with his wife Deborah in their house in Italy, as indeed they did, also welcoming their first grandchild into the world in September 2012. It came as a great shock to all their friends when Deborah suffered a severe stroke at the end of December 2012 and died on 4 January 2013. A large number of Westminster friends, both members and colleagues, helped to fill their church in Chiswick to capacity for Deborah's funeral, further testimony to the affection in which they were so widely held.

THE IMPACT OF THE PARLIAMENT ACTS 1911 AND 1949 ON A GOVERNMENT'S MANAGEMENT OF ITS LEGISLATIVE TIMETABLE, ON PARLIAMENTARY PROCEDURE AND ON LEGISLATIVE DRAFTING

RHODRI WALTERS
Reading Clerk, House of Lords[1]

The Parliament Acts 1911 and 1949 apply to two categories of bills. The first is Money Bills. This category was created by the 1911 Act as one which contains only provisions relating to taxation, supply, appropriation or the raising or repayment of loans. The second category is any other public bill—other than a Money Bill or a bill containing a provision to extend the maximum duration of Parliament beyond five years—which originates in the House of Commons. The considerations which apply to these two kinds of bill are very different.

Money Bills

The Parliament Act 1911 provides that any bill certified by the Speaker as a Money Bill, unless passed by the Lords without amendment within one month of its receipt from the Commons, shall be presented for Royal Assent without the Lords' agreement—unless the House of Commons direct to the contrary.

It is perhaps worth dwelling on that last little phrase, "unless the House of Commons direct to the contrary", because it admits to the possibility of the Lords amending money bills and of the Commons agreeing to those amendments. Indeed, there are examples in the 1920s and 1930s where the Lords amended Money Bills and the Commons accepted the amendments. On one occasion when the author was private secretary to the Leader of the House of Lords and Government Chief Whip in the late 1980s Her Majesty's Treasury made contact with a view to moving amendments to a Money Bill in the Lords. Once political masters had been engaged the Treasury were persuaded to drop

[1] This article is based on a paper delivered by the author in November 2011 at a seminar held by the University of Cambridge Centre for Public Law at the London offices of Clifford Chance to commemorate the centenary of the passing of the Parliament Act 1911.

the idea. As recently as 1995 the Lords held a committee stage on a Money Bill (the European Communities (Finance) Bill).

However, the fact remains that the Money Bill provisions of the Parliament Acts have never been invoked in order to achieve Royal Assent. Even when a Money Bill through inadvertence or the arrival of a parliamentary recess had not been passed within the statutory month, the bill passed under the normal procedures.

Provided that a Money Bill is drafted in such a way as to enable it to be certified by the Speaker, there are no particular procedural or timetabling issues. Indeed, everything is accelerated.

But one must not underestimate the burden that this places on parliamentary counsel in ensuring that, in drafting a potential Money Bill, the terms of the Parliament Act 1911 are observed. The bill must deal exclusively with money as defined in the Act. Ultimately it is for the House of Commons authorities to advise Mr Speaker on whether on not to grant his certificate.

The expedition afforded by the Act to Money Bills does not, however, extend to other public bills.

Other public bills

The Parliament Acts, having set out the arrangements for Money Bills, then provide for the "restriction of the powers of the House of Lords as to bills other than Money Bills". Any public bill other than a Money Bill or a bill extending the maximum duration of a Parliament beyond five years can be subject to these restrictions. Such a bill, if passed by the Commons in identical form in two successive sessions, and having been sent to the Lords at least one month before the end of each session, and rejected by the Lords in each session, shall be presented for Royal Assent without the consent of the Lords. A bill shall be deemed to be rejected by the House of Lords if it is not passed by the Lords either without amendment or with such amendments only as may be agreed by both Houses. Indeed when the Parliament Acts are resorted to now it is usually because of an irreconcilable difference between the Houses over particular amendments rather than over the whole bill. An exception was the War Crimes Bill, which was rejected by the Lords at second reading in two successive sessions: 1989–90 and 1990–91.

Finally, one year must lapse between the date of second reading in the Commons in the first session and the date of passing by the Commons in the second.

These provisions are the so-called suspensory veto. The one-year minimum

interval prescribed and the one-month minimum period allowed to the Lords before the end of each session for their debates, combine to give a total of 13 months, and the Lords' powers of delay are often described in those terms—that is to say, a year and a month. In fact the period of delay depends very much on the handling decisions of the Government business managers on the one hand and the approach of the bill's opponents—whether the official opposition or backbench members—on the other. Two relatively recent examples illustrate the point.

The European Parliamentary Elections Bill failed in the Lords at the end of the 1997–98 session because of a disagreement over the regional closed-list system. These amendments were insisted upon by the Lords during ping-pong. The bill was re-introduced early in the 1998–99 session and rejected at second reading in the Lords on 15 December 1998. This allowed the bill to be certified by Mr Speaker and presented for Royal Assent in January 1999, when the statutory period of 12 months prescribed in the Parliament Acts 1911 and 1949 had lapsed. Thus the official opposition had made its point without preventing the elections taking place on time the following June.

The history of the passage of the Sexual Offences Bill is an altogether different story. First introduced in the 1998–99 session, the bill received its second reading in the Commons on 25 January 1999. It was rejected at second reading by the Lords, by the dilatory motion procedure, on 13 April. It was reintroduced into the Commons in the following session and sent to the Lords at the end of February 2000. It was given a second reading and committed to a committee of the whole House. Knowing that they needed to do nothing further, and knowing that opponents of the bill were ready with their amendments, the Government business managers took no further action until 13 November 2000 when one day's disastrous committee stage took place. There were no further proceedings until the end of the session later that month, when Royal Assent was given under the Parliament Acts. So in the case of that bill, the period of delay was one year and ten months.

Implications for the legislative timetable and handling

The most important effect is that contentious bills likely to run into trouble in the Lords must start in the Commons if it is thought that the Acts are to be used. Relatively few bills can, in advance, be recognised as Parliament Acts material, but the general rule applies.

In 2004, business managers were faced with a particularly difficult choice. While their legislative programme was being prepared, there was a real possi-

bility of a further bill on Lords reform which, if it went ahead, was clearly a Commons starter. Then at shorter notice the Constitutional Reform Bill entered the lists and for business management reasons was started in the Lords. This was a decision which Sir Humphrey—has it been an episode of "Yes, Minister"—might have described as "courageous". In fact it proved very troublesome. And, in the event, there was no Lords reform bill.

As a tool of business management the Parliament Acts are clunky. Administrations and ministers want their bills through as quickly as possible. And many bills have financial consequences—spending or saving—which are already factored into the estimates. So when a bill runs into heavy weather in the Lords, it comes as little comfort to the minister to know that in the last resort he can have his bill possibly as late as the latter part of the next session. The minister wants it instantly.

Once a bill is passed by the Commons in the second session and sent to the Lords very little more needs to be done. As proceedings on the Sexual Offences Bill illustrate, a second reading and perhaps a day of committee for form's sake are all that is required. The opinion of the Lords in the second session—unless agreement is a possibility—is of no consequence to the Government.

To what extent can the Parliament Acts be used as an instrument of reconciliation between the Houses?

Clearly in the exchanges between the Houses which precede its use there will be dialogue between Government and opposition with a view to achieving agreement. These discussions will, of course, be off the floor, informal and usually unrecorded for posterity. They represent a final attempt to avoid recourse to the Parliament Acts.

The Act of 1911 contains very limited provisions for further amendment of the second-session bill. The first is that the Speaker may certify in the second-session bill any amendments necessary owing to the time which has elapsed since the date of the first-session bill, or to represent any amendments made by the Lords in the preceding session and agreed to by the Commons. The second is that in the text presented for Royal Assent the Speaker may certify any Lords amendments made in the second session and agreed to by the Commons. Essentially, these provisions enable the Government to incorporate such Lords amendments as they may wish to approve.

Thirdly, there is provision for the Commons to propose further "suggested amendments". No bill has ever received Royal Assent under the Parliament Acts including such amendments, though they have been suggested on three occasions. Most recently, a suggested amendment was proposed by the

Commons to the Hunting Bill when it was sent up to the Lords in the second session, on 16 September 2004. The provision takes the form of a proviso to section 2(4) of the 1911 Act and reads—

> "Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords and agreed to by the House of Commons; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords."

There are two points to be made here. First, the suggested amendments are not in the House Bill—the text of the bill which is transmitted from one House to the other. They are the subject of separate resolutions. Secondly, although the provision states "any such suggested amendments shall be considered by the House of Lords", the Acts are silent as to when they are to be considered, and do not require the House to come to a decision on them. The suggested amendment to the Hunting Bill would have delayed commencement of most of the bill, and a motion to "consider" the suggested amendment was moved formally after the motion for second reading, thus fulfilling the requirement of the Acts. But the motion to agree the suggested amendment was not decided until the second stage of ping-pong on 17 November 2004, the day before the end of the session. By then the Lords had rewritten the bill and so the amendment was irrelevant and it was defeated.

What, then, is the point of suggested amendment procedure? Clearly it allows the Commons a further attempt at compromise in the second session. In the case of the Hunting Bill, the delay in commencement was meant to butter parsnips. But as a procedure it is deeply flawed. It is also rather pointless. If, say, suggested amendments have been arrived at after further discussions with a bill's opponents, and if those amendments were likely to help carry the day in the Lords, why not simply table them as amendments in the Lords in the usual way and watch the bill sail on to Royal Assent without recourse to the Acts? Perhaps the ultimate irony is that amendments which are meant to facilitate the passage of a bill, if agreed, can only be included if the bill is then rejected.

Conclusion

The provisions of the Parliament Acts, other than those on Money Bills, are perhaps best described as a framework within which an administration which is prepared to wait can get its bills to the statute book without Lords agreement, while retrieving from the debris of Lords consideration such amendments in either session as it may find convenient. They are not instruments of reconciliation, though the disciplines they impose can focus minds in that direction.

The real significance of the Acts in terms of business management is as much psychological as it is practical. They state loud and clear which House is boss.

THEN AND NOW: NECESSITY, THE CHARTER AND PARLIAMENTARY PRIVILEGE IN THE PROVINCIAL LEGISLATIVE ASSEMBLIES OF CANADA

CHARLES ROBERT and DAVID TAYLOR*

Introduction

When the provinces of Canada (divided into Ontario and Québec), New Brunswick and Nova Scotia came together in 1867 to form the new Dominion of Canada, the authority to legislate the parliamentary privileges of the Senate and the House of Commons was expressly granted to the federal Parliament by the British North America Act,[1] as the Constitution Act 1867 was then called. The absence of any equivalent constitutional provision for the provincial assemblies, together with their perceived subordinate status, put their parliamentary privileges on a somewhat less certain footing. In the years following Confederation, the provincial legislative assemblies were, with the assistance of the courts, ultimately successful in staking out the right to claim and exercise their parliamentary privileges despite the initial opposition of Ottawa and London.

By the early 20th century, there was no doubt that the legislatures of the provinces possessed privileges that were largely equivalent to those enjoyed by the federal Parliament. Indeed, most provinces had explicitly legislated their claims to privilege in order to go beyond the limitations imposed at common law. For years, the matter seemed to be settled and beyond dispute. However, questions are once again being raised about the nature and extent of these privileges. This is mostly due to the Canadian Charter of Rights and Freedoms.[2] The conflicting interaction of parliamentary privilege and the Charter, and the values it represents, have prompted new challenges and some

* Charles Robert is the Principal Clerk, Chamber Operations and Procedure, to the Senate of Canada and David Taylor is a Law Clerk to the Honourable Madam Justice Andromache Karakatsanis of the Supreme Court of Canada for the 2012–13 term. All views expressed in this article are those of the authors. The authors would like to thank Jonathan Shanks, Vladimir Rebinczak, and B. Thomas Hall for their assistance in completing this article.

[1] See Constitution Act 1867, 30 & 31 Vict., c. 3.

[2] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act (UK) 1982, c. 11 (hereafter referred to as "the Charter").

rethinking of the actual extent of the privileges possessed by provincial legislative assemblies.

More than 30 years following the introduction of the Charter in 1982, the exact nature of the relationship between the Charter and parliamentary privilege has yet to be fully explored and defined. Through its three decisions on the subject, the Supreme Court of Canada has sought to clarify this relationship. However, the inconsistency of some recent lower-court decisions has cast new doubt on the scope of some parliamentary privileges. What was thought to be firmly settled may now again be open to debate. For different reasons, provincial legislatures may find themselves once more obliged to reconsider their claims to privilege. For a second time, the courts will likely play a decisive role, but the eventual outcome this time round is still unclear.

The history of the early conflicts between the federal government and the provinces over their legislated claims to privilege has rarely been recounted in any detail. Nor is the eventual détente reached by the early 20th century and the role played by the courts that well known. The story begins with decisions by Ottawa to invoke section 90 of the Constitution Act 1867. This extraordinary provision of the Constitution granted to Ottawa the discretionary power to reserve or disallow Acts of the provincial legislatures. This federal power over provincial Acts mirrored the power exercised by London over Acts of the federal Parliament. While this feature of the Constitution has now fallen into disuse, it was a key component of early battles between Ottawa and the provinces over the division of powers, including provincial claims to parliamentary privilege. However, Ottawa's ability to use its disallowance power to resolve these disputes was eventually displaced by the development of a proper judicial system, including the creation of the Supreme Court of Canada. Indeed, the courts played a significant role in recognising the constitutional right of the provinces to legislate in the domain of privilege.

All seemed settled by 1900. There was consensus about the provincial legislatures' possession of parliamentary privileges equivalent to those enjoyed by the federal Houses through section 18 of the Constitution Act 1867. This is clear from the steps taken by Saskatchewan and Alberta to claim privileges after they became provinces in 1905. In the decades that followed, only a few cases relating to parliamentary privilege were argued before any lower court and none before the Supreme Court of Canada.[3]

[3] The most fascinating case involves John H. Roberts, the editor of a Montreal tabloid *The Axe*. In October 1921 Mr. Roberts was the subject of *An Act to amend the Revised Statutes, 1909, and to provide for the imprisonment of John H. Roberts* (QC), 13 Geo V (1922), c. 18, which sentenced him to imprisonment for a term of one year after he had raised questions about the possible

The situation changed significantly with the enactment of the Charter of Rights and Freedoms as part of the Constitution Act 1982. By 2005 there were three Supreme Court decisions and numerous lower court judgments touching various aspects of parliamentary privilege. The rights and values guaranteed by the Charter have prompted these court challenges to parliamentary privilege where there is an apparent conflict. This is clearly what the Supreme Court sought to resolve in its three decisions beginning with *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*.[4] While the Supreme Court appears to be more definitive and unified with each decision, there is still much that is unresolved in determining the proper relationship between privilege and the Charter. This is also evident from the inconsistent application of these decisions by lower courts. Despite the clear reluctance of the courts to give preferential weight to either privilege or the rights and values of the Charter, the trend thus far seems to favour privilege. This may change. If necessity—the foundation of all established privilege—is only to be determined in the contemporary context, as the Supreme Court has decided, the scope of these privileges may someday come to be framed by the values of the Charter. The continuing challenges placed before the courts suggest that this is a possibility. Though it is still too early to be sure, these challenges could be evidence of an emerging paradigm shift. For privilege to remain meaningful in the era of rights, it should not just be the instrument of a Parliament that sees itself as "supreme"; it should also be a reflection of a Parliament that acknowledges and values the principles enshrined in the Charter.

Early battles: provincial efforts to claim privileges from 1868–74

Today, parliamentary privilege is seen as an important element of the Canadian system of government. These privileges exist to protect the ability of legislative bodies to carry out their core functions. They are part of Canada's political and legal inheritance from Britain. The rights, immunities and powers that constitute the body of privilege are firmly rooted in the long history and successful struggle of England's Parliament against the Crown to secure a central role in the structure of government. For very different reasons, the right

involvement of members of the Assembly in the disappearance and presumed murder of a Québec City teenager, Blanche Garneau. The Supreme Court of Canada refused Mr. Roberts' *habeus corpus* motion, as Anglin J. found the Court had no jurisdiction to review the enactment of this unprecedented bill of pains and penalties: see *In Re J.H. Roberts* [1923] S.C.R. 524.

[4] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319.

to claim parliamentary privilege became part of another kind of struggle in Canada shortly after Confederation. For a brief time, Ottawa resisted statutory claims to parliamentary privilege made by provincial assemblies. These skirmishes were part of what became a larger, more durable dispute over competing views of a centralising federal government challenged by the jurisdictional assertions of the provinces.

Section 18 of the Constitution Act 1867 gave the federal Parliament the ability to legislate for the Senate, the House of Commons and their members all the privileges held and exercised by the House of Commons at Westminster.[5] Previously, colonial legislatures were judged to be entitled only to those necessary privileges which were available under common law. This authorisation removed most doubts about the extent of the privileges that could be exercised by the Parliament at Ottawa. Within one year of Confederation, it enacted legislation asserting its possession of parliamentary privileges based on section 18.[6] However, the Constitution was silent about

[5] Section 18 of the Constitution Act 1867 now reads—

> "The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof."

Section 18 was repealed and re-enacted by the Parliament of Canada Act 1875, 38–39 Vict., c. 38 (U.K.), in order to remove some doubts that had arisen with regard to the power of defining by an Act of Parliament its privileges, powers or immunities. It originally read—

> "The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof." [Emphasis added.]

[6] These privileges are now claimed by way of section 4 of the Parliament of Canada Act, R.S.C. 1985, c. P-1, which reads—

> "4. The Senate and House of Commons, respectively, and the members thereof hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and such privileges, immunities and powers as are defined by Act of Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof."

any privileges that might be possessed by the provincial legislative assemblies. All the same, following the federal example, Ontario and Québec both passed statutes claiming a similar level of privilege to that of the federal Parliament. Their statutes simply asserted this claim without the benefit of any grant or authorisation using language that replicated section 18 of the Constitution Act 1867. The reaction of Ottawa to this overt assumption of equal status was swift and hostile. Both statutes were disallowed by the Governor General in Council shortly after they were passed. The reason was simple. In the view of the federal Government, these statutory claims to privilege exceeded the scope of the provincial legislatures' constitutional powers.

In March 1869 the then Prime Minister and Minister of Justice, Sir John A. Macdonald, raised concerns regarding Ontario's attempt to enact privileges for its legislative assembly.[7] The Under-Secretary of State for the Colonies in London referred the matter to the Law Officers of the Crown one month later. The Law Officers reported in May 1869, stating that the capacity to legislate privileges lay outside the powers conferred on the provincial legislatures by section 92 of the Constitution Act 1867. This led to a report by Macdonald in July 1869, in his capacity as Minister of Justice, to the effect that the provincial legislatures could not claim privileges because (1) the courts had decided that colonial legislatures had no inherent privileges; and (2) the absence of a constitutional provision for the provincial legislatures like section 18 meant that they lacked the capacity to legislate their privileges. This report was the subject of a spirited reply by the Attorney General of Ontario, John S. Macdonald, in September 1869, where he argued that the inability to claim such privileges would give the legislative assembly less power to maintain its own process than a justice of the peace, and that there was no provision in the Constitution Act 1867 to prohibit such a claim. In the end, the Ontario Act was disallowed by the Governor General in Council in December 1869.[8]

As correspondence flew back and forth between Ottawa, London and Toronto, Québec passed its own legislation to define the privileges of its legislative assembly and legislative council.[9] This Act also caught the eye of the Minister of Justice, who recommended, in a report approved by the Governor General in Council in November 1869, that the exchanges with London regarding the Ontario Act be brought to Québec's attention so that the latter

[7] *An Act to define privileges, immunities and powers of the Legislative Assembly, and to give summary protection to persons employed in the publication of Sessional Papers* (ON), 32 Vict (1868), c. 3.

[8] Canada Gazette, Vol. III, No. 23, p. 386.

[9] *An Act to define the Privileges, Immunities and Powers of the Legislative Council and Legislative Assembly of Quebec and to give summary protection to persons employed in the publication of Parliamentary Papers* (QC), 32 Vict. (1869), c. 4.

province would repeal its privileges statute. Following an apparent refusal by Québec in late November 1869, the Act was disallowed, on the same day as the Ontario Act.[10]

Provincial legislation on privilege would again fall prey to the disallowance power, or the threat of it, in 1872 and 1874. For reasons that are not clear, both British Columbia and Manitoba seemed to have been unaware of what had happened in Ontario and Québec and the fact that Ottawa had exercised its authority to disallow their Acts, claiming privilege based on the language of section 18. Nonetheless, both British Columbia and Manitoba followed Ontario and Québec in adopting legislation doing precisely the same thing, simply claiming the right to exercise all the same privileges possessed by Ottawa. Again, Ottawa opposed these enactments, believing them to be beyond the constitutional limits of the provinces. In 1872 Macdonald recommended the repeal of legislation adopted by British Columbia. Rather than have the Act disallowed, British Columbia agreed to repeal this Act in 1873.[11] In 1874 Manitoba also enacted legislation that was identical in wording to the 1868 Ontario Act regarding privileges. In this case, the disallowance power was used on the recommendation of Justice Minister Fournier,[12] over the objections of then Lieutenant-Governor Morris. In an October 1874 letter to the then Secretary of State for Canada, Richard William Scott, Lieutenant-Governor Morris enquired as to the reasons for the disallowance, noting that the province's Executive Council felt "that in this new community, with a legislature composed, of necessity, of members untrained to parliamentary practice, every support ought to be accorded to them by the Privy Council in the difficult work of legislating for the varied wants of this rising society".[13] Under Secretary Langevin replied the following month, providing a copy of Macdonald's March 1869 report regarding Ontario's first attempt to claim privileges.[14]

[10] Hodgins, W.E., *Correspondence, reports of the ministers of justice and orders in council upon the subject of Dominion and provincial legislation, 1867-1895: compiled under the direction of the Honourable the minister of justice* (Ottawa: Government Print Bureau, 1896) at pp. 254–56 [Disallowance Correspondence].

[11] Disallowance correspondence, *supra* note 10 at pp 1014–16. See also *An Act to define the Privileges, Immunities, and Powers of the Legislative Assembly, and to give summary protection to persons employed in the publication of Sessional Papers* (BC), 35 Vict. (1872), c. 4; *An Act to repeal "The Legislative Assembly Privileges Act, 1872"* (BC), 36 Vict. (1873), c. 35; *An Act to define some of the Privileges of the Members of the Legislative Assembly* (BC), 36 Vict. (1873), c. 42.

[12] *Ibid.* at p 780.

[13] *Ibid.* at p 781.

[14] *Ibid.* at pp 782–83.

Emerging compromise: targeted claims of privilege from 1870–76

Despite this initial position, the federal view with regard to provincial legislation on parliamentary privilege was open to an alternative approach. In the midst of the early disallowances, the legislature of Québec passed an Act in 1870 defining in more detail its claim to parliamentary privilege, including, among other privileges, the power to punish by imprisonment any breach of privilege.[15] Sir John A. Macdonald recommended against disallowance in this case, as "the Act in question contains provisions necessary to uphold the authority and dignity of the provincial legislature."[16] In his view, the best course would be to leave the Act in force, recognising that it was "of course, open to any parties affected by it to dispute, before the legal tribunals, the constitutionality of the Act."[17] This is precisely what happened in 1875 in the Court of Queen's Bench of Québec in *Ex parte Dansereau*, where it held that the Act was *intra vires*.[18] This case concerned a petition for a writ of *habeas corpus* brought by Mr Dansereau, who had been arrested pursuant to a Speaker's warrant in order to be brought before the Assembly to testify as a witness. By a majority of four to one, the court held that the Speaker's warrant was valid. Dorion C.J. was of the view that provincial legislative assemblies had "the right to exercise such rights and privileges as are mere incidents of the powers specifically vested in them, and without which they could not properly exercise the duties devolving upon them."[19] The *Dansereau* decision led to a paradigm shift in which the kinds of "great doubts whether the legislature had jurisdiction … to enact the said measure", as were expressed by Justice Minister Macdonald in his communiqué to the Governor General in Council regarding this Act, were laid to rest.

The extent of the change in the federal position became apparent in 1876, when Ontario enacted *An Act respecting the Legislative Assembly*,[20] which, much like its Québec counterpart, elaborated in more detail its parliamentary privileges without referring generally to the privileges enjoyed by the Canadian Parliament. Pursuant to that Act, the Legislative Assembly for Ontario granted itself the power to punish by imprisonment any breach of its privileges.[21]

[15] *Quebec Parliamentary Act* (QC), 33 Vict. (1870), c. 5, s. 8. The current *Act respecting the National Assembly*, R.S.Q. c. A-23.1, no longer provides for such punishment. A fine may, however, be imposed (s. 133).

[16] Disallowance Correspondence, p 256.

[17] *Ibid.*

[18] *Ex parte Dansereau* (1875), 19 L.C.J. 210 (Q.B.).

[19] *Dansereau*, *supra* note 18 at p 232.

[20] *An Act respecting the Legislative Assembly* (ON), 39 Vict. (1876), c. 9.

[21] *Ibid.* at s. 12. See section 47 of the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, which still provides for this punishment.

Moreover, the Legislative Assembly of Ontario was empowered with the rights and privileges of a Court of Record for the purposes of enquiring into and punishing any breaches of its privileges.[22] Edward Blake, the then Minister of Justice, expressed similar reservations to those made by Macdonald in 1870 with regard to the Québec Parliamentary Act. On 13 October 1876 Blake reported to the Governor General in Council that in his view parts of the *Act respecting the Legislative Assembly* were "open to very serious question, as being *ultra vires* of a local legislature, but almost all of them are contained in an Act of the legislature of Quebec upon the same subject, which was left to its operation."[23] Based on this, he felt "bound to recommend that, following the precedent referred to, the Act should be left to its operation, it being quite possible for those who may object to its constitutionality to raise their objections in the courts."[24] A short time later, on 25 October 1876, Blake took the same approach to Manitoba's *Act Respecting the Legislative Assembly*.[25]

In 1878 the development of parliamentary privilege at the provincial level took another turn when the newly formed Supreme Court of Canada rendered its judgment in *Landers v Woodworth*,[26] concluding that the Nova Scotia Legislative Assembly did not have the inherent power to remove one of its members, or to punish him otherwise, unless that member was actually obstructing the business of the House. The court implied, however, that the Assembly could grant itself that power. Chief Justice Richards expressly invited the province to legislate on the matter, holding—

> "The Legislatures of Ontario and Quebec seem to have conferred on the House of Assembly in these Provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The Legislatures of the other Provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power, which it is desirable they should possess."[27]

As a matter of fact, the Nova Scotia legislature had legislated respecting its parliamentary privileges pending the appeal before the Supreme Court of

[22] *An Act Respecting the Legislative Assembly* (ON), 39 Vict. (1876), c. 9, s. 11.

[23] Disallowance correspondence, *supra* note 10 at p 147.

[24] *Ibid.* at p 147.

[25] *An Act respecting the Legislative Assembly* (MB), 39 Vict. (1876), c. 12. See Disallowance correspondence at p 812.

[26] *Landers v Woodworth* (1878), 2 S.C.R. 158. The Supreme Court of Canada was constituted in 1875.

[27] *Landers*, *supra* note 26 at p 192, per Richards C.J.

Canada.[28] That Act conferred on the Legislative Council and the House of Assembly of the province the same privileges as those of the Senate and the House of Commons respectively.[29] Though the provisions of that Act were for all purposes similar to those contained in the Ontario, Québec, British Columbia and Manitoba statutes, which had been disallowed by Ottawa, the Nova Scotia Act was allowed to stand, in spite of objections from Justice Minister Blake. In his report to the Governor General in Council of 13 November 1876, Blake noted that "the 2nd section of the Act under consideration professes to give, in the case of Nova Scotia, the powers which it was decided that the legislatures of Ontario and Quebec should not assume."[30] However, given that the remaining provisions mirrored those in Acts that had not been disallowed, he recommended "that the attention of the Lieutenant-Governor should be called to the objection with a view to the repeal of this section before the time with-in which the Act can be disallowed shall have expired."[31]

The battle ends: judicial consideration of provincial privilege from 1896–1904

In 1896, in *Fielding v Thomas*,[32] the Judicial Committee of the Privy Council confirmed the constitutionality of provincial statutes regarding parliamentary privilege. The 20-year gap between Ottawa's decision to leave these statutes to their operation and a ruling on the validity of them by the Privy Council is explained by the fact that a resolution by the courts required a litigant. This litigant only emerged in 1892 in the person of David J. Thomas, the then mayor of Truro, Nova Scotia. Mr Thomas had disobeyed an order of the Nova Scotia House of Assembly to remain in the parliamentary precincts after having been called to the bar. As a result the Assembly voted that he be arrested and committed to imprisonment for 48 hours after he refused to apologise. At trial, Mr Thomas received $200 in damages and the Nova Scotia Supreme Court was equally divided on appeal, with two judges in favour of overturning the trial judge's verdict, and two judges in favour of upholding it.[33]

[28] *An Act Respecting the Legislature of Nova Scotia* (NS), 39 Vict. (1876), c. 22.

[29] *Ibid.*, s. 12. See also *House of Assembly Act*, R.S.N.S. 1989 (1992 Supp), c. 1, s. 26.

[30] Disallowance correspondence, *supra* note 10 at p 495.

[31] *Ibid.* The Lieutenant-Governor's attention was evidently insufficient, as section 2 of the Nova Scotia Act can be found in the 1884 revision of the Statutes of Nova Scotia as section 20 of *An Act regarding the composition, powers and privileges of the Houses*, R.S.N.S. 1884, c. 3, and, as will be seen, would later be considered by the Supreme Court of Canada in 1904.

[32] *Fielding v Thomas* [1896] A.C. 600 (J.C.P.C.).

[33] *Thomas v Haliburton, et al.* (1893) 26 N.S.R. 55.

The Privy Council held that the members could validly rely on the legislated indemnity in respect of civil liability, and that such a provision was *intra vires* the provincial legislature. The Lord Chancellor, delivering the judgment of the Privy Council, held that the legislature of Nova Scotia could validly, pursuant to the Colonial Laws Validity Act[34] and the Constitution Act 1867, amend its own constitution and that parliamentary privileges were in the ambit of that power—

> "By Section 88 the constitution of the Legislature of the Province of Nova Scotia was subject to the provisions of the [British North America] Act to continue as it existed at the union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By Section 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) it had at that time full power to make laws respecting its constitution, powers and procedures. It is difficult to see how this power was taken away from it and the power seems sufficient for that purpose.
>
> Their Lordships are however of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By Section 92 of that Act the provincial legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated *inter alia*, the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant Governor.
>
> It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province."[35]

[34] Colonial Laws Validity Act, 28 & 29 Vict. c. 63. Section 5 of the Act read: "Every colonial Legislature shall have, and be deemed to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony and its jurisdiction, have, and deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such Legislature, provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony." [Capitalisation modernised.]

[35] *Fielding*, *supra* note 32 at pp 610–11. Section 92(1) of the Constitution Act 1867 was repealed by the Constitution Act 1982 and replaced by section 45 of that Act providing: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province."

The Lord Chancellor further stated that these "express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, *Quando lex aliquid concedit, concedere videtur et ihud, sine quo res ipsa esse non potest*."[36] As for the provisions making the House of Assembly a court of record, it was stated—

> "the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purposes of dealing with breaches of privilege and contempt by way of committal."[37]

In 1904 the Supreme Court of Canada rendered its decision in *Payson v Hubert*.[38] Davies J. followed *Fielding v Thomas* and held that the Speaker could rely upon section 20 of the Nova *Act regarding the composition, powers and privileges of the Houses*,[39] which granted such privileges as those of the House of Commons of Canada to the House of Assembly of Nova Scotia, to justify the expulsion of someone from the parliamentary precincts in order to maintain order and decorum. Much to the likely chagrin of Ministers Macdonald and Fournier, who disallowed similar provisions,[40] and certainly of Minister Blake, who recommended disallowing this specific provision,[41] Davies J. found that there was—

> "no doubt that it was the duty of the trial judge to have charged the jury that the Speaker was within his rights when, after having had an opportunity of forming a judgment upon the manner in which the plaintiff conducted herself on the occasion of the alleged assault in the smoking room of the

[36] *Ibid.* at p 613. "Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest" may be translated as: "When the law grants anything, it appears to grant that also without which the thing itself cannot exist."

[37] *Fielding*, *supra* note 32 at 612.

[38] *Payson v Hubert* (1904) 34 S.C.R. 400. *Payson* was a civil action for assault and battery brought by a woman who "frequented the House and its corridors in the promotion of a petition which she had presented to the House, in the previous session of 1901, and which had not been dealt with or disposed of by the House or the Government" (at 401) and was physically removed from the premises by the chief messenger of the House of Assembly.

[39] *An Act regarding the composition, powers and privileges of the Houses*, R.S.N.S. 1884, c. 3, s. 20.

[40] Disallowance correspondence, *supra* note 10 at pp 254–56 (Quebec), 386 (Ontario) and 780 (Manitoba).

[41] *Ibid.* at p 495.

House in 1902, and with his knowledge of her previous history in offending against the order and decorum of the Assembly, over which he presides, he ordered the officials to remove her beyond the precincts of the House."[42]

Détente: provincial claims to privilege in the early 20th century

The court decisions of 1896 and 1904 resolved any doubt about the right of the provincial legislatures to claim parliamentary privilege. The reality of this situation was apparent when Saskatchewan and Alberta became provinces. Both were created by separate Acts of the federal Parliament from land in the Northwest Territories in 1905, shortly after the Supreme Court of Canada's decision in *Payson*. Their legislatures were also the first to be created in Canada since Prince Edward Island joined the Confederation in 1873, when the capacity of provincial legislative assemblies to claim privilege had still to be finally resolved. Within a few years of their formation, both provinces passed legislation to provide for the operation of their respective legislative assemblies in the full realisation that there was no question as to their right to claim these privileges. They were the first legislatures to enact privileges for themselves since New Brunswick did so in 1890,[43] when matters were still unsettled, and paved the way for Prince Edward Island and Newfoundland (as it was then called) to complete the task by 1913 and 1952, respectively.[44]

Saskatchewan passed its first Legislative Assembly Act in 1906.[45] An entire section of the Act was devoted to the "Powers and Privileges of the Legislative Assembly". Saskatchewan's early legislators saw fit to address such matters as the Legislative Assembly's ability to: (1) compel the attendance of persons; (2) examine witnesses under oath; (3) protect its members from civil actions, prosecution and jury service; (4) prohibit its members from accepting fees or rewards for the promotion of a matter before the legislature; and (5) imprison for assaults on members, tampering with witnesses, and presenting forged or falsified documents to the Assembly.

[42] *Payson*, *supra* note 38 at 416. While Davies J. was of the view that parliamentary privilege applied, he and the remaining four justices who sat on this appeal ordered a new trial of the action. Taschereau C.J., and Sedgewick and Nesbitt JJ did not provide reasons while Killam J. indicated that, although he agreed the Speaker had the authority to order the removal, he thought that a new trial was needed due to evidence of unnecessary force being used to remove the plaintiff.

[43] *An Act respecting the Powers and Privileges of the Legislature of New Brunswick*, 53 Vict. (1890), c. 6.

[44] *An Act Respecting the Legislative Assembly*, S.P.E.I. 1913, c.1, ss 1–15; *An Act Respecting the House of Assembly*, R.S.N. 1952, c. 3, ss 6–18.

[45] Legislative Assembly Act, S.S. 1906, c. 4.

Alberta enacted its own Legislative Assembly Act in 1909.[46] It followed Saskatchewan's path in providing a section entitled "Powers and Privileges of the Legislative Assembly." This section was almost a word-for-word reproduction of the powers and privileges enacted by its sister province three years earlier. Some notable differences include the absence of provisions prohibiting members from accepting fees or rewards for promoting a matter before the Assembly, and the ability to issue warrants for arrest to be executed by the sergeant-at-arms, the governor of the "common gaol" in Edmonton, or the commanding officer of the Royal North-West Mounted Police for Edmonton, where a contempt has been committed against the Assembly.

These Acts were passed as a matter of course in the development of the system of laws and governance of the first provinces to enter Confederation in the 20th century. In fact, more than 100 years later, some of the same provisions remain a part of Saskatchewan's Legislative Assembly and Executive Council Act 2007 (ability to punish for contempt, immunity from civil action)[47] and of Alberta's Legislative Assembly Act.[48] Interestingly, both the Saskatchewan and the Alberta Acts have residual claims of privilege with different sources: the Saskatchewan Act provides that, in addition to its specified privileges, it holds all of the privileges of the House of Commons of Canada (s. 23), while Alberta claims the privileges of the House of Commons of the United Kingdom (s. 9(1)). Section 23 of the Saskatchewan Act and subsection 9(1) of the Alberta Act mirror section 4 of the Parliament of Canada Act, which is Ottawa's general claim to privilege for the House of Commons and the Senate.

The breadth of powers claimed by Saskatchewan and Alberta in their early years, and the extent of powers each claims today, belies the controversy that surrounded claims and use of privileges by provincial legislative assemblies in Canada's early days. From the time when claims to privilege by provincial legislatures were initially resisted by the Macdonald government, a stance supported by the Colonial Office in London, it would take four decades of political and judicial wrangling to reach the point where Saskatchewan and Alberta were able to assume their powers with ease in the first decade of the 20th century.

As stated above, the legislatures of both Ontario and Québec empowered their legislative assemblies (and, in Québec, its legislative council) to administer oaths to witnesses appearing before them. Statutory provisions to the same

[46] Legislative Assembly Act, S.A. 1909, c. 2.

[47] Legislative Assembly and Executive Council Act 2007, S.S. 2007, c. L-11.3.

[48] Legislative Assembly Act, R.S.A. 2000, c. L-9.

effect remain in force today in those provinces[49] and have been enacted by the other provinces as they joined the Confederation, or shortly thereafter, and similar provisions are still in force today.[50] Moreover, as is provided for the legislative assemblies of Ontario and Nova Scotia (and, in Nova Scotia, its legislative council), some provinces declared their legislative assemblies (and councils) to be a court for the purpose of investigating and punishing breaches of their privileges.[51] In some instances, it is stated explicitly that the legislative assembly (and council) may impose imprisonment for a breach of its privileges.[52] These legislated parliamentary privileges are in addition to the general

[49] Ontario: *Legislative Assembly Act*, R.S.O. 1990, c. L.10, s. 59; Québec: *An Act respecting the National Assembly,* R.S.Q. c. A-23.1, s. 52.

[50] Alberta: *An Act respecting the Legislative Assembly of Alberta*, S.A. 1909, c. 2, s. 39; today's version is the *Legislative Assembly Act*, R.S.A. 2000, c. L-9, s. 14; British Columbia, *British Columbia: Legislative Oaths to Witnesses Act*, 35 Vict., c. 5. It seems that the general claim to "privileges, immunities and powers" of the United Kingdom House of Commons as of 4 February 1871 does not include the right to administer oaths since the Parliamentary Witnesses Oaths Act 1871 34 & 35 Vict. (c. 83) was enacted and came into force on 16 August 1871. Manitoba: *Acte pour permettre d'assermenter les témoins, dans certain cas, pour les fins du Conseil Législatif ou de l'Assemblée Législative*, 36 Vict. (1873), c. 3; Legislative Assembly Act, C.C.S.M., c. L110, ss. 36–38; New Brunswick: *An Act to provide for the attendance and examination on oath of Witnesses before the Legislature and Committees thereof*, 33 Vict. (1870), c. 33; *Legislative Assembly Act*, R.S.N.B. 1973, c. L-3, ss. 3 and 4; Newfoundland: see section 6 of chapter 2, Title 2 of the C.S. Nfld., 3rd series for the applicable provision when Newfoundland joined Confederation in 1949; *House of Assembly Act*, R.S.N.L. 1990, c. H-10, s. 8; Nova Scotia: *An Act Respecting the Legislature of Nova Scotia*, 39 Vict. (1876), c. 22; House of Assembly Act, R.S.N.S. 1989 (1992 Supp.), c. 1, s. 34; Prince Edward Island: *Legislative Assembly Privileges Act*, S.P.E.I. 1913, ss. 9 and 10; Saskatchewan: Legislative assembly Act, S.S. 1906, c. 4, s. 29; *Legislative Assembly and Executive Council Act, 2007*, S.S. 2007, c. L.11, ss. 34–35.

[51] Alberta: An Act respecting the Legislative Assembly of Alberta, S.A., 1909, c. 2, s. 40; Legislative Assembly Act, R.S.A. 2000, c. L-9, s. 12; British Columbia: Legislative Assembly Privileges Act, S.B.C. 1892, c. 28, s. 5; Legislative Assembly Privilege Act, R.S.B.C., c. 259, s. 5; Manitoba: *Acte concernant l'Assemblée Législative*, S.M., 1876, c. 12, s. 10; Legislative Assembly Act, C.C.S.M. c. L110, ss. 39 and 40; Prince Edward Island: Legislative Assembly Privileges Act, S.P.E.I. 1913, s. 5; Legislative Assembly Act, R.S.P.E.I. 1988, c. L-7, s. 31; Saskatchewan: Legislative Assembly Act, S.S. 1906, c. 4, s. 37; Legislative Assembly and Executive Council Act, 2007, S.S. 2007, c. L-11.3, s. 24.

[52] Alberta: An Act respecting the Legislative Assembly of Alberta, S.A., 1909, c. 2, s. 45; Legislative Assembly Act, R.S.A. 2000, c. L-9, s. 11 (imprisonment/fine); British Columbia: Legislative Assembly Privileges Act, S.B.C. 1892, c. 28, s. 6; Legislative Assembly Privilege Act, R.S.B.C., c. 259, s. 7; Manitoba: Acte concernant l'Assemblée Législative, S.M., 1876, c. 11, s. 10; Legislative Assembly Act, C.C.S.M. c. L110, s. 41; New Brunswick: *An Act to provide for the attendance and examination on oath of Witnesses before the Legislature, and Committees thereof*, 33 Vict. (1870), c. 33, s. 3; Legislative Assembly Act, R.S.N.B. 1973, c. L-3, s. 5; Newfoundland: see section 15 of the chapter 2, Title 2, of the C.S. Nfld, 3rd series for the applicable provision when

claim to the same parliamentary privileges as those of the Canadian House of Commons[53] or, in the cases of Alberta and British Columbia, the United Kingdom House of Commons.[54] There is a certain irony to the fact that the provinces now mimic Ottawa in their general manner of claiming privileges, as it was just such a general claim that grounded the Macdonald government's decision to disallow the first attempts of Ontario, Québec, British Columbia and Manitoba to claim privilege after Confederation. Indeed, in a July 1869 report, Macdonald noted "that the legislature of Ontario has declared that the Legislative Assembly and its members shall enjoy the same privileges as those exercised by the House of Commons of Canada. It would seem, therefore, that this Act is in excess of the power of the provincial legislature."[55] The current existence of these general claims, and the ability of some provinces to go further and claim the privileges of Westminster, which are not limited by the provisions of Part IV of the Constitution Act 1867,[56] belies the fact that this early constitutional struggle was laid to rest long ago.

As can be seen through the early actions of Saskatchewan and Alberta in defining their privileges, the Privy Council's recognition in *Fielding* that provincial legislative assemblies were competent to legislate their own powers and privileges through their ability to amend their provincial constitutions gave rise to a set of privileges based on legislative choice as opposed to necessity. Given the legislative supremacy that existed in the pre-Charter context, the *Fielding* approach to the privilege of provincial assemblies arguably gave those bodies a wider ability to claim privilege than the federal Parliament enjoyed

Newfoundland joined the Confederation in 1949 (imprisonment/fine); House of Assembly Act, R.S.N.L. 1990, c. H-10, s. 17 (imprisonment/fine); Prince Edward Island: Legislative Assembly Privileges Act, S.P.E.I. 1913, s. 6; Legislative Assembly Act, R.S.P.E.I. 1988, c. L-7, ss 12 and 32; Saskatchewan: Legislative assembly Act, S.S. 1906, c. 4, s. 38; Legislative Assembly and Executive Council Act, 2007, S.S. 2007, c. L-11.3, s. 25 (imprisonment/fine).

[53] New Brunswick: Legislative Assembly Act, R.S.N.B. 1973, c. L-3, s. 1; Newfoundland: House of Assembly Act, R.S.N.L. 1990, c. H-10, s. 19; Prince Edward Island: Legislative Assembly Privileges Act, S.P.E.I. 1913, s. 6; Legislative Assembly Act, R.S.P.E.I. 1988, c. L-7, s. 27; Saskatchewan: Legislative Assembly and Executive Council Act, 2007, S.S. 2007, c. L-11.3, s. 23. The Province of Manitoba had enacted a similar provision in 1873 but the Act containing it was disallowed. See Acte pour définir les Privilèges, Immunités et Pouvoirs du Conseil Législatif et de l'Assemblée Législative de Manitoba, et pour donner une protection sommaire aux personnes employés dans la publication des papiers parlementaires, 35 Vict. (1872), c. 2, s. 2.

[54] Alberta: Legislative Assembly Act, R.S.A. 2000, c. L-9, s. 9 (as of 29 March 1867); British Columbia: Legislative Assembly Privilege Act, R.S.B.C., c. 259, s. 1 (as of 14 February 1871).

[55] Disallowance correspondence, *supra* note 8 at p 83.

[56] See generally: Charles Robert, "Parliamentary Privilege in the Canadian Context: An Alternative Perspective" (2010), 78 *The Table* 32.

since its claims of privilege were constrained by section 18 of the Constitution Act 1867. However, this balance would be altered in 1982 with the entrenchment of constitutional rights in the Charter and the Supreme Court of Canada's subsequent interpretation of the interaction between the rights and freedoms that the Charter brought to Canada's constitutional order and parliamentary privilege.

A new balance: the SCC's approach to the relationship between privilege and the Charter

The Canadian Charter of Rights and Freedoms guarantees certain rights under the Canadian Constitution. Introduced at the time of the patriation of Canada's Constitution in 1982, its entrenchment was a response to the reluctance of the courts to enforce the Canadian Bill of Rights in situations where its provisions conflicted with another statute.[57] The Charter protects various rights and freedoms, such as the freedoms of religion, expression, peaceful assembly and association (s. 2); democratic rights (ss 3–5); mobility rights (s. 6); rights against unreasonable search and seizure or arbitrary detention (ss 8 and 9); fair trial rights (s. 11); equality rights (s. 15); and language rights (ss 16–23). All of these are subject to reasonable limitations prescribed by law that are demonstrably justified in a free and democratic society (s. 1), and some rights are subject to an override by Parliament or a provincial legislature through what is known as the "notwithstanding clause" (s. 33).

From the entrenchment of the Charter in 1982 until 2005, the Supreme Court of Canada has granted leave for three appeals that engaged questions of parliamentary privilege. The judgments in these appeals, and particularly the court's unanimous decision in the most recent appeal, *Canada (House of Commons) v Vaid*,[58] constitute the leading authority regarding the present state of Canadian law with regard to parliamentary privilege. While the lower courts have continued to grapple with issues regarding parliamentary privilege in the seven years since *Vaid* and some litigants have sought leave to appeal to the Supreme Court of Canada, leave has been denied in every instance.

[57] Canadian Bill of Rights, S.C. 1960, c. 44. In *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177 Wilson J. noted these shortcomings at p 209: "It seems to me rather that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterised their approach to the Canadian Bill of Rights ought to be re-examined."

[58] *Canada (House of Commons) v Vaid* [2005] 1 S.C.R. 667.

New Brunswick Broadcasting Co[59] was the Supreme Court of Canada's first occasion to deal with the relationship between parliamentary privilege and the Charter. The issue in this appeal was whether Nova Scotia's House of Assembly could prohibit the use of television cameras in its public gallery. The press alleged that this prohibition was contrary to the guarantee of freedom of the press provided in subsection 2(b) of the Charter. At first instance, Nathanson J. of the Supreme Court of Nova Scotia Trial Division granted the New Brunswick Broadcasting Co.'s request to access the gallery with its own cameras to televise the House of Assembly's proceedings.[60] An appeal from Nathanson J.'s decision was heard by a five-judge panel of the Supreme Court of Nova Scotia Appeal Division. Writing for the three-judge majority, Jones J.A., with whom Clarke C.J.N.S. and Matthews J.A. concurred, upheld the bulk of Nathanson J.'s order (Hallett and Macdonald JJ.A. dissenting).[61] Shortly thereafter, the Speaker of the House of Assembly was granted leave to appeal to the Supreme Court of Canada.[62]

While the Supreme Court of Canada allowed the appeal of the Speaker of the Nova Scotia House of Assembly in 1993, it did so in a way that left no clear majority. Due to Stevenson J.'s retirement the previous year, eight judges participated in the decision, rendering five separate sets of reasons, four of which reached the same result, with only Cory J. dissenting.

McLachlin J., as she then was, delivered reasons that were concurred in by L'Heureux-Dubé, Gonthier and Iacobucci JJ. These reasons have generally been seen as the court's majority reasons, as La Forest J. agreed generally with McLachlin J., though he emphasised that the parliamentary privileges granted to legislative assemblies as being necessary to carry out their functions were similar, but not identical, to those of the Parliament of the United Kingdom. McLachlin J. held that even though the Constitution Act 1867 did not contain a specific provision conferring parliamentary privilege upon the provincial legislative assemblies, these assemblies possess such privileges as are necessary for their proper functioning. This view was grounded in the preamble of the Constitution Act 1867, which refers to Canada having a "Constitution similar in Principle to that of the United Kingdom".

McLachlin J. also considered the court's role with regard to the privileges of a legislative assembly, finding that while the courts may be called upon to rule

[59] *New Brunswick Broadcasting*, *supra* note 4.

[60] *New Brunswick Broadcasting Company Ltd v Nova Scotia (Speaker of the House of Assembly)* (1990) 97 N.S.R. (2d) 365, 71 D.L.R. (4th) 23 (SC).

[61] *Donahoe v Canadian Broadcasting Corporation* (1991) 102 N.S.R. (2d) 271, 80 D.L.R. (4th) 11.

[62] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1991] 1 S.C.R. viii.

on questions related to privilege, their role would be to determine the necessary sphere of exclusive and absolute parliamentary jurisdiction without which the dignity and efficiency of a legislative assembly could not be upheld. She held that the parliamentary privileges that engage this dignity and efficiency are part of the Constitution, and maintain this status whether or not they are claimed by way of statute. Drawing upon the principle that one part of the Constitution cannot abrogate another, she held that once a claimed privilege has been upheld as necessary, the exercise of that privilege cannot be judicially reviewed on Charter grounds.

In *Harvey v New Brunswick (Attorney General)*[63] the Supreme Court had occasion to consider the constitutionality of a statute providing for the automatic expulsion of a member of the New Brunswick Legislative Assembly upon his or her conviction for certain specified offences. Mr Fred Harvey, who had been elected as the member for Carleton North in the 1991 provincial election, was convicted of illegal practices under the New Brunswick Elections Act.[64] As a result of subsection 119(c) of the Act, his seat was vacated as of the date of his conviction, and Mr Harvey was disqualified from seeking re-election for five years.

Mr Harvey challenged the constitutionality of his disqualification, claiming that it was contrary to the democratic rights enshrined in section 3 of the Charter.[65] The Supreme Court, although unanimous in rejecting Mr Harvey's appeal, issued three sets of reasons. La Forest J. wrote for a six-judge majority and, declining to proceed on the basis of parliamentary privilege, held that subsection 119(c) was contrary to the democratic rights protected by section 3 of the Charter, but that this violation was justified in a free and democratic society pursuant to section 1 of the Charter. Lamer C.J. concurred with La Forest J.'s reasons, but on the basis of the view of parliamentary privilege he espoused three years earlier in *New Brunswick Broadcasting*.

McLachlin J., as she then was, with whom L'Heureux-Dubé J. concurred, held that the automatic expulsion in subsection 119(c) of the Elections Act was a proper exercise of parliamentary privilege necessary to maintain the dignity, integrity and efficiency of the legislature. McLachlin J. also held that disqualification was a valid exercise of privilege, not only because it would make the expulsion effective by preventing the expelled member from seeking re-election at the first opportunity, but also because it would maintain the

[63] *Harvey v New Brunswick (Attorney General)* [1996] 2 S.C.R. 876.

[64] Elections Act, R.S.N.B. 1973, c. E-3.

[65] Section 3 of the Charter provides that "Every citizen of Canada has the right to vote in an election of members ... of a legislative assembly and to be qualified for membership therein."

dignity and efficiency of the legislature. In so holding, McLachlin J. stated expressly that parliamentary privileges, whether legislated or inherent, were of the same constitutional status as the Charter.

McLachlin J.'s concurring judgment is significant because it provided greater detail regarding the relationship between two elements of fundamental importance to our constitutional order: privilege and the Charter. She gave clear instruction in her reasons that in cases of conflict between a given aspect of privilege and a right under the Charter, "the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them."[66] She clearly identified the importance of the Charter's role in displacing the pre-1982 status quo, which was founded on the traditional British model—

> "Under the British system of parliamentary supremacy, the courts arguably play no role in monitoring the exercise of parliamentary privilege. In Canada, this has been altered by the Charter's enunciation of values which may in particular cases conflict with the exercise of such privilege. To prevent abuses cloaked in the guise of privilege from trumping legitimate Charter interests, the courts may properly question whether a claimed privilege exists."[67]

The latest judgment of the Supreme Court of Canada pertaining to parliamentary privilege is *Canada (House of Commons) v Vaid*.[68] In this case, the court had to decide if the staffing decisions of the Speaker of the House of Commons were exempted from the requirements of the Canadian Human Rights Act as a consequence of a parliamentary privilege of the House of Commons and its members regarding parliamentary employment matters. In particular, this appeal concerned Mr Satnam Vaid, who had been reinstated as the chauffeur of the Speaker of the House of Commons following a grievance under the Parliamentary Employment and Staff Relations Act only to find that his position had become surplus due to a reorganisation. Mr Vaid complained to the Canadian Human Rights Commission, alleging harassment and discrimination on the part of the Speaker and the House of Commons. The Commission accepted the complaint and referred it to the Canadian Human Rights Tribunal. The Speaker challenged the Tribunal's jurisdiction on the basis that parliamentary privilege protected his power to hire, manage and dismiss employees, meaning that that power could not be reviewed. The Tribunal

[66] *Harvey*, *supra* note 63 at para 69.
[67] *Ibid.* at para 71.
[68] *Vaid*, *supra* note 58.

dismissed the Speaker's challenge, a decision that was confirmed by both the Federal Court and the Federal Court of Appeal on judicial review.

While the Supreme Court of Canada allowed the Speaker's appeal based on administrative law principles, Binnie J., writing for a unanimous court, rejected the broad claim to a privilege regarding the "management of employees" that would give immunity to legislative assemblies and their members with respect to all dealings with all employees of the legislative branch without exception.

While the Supreme Court decided this claim in the context of a privilege claimed by the House of Commons, and thus resting on section 4 of the Parliament of Canada Act and section 18 of the Constitution Act 1867, of which there is no equivalent for provincial legislative assemblies, the principles asserted by the court are also applicable in the provincial context.

The court defined the approach to establishing a parliamentary privilege, stating that when a privilege is claimed, the courts must determine not only the historical roots of the claim but also whether the privilege is still necessary to the functioning of a legislative body in the contemporary context, which will ensure that privilege evolves along with societal changes. However, the content of the contemporary context remains somewhat unclear since the question remains whether this context includes only descriptive elements, such as the level of technology involved in executing tasks, or normative considerations as well. Once a court has determined the historical basis for the claimed privilege and has determined that the privilege is necessary in the contemporary context, Binnie J. was clear that the court's reviewing role had come to an end. This was a significant finding in that a unanimous court confirmed that recognised privileges would not be subject to ordinary legal remedies and, in light of their constitutional nature, would also fall outside the purview of the Charter.

The *Vaid* decision was also significant because Binnie J. held that "[t]he immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e., inherent privilege versus legislated privilege)."[69] Accordingly, where a privilege is legislated, whether under section 18 of the Constitution Act 1867 or pursuant to provincial constitutional amendment powers under section 45 of the Constitution Act 1982, it will have constitutional status if it meets the necessity test. If it does not meet this test, its scope will not be immune from Charter scrutiny and its exercise will not be free from judicial review.

[69] *Vaid*, *supra* note 58 at para 34.

The continuing struggle: consideration of parliamentary privilege by lower courts

The Supreme Court of Canada may have achieved unanimity on the approach to defining the scope of privilege in Canada; however, lower courts continue to struggle with the proper approach. One impact of this uncertainty has been a state of affairs in which the same privilege takes on a different scope in different provinces. For instance, the immunity of parliamentarians from being summoned to testify in civil proceedings extends to 40 days before and after legislative sessions in Ontario[70] and Prince Edward Island,[71] 14 days before and after legislative sessions in matters before the Federal Court,[72] and only for the duration of legislative sessions in British Columbia.[73] This wide range of results demonstrates varying perspectives on necessity, creating a patchwork of principles regarding what legislative bodies require to perform their essential functions. In some cases, legislatures may add their voices to the evolving conversation, as the Québec Parliament has chosen to do in the context of immunity from summonses to testify, which it has set at the shortest period in the country, extending from two days before a sitting of the National Assembly or one of its committees to two days after the conclusion of that sitting.[74]

To this point, it appears that the primary avenue for the development of privilege in the 21st century will be litigation.[75] In the post-*Vaid* context, such conflicts have extended to the right of a private citizen to defend himself against a censure motion,[76] the summary dismissal of officers of a legislature,[77] the use of parliamentary testimony and documents in litigation to which the legislative assembly is not a party,[78] and the right of a legislative assembly to manage its process without regard to statutes of general application.[79] Given the fact that the Supreme Court of Canada has not granted leave

[70] *R v Brown*, 2001 PESCTD 6, 197 Nfld & PEIR 285.

[71] *Telezone Inc. v Canada (Attorney General)* (2004) 69 O.R. (3d) 161 (CA).

[72] *Samson Indian Nation and Band v Canada* 2003 FC 975.

[73] *Ainsworth Lumber Co. v Canada (Attorney General)* 2003 BCCA 239.

[74] *Act Respecting the National Assembly*, *supra* note 49, s. 46.

[75] For more details on the development of privilege through litigation, see Charles Robert and Vince MacNeil, "Shield or Sword? Parliamentary Privilege, Charter Rights and the Rule of Law" (2007), 75 *The Table* 17.

[76] *Michaud v Bissonnette* 2006 QCCA 775.

[77] *March v Hodder* 2007 NLTD 93; *Neville v Fitzgerald* 2009 NLTD 189.

[78] *R v Basi* 2009 BCSC 739; *Canada (Royal Canadian Mounted Police) v Canada (Attorney General)* 2007 FC 564; *Gagliano v Canada (Attorney General)* 2005 FC 576.

[79] *Fédération Franco-Ténoise v Canada (Attorney General)*,2008 NWTCA 6. For a critique of the Northwest Territories Court of Appeal's reasoning in this case, see Charles Robert, "Falling

to appeal for a case involving parliamentary privilege since *Vaid*, these controversies will likely be contested in the courts of appeal in provinces where they have yet to be addressed.

An individual's interests can be affected by privilege either directly or indirectly. In recent years, legislative assemblies in Québec and Newfoundland and Labrador have been taken to court by individuals complaining that they did not have the opportunity to respond to resolutions passed by the legislative assembly. Ultimately, the process of adopting resolutions was found to be immune from judicial scrutiny because of privilege. In *March v Hodder* and *Neville v Fitzgerald*, officers of the legislature (in *March*, the Citizens' representative, in *Neville*, the Child and Youth Advocate) claimed that the House of Assembly owed them a duty of fairness and the ability to participate in the consideration of resolutions that would have the effect of removing them from office, for cause. Mr March was removed by resolution in December 2005, and Ms Neville faced such a resolution in August 2009, following her suspension with pay by the Lieutenant-Governor in Council.[80] In both cases, the court found that it could not bind the House of Assembly to provide Mr March or Ms Neville the right to be heard because the process of adopting resolutions, even on employment matters, was covered by the House's privilege over its own proceedings. Orsborn J. expressed his finding that the House of Assembly was the sole arbiter of the duty of fairness owed in such situations in the following terms—

> "It is difficult to conceive of a role more central to the functioning of the House as a deliberative body. Debating and passing resolutions lies at the core of the function or business of the legislative assembly. Indeed, in this case, the assembly debated the very question now raised as a breach of the duty of procedural fairness. The Foote amendment proposed that March be given the opportunity to address the House. That amendment was fully debated. The amendment was voted on by the members. If the majority of members had voted in favour of the amendment, March would have been invited to address the House. But the amendment did not pass. For the court to now intervene and take upon itself the jurisdiction to consider whether March was entitled by law to address the House would be an improper intrusion by the court into the heart of the internal debates or proceedings of the House of Assembly. The dignity and efficiency of the House would be significantly impaired."[81]

Short: How a Decision of the Northwest Territories Court of Appeal Allowed a Claim to Privilege to Trump Statute Law" (2011), 79 *The Table* 19.

[80] *March*, *supra* note 77 at paras 3–9; *Neville*, *supra* note 77 at paras 3–8.

[81] *March*, *supra* note 77 at para 64. See also *Neville*, *supra* note 77 at para 30.

A similar result arose in *Michaud v Bissonnette*. That case stemmed from alleged controversial comments made by Mr Michaud, a candidate for the Parti Québécois nomination in the riding of Mercier, on a Montreal radio show and before a provincial commission reporting on the French language in Québec. The National Assembly, without reference to the actual text of Mr Michaud's remarks, unanimously passed a resolution censuring him without debate. The resolution read—

> "That the National Assembly uncompromisingly, unequivocally and unanimously denounces the unacceptable remarks about ethnic communities and, in particular, the Jewish community, made by Yves Michaud in Montreal, on December 13, 2000, at the Estates-General hearings on the French Language."[82]

After petitioning the National Assembly twice to be heard on the matter of the resolution, Mr Michaud took the National Assembly to court in December 2003, where he argued that the National Assembly did not have the authority to make the resolution in question and that it was required to address his petitions for redress.[83] The Court of Appeal was of the view that the National Assembly was exercising its freedom of speech privilege to express itself "on a current political issue in Quebec."[84] The ability to do so was seen to be part of "one of the primary functions of Parliament, namely, that of debating and passing resolutions freely on the subjects of its own choosing".[85] However, the extreme nature of this result, which had the effect of granting the National Assembly the unilateral ability to censure a private citizen, did not go unnoticed at the Court of Appeal. In concurring reasons, Baudouin J.A. expressed some reservations, stating—

> "I agree with the analysis and conclusions of my colleague Dutil J.A. However, I cannot help but think that the Law in this case presents a strange paradox.
>
> To preserve parliamentary democracy, and, hence, the free flow of ideas, the Law at the time of charters and the predominance of individual rights means that an individual can be condemned for his ideas (good or bad, politically correct or incorrect, it matters little) without appeal and then publicly hung out to dry without having had a chance to defend himself and even without the reasons for his condemnation having first been clearly

[82] *Michaud*, *supra* note 76 at para 12.
[83] *Ibid.* at paras 17–25.
[84] *Ibid.* at para 48.
[85] *Ibid.* at para 46.

> stated before his judges, the parliamentarians. "*Summum jus summa injuria*", as the Roman jurists would have said!"[86]

Despite the result in *Michaud*, Canadian courts have not always been willing to proceed with an expansive definition of the scope of a privilege in instances where the existence of that privilege might conflict with values that are fundamental to the Canadian constitutional order. For instance, in *R v Basi*, Bennett J. of the Supreme Court of British Columbia was faced with a disclosure application made by co-accused seeking documents in the possession of the legislature's Conflict of Interest Commissioner which would prove that they were innocent of the fraud charges that had been brought against them. Bennett J. recognised that the authorities were clear that Charter rights, such as the right to make full answer and defence, could not trump privilege.[87] However, in light of the fundamental importance to the Canadian legal system of the principle that the innocent not be convicted, he could not "conceive that the scope of the privilege would allow the conviction of an innocent person. This is a proposition that is as tyrannical as some of the abuses seen centuries ago."[88] In so holding, he recognised that the necessity inquiry cannot operate in a vacuum. While the ability of the legislative assembly to function is a value of key importance in a constitutional democracy, it should be remembered that other values that inhere in our constitutional democracy must play a role in shaping the privileges that the legislative assembly will exercise, lest they be undermined.

New uncertainties: the Charter and provincial parliamentary privilege

As the Charter begins to exert its role in shaping the exercise of parliamentary privilege by legislative assemblies in Canada, a fundamental difference between late 19th century and early 21st century challenges to legislative assemblies claiming and exercising privileges will become apparent. While the early battles over the nature and exercise of privilege were based on the subordination of provincial legislative assemblies to Ottawa, or of the Dominion parliament to London, modern-day challenges are motivated by the view that the individual rights of the governed are at least as important as the rights, privileges and immunities that inhere in the bodies that govern them.

[86] *Michaud*, *supra* note 76 at paras 64–65. The Latin expression "*Summum jus summa injuria*" translates as "extreme justice becomes extreme injustice."

[87] *Basi*, *supra* note 78 at para 49.

[88] *Ibid* at para 57.

From a practical perspective, as a result of the Supreme Court of Canada's decisions in *New Brunswick Broadcasting* and *Vaid*, the privileges that provincial legislatures have enacted since the Privy Council's decision in *Fielding* are vulnerable to Charter scrutiny to the extent that they cannot be shown to be necessary to the functioning of a legislative assembly. While this is a dramatic change, it should be recalled that, to the extent that privileges are subject to Charter scrutiny, legislative assemblies may be able to demonstrate that their impact on rights protected by the Charter is a pressing and substantial objective that is demonstrably justified in a free and democratic society under the test established by the Supreme Court of Canada in *R v Oakes*.[89]

This situation is notably different than that which faces both Houses of the federal Parliament, which benefit from section 18 of the Constitution Act 1867 as a source of their privileges. As the Supreme Court of Canada noted in *Vaid*, while the federal Parliament may claim the same necessity-based privileges that can be claimed by the provincial legislatures, it also "has an express legislative power to enact privileges which may exceed those "inherent" in the creation of the Senate and the House of Commons, although such legislated privileges must not "exceed" those "enjoyed and exercised" by the UK House of Commons and its members at the date of enactment."[90] While provincial legislative assemblies could attempt to claim identical privileges by way of their authority to amend the provincial constitution, these privileges would be subject to Charter scrutiny to the extent that they do not meet the necessity test.

The necessity test will also have to account for modern public expectations. On the one hand, citizens are faced with parliamentary privileges that are poorly understood and that stem from a time when a group of representatives of a largely agrarian society attempted to wrest control of the reins of the state from an hereditary monarch. On the other hand, citizens are imbued with fundamental constitutional rights, such as freedom of speech, the right to due process and equality rights, which were adopted by democratically elected federal and provincial leaders following consultation with the public. When faced with a conflict between these two values, it is hardly surprising that there might be popular consternation if these essential rights were to be subordinated to privilege.

Future litigation with regard to the validity of privilege must also bear in mind the changed expectations of the public with regard to those who govern them. In light of the increased scrutiny that has been given in recent years to

[89] *R v Oakes* [1986] 1 S.C.R. 103.
[90] *Vaid*, *supra* note 58 at para 33.

the exercise of legislative power between elections, a development stemming from the rise of the 24-hour news cycle, social media and the proliferation of state power in increasingly complex areas, the electorate holds today's legislators to a higher standard than that which existed at confederation. The increasing expectation of accountability on the part of the public has changed not only the traditional view of the role of the legislature but also of the role of privilege. While it remains to be seen whether this changing perspective has an impact on the necessity analysis to which claims of privilege that conflict with the Charter will be subjected, it will at the very least have an impact on the political calculus involved in a legislature's decision whether it ought to exercise its privilege in a given matter.

These important changes ought to affect the way in which courts define the scope of privilege. While Binnie J. clarified in *Vaid* that necessity is the watchword of privilege, it is also clear from his reasons that the changing context in which privileges will operate is an essential factor in defining the scope of a privilege. In *Vaid* itself, Binnie J. relied on the vastly expanded workforce, both in terms of number of employees and types of services provided, in finding that the privilege over management of employees could not extend to all employees of the House of Commons.[91] However, the nature of the modern context that this enquiry is to consider should not be limited to the increased complexity of the modern state but also to the changing expectations of those who wield the instruments of power. While there is no doubt that law-making in the 21st century is a more complex exercise than it was in 1867, it must also be recognised that these laws are made under the watchful gaze of a public that is more diverse, involved and demanding.

To this end, it should be recognised that the inquiry into the contemporary necessity of a given privilege must take into account certain values that are fundamental to the Canadian constitutional order. This is not to suggest that one part of the Constitution may be used to trump another, a result that the Supreme Court of Canada's jurisprudence precludes. Instead, this approach would recognise that certain constitutional values, including some which may inform the various rights guaranteed under the Charter, underlie privilege and have a role to play in defining its scope. While the precise nature of these constitutional principles remains to be developed, the principles of federalism, constitutionalism and the rule of law, democracy and respect for minorities identified by the Supreme Court of Canada in the *Reference re Secession of Quebec* may provide an excellent starting point.[92] Charter values may also

[91] *Vaid*, *supra* note 58 at para 72.

[92] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at paras 49–82.

provide grounds to test a privilege for its contemporary necessity, much as they serve as an instrument for the incremental development of the common law.[93]

Conclusion

In its decisions in *New Brunswick Broadcasting* and *Vaid*, the Supreme Court of Canada has laid out an approach that casts the judiciary in the role of an arbiter, not an actor, when affirmed privileges come into conflict with the constitutional rights that have been guaranteed to individual Canadians. For the present time, it would seem that the renewed challenge to the ability of provincial legislatures to be certain of their privileges will be answered by the courts exercising their role of incremental development, much as they did in the series of late 19th century court cases that led to the establishment of a status quo in *Payson v Hubert*, which provided sufficient certainty to allow legislative assemblies to enact the privileges and powers needed to support the day-to-day functioning of legislative assemblies. However, it remains possible that in the face of a proliferation of challenges from a Canadian public with heightened expectations, courts may be inclined to take a bolder approach. While future judicial action will certainly be limited to defining the scope of parliamentary privileges, due to the impact of the Supreme Court of Canada's unanimous decision in *Vaid*, these expectations may cause the courts to take a more assertive approach to the definition of privileges that conflict with the public's legitimate expectations. While the prospects of a reversal of the *Vaid* decision in the near future are slim given the court's firmly held view that in order to overturn a past decision, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled",[94] changing public expectations of those exercising the power of the state may well have an impact on the interpretation of unwritten portions of the Canadian constitution.

While the courts are likely to play an incremental role in mediating such conflicts, legislative assemblies have an even greater part to play in determining the proper exercise of their privileges in a modern context. Legislative assemblies do not operate in a vacuum. They play an essential role in the complex system of governance that has evolved in Canada in the years following confederation. With regard to privilege, a key part of this role is setting out the assembly's view of necessity, taking into account that the assembly and its

[93] *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 at paras 91–98, per Cory J.
[94] *Canada v Craig* 2012 SCC 43 at para 25.

members are accountable to those in whose name they serve. By returning to the considered approach of the late 19th and early 20th century, which favoured specific claims of privilege over broadly-based general assertions that would only concretise in the specific instances in which a privilege was to be exercised, claims to privilege can be adjusted in a way that minimises any over-infringement of rights guaranteed by the Charter, providing greater respect for the expectations of those on whom legislators depend for their authority.

AUSTRALIA'S PARLIAMENTARY PRIVILEGES ACT 25 YEARS ON

BERNARD WRIGHT
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Australia's Parliamentary Privileges Act is not a common creature—it is an Act which declares comprehensively the "powers, privileges and immunities" of each House of a national Parliament, and of the members and committees of each House.

The Parliamentary Privileges Act was assented to and came into effect on 20 May 1987. This article gives the background to the introduction of the bill that was eventually passed by outlining the constitutional provisions that apply to Australia's Federal Parliament and by noting difficulties that arose, particularly in the 1970s and 1980s, which led to a comprehensive review of the law and practice of privilege in 1982–84. The article summarises the findings and recommendations of the review, and other events which were the stimulus to the introduction of the bill. It lists the key provisions of the 1987 Act and comments on the experience of the Commonwealth Parliament with the Act since it came into effect.

Constitutional provisions

Like the provisions in some other parliaments in the Westminster tradition, section 49 of Australia's Constitution links the "powers, privileges and immunities" of each House of the Parliament to those of the House of Commons and its committees and members. The provisions given to the new Federal Parliament were those of the House of Commons as at 9 May 1901, although because the new Parliament was given the power to declare its powers, privileges and immunities, technically the tie to the Commons was of an interim nature. The most important inherited provision was the great privilege of freedom of speech; however other immunities, although less important for all practical purposes, were also inherited, such as the immunity from arrest in civil matters. A most significant power was the power of each House to impose penalties for contempts.

Despite a review by a joint committee in 1907–08 no action was taken to declare powers, privileges or immunities, or to enact other provisions, for many

years. The House established a Committee of Privileges in 1944, and the Senate did so in 1966.

Difficulties in the 1970s and 1980s

Difficulties were experienced in the 1970s and 1980s, although most concerned members of the House of Representatives rather than the Senate. On a number of occasions members raised complaints following critical and at times scurrilous media reports. When a complaint was raised, it fell, as it still does, to the Speaker to make an initial judgment as to whether a *prima facie* case had been made. In considering complaints, reference was made to the precedents of the House of Commons, especially in relation to contempts. However, on at least one occasion the Speaker gave a strong hint that he saw no value in a Committee of Privileges inquiry applying relevant precedents. In some such cases decisions were given that a *prima facie* case had been made and the matters were referred to the Committee of Privileges. As might be imagined, these were not easy inquiries for the committee.

Following a particularly difficult case, which led to majority and three dissenting reports,[1] a joint select committee was appointed in 1982 to conduct a thorough review of the law and practice of parliamentary privilege.

Committee review

The joint committee received written submissions and evidence from members, from the Clerk of each House, from academics and from representatives of the media. A great deal of helpful information about the law and practice of other jurisdictions was also obtained from parliamentary staff in Australia and more broadly. There were a number of similarities between this process and the review conducted by the joint committee in the United Kingdom in 1997–99.[2]

A key question was whether the penal jurisdiction should be transferred to the courts. The committee's conclusion was that it should not. The committee agreed that the Houses should retain the power to punish contempts, but recommended that safeguards be introduced, including the formal adoption of a policy of restraint, the adoption of provisions for the protection of witnesses before the privileges committees, provisions for a limited review of a penalty

[1] Article in Sydney *Daily Mirror*, 2 September 1981, "Committee of Privileges Report", (House) PP 202 (1981).

[2] HL Paper 43; HC 214; and see *Erskine May*, 24th edition, p 218.

of imprisonment imposed by a House, and provision for the imposition of fines.[3]

A number of the committee's recommendations could be implemented by resolution or by standing orders—for example, those relating to the protection of witnesses, and the "right of reply" procedure.[4] Other recommendations, however, could only be implemented by statute. These included the adoption of a definition of "proceedings in parliament", the narrowing of the immunities from arrest in civil matters and from compulsory attendance in court, the introduction of a limited review of penalties of imprisonment, and clarification of the ability of a House to impose a fine on a person or body corporate found to have committed a contempt.

Other developments

The committee's final report was presented in October 1984, but before decisions were made on its recommendations proceedings in courts in New South Wales focused attention on one aspect of the law of privilege. A High Court judge had been the subject of two inquiries by Senate committees, and later faced charges in NSW courts. During the course of those proceedings, witnesses were allowed to be cross-examined about evidence they had given to the Senate inquiries and comparisons were made and inferences drawn in respect of answers to questions in court and evidence they had given to the Senate committees. The courts rejected submissions that had been made on behalf of the President of the Senate that the law of parliamentary privilege prevented the use of committee evidence in this way.

It was concluded that the consequences of the courts' decisions could only be reversed effectively by legislation. Accordingly, a bill was introduced under the sponsorship of the President of the Senate, supported by the Speaker of the House of Representatives. It was interesting that in the years before the joint committee's review, and during the review, the use of parliamentary records in courts had not emerged as an issue of significant concern at the federal level in Australia. As far as the privilege of freedom of speech was concerned, the issues canvassed during the inquiry had been to do with the breadth of the immunity—for example whether correspondence between

[3] The author was the secretary to the committee and so has some commitment to its reports. An exposure report was presented in June 1984 (PP 87/1984), a final report in October of that year: PP 219 (1984).

[4] The committee received comments about the misuse of privilege, and recommended the introduction of a limited "right of reply", under which a person reflected on in proceedings could apply to have a limited response published.

members and ministers should be protected by absolute privilege. As far as the use of parliamentary proceedings in court was concerned, the only point canvassed was the more limited question of whether approval should be given on a case by case basis for the adduction of records of proceedings into evidence for the limited purposes that had been accepted, or whether a resolution of continuing effect on this aspect should be agreed by each House.

Parliamentary Privileges Act provisions

The Parliamentary Privileges Act dealt with the recommendations of the joint select committee which required implementation by statute, as well as the problem that had arisen in NSW.

Key provisions of the Act included—

- Section 4, which gave statutory form to the recommendation for the adoption of a "policy of restraint" in the exercise of the penal jurisdiction. It provided that an act could not constitute a contempt unless it amounted, or was 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 his or her duties as a member.
- Section 5, which retained the link to the British House of Commons provided by section 49 of the Constitution in cases where the act did not expressly provide otherwise.
- Section 6, which abolished the category of contempt by defamation.
- Section 7, which dealt with penalties of imprisonment and fines. Each House was empowered to impose fines not exceeding $5,000 on natural persons and $25,000 on corporations, an unpaid fine becoming a debt due to the Commonwealth that could be recovered in the usual manner.
- Section 8, which provided that a House could not expel a member.
- Section 9, which provided for the possibility of a limited review by requiring that where a penalty of imprisonment was imposed the resolution imposing the penalty and the warrant for committal had to include particulars of the matter determined to constitute the offence.
- Section 10, which provided that it was a defence to an action for defamation that defamatory matter was contained in a fair and accurate report of proceedings of a House or committee.
- Section 11, which protected officers in respect of the publication of a document that had been tabled.
- Section 12, which created an offence in respect of actions or attempts by

- improper means to influence another person in respect of evidence given or to be given before a House or a committee.
- Section 13, which made it an offence to disclose *in camera* evidence without the authority of a House or a committee.
- Section 14, which narrowed the immunities from arrest and compulsory attendance in court to sitting days, days on which a committee of which the member concerned was a member met, and days within five days before or after those days.
- Section 15, which confirmed the applicability of the laws in force in the Australian Capital Territory within Parliament House, according to their tenor and except as otherwise provided.

The use in proceedings of material forming part of proceedings in Parliament, the issue which had been the trigger for the introduction of the bill, was dealt with in section 16. Subsection (2) defined "proceedings in Parliament"; subsection (3) prevented evidence from being received, questions asked, or comments made concerning proceedings in Parliament

"by way of, or for the purpose of—

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

The full terms of the Act are available at:
http://www.austlii.edu.au/au/legis/cth/consol_act/ppa1987273/.

It is notable that the Act did not attempt to specify matters which could be found to constitute contempts. Apart from section 4 (which set a threshold test for a matter to be found to be a contempt) and the provisions concerning penalties, the specification of matters which could be found to constitute contempts was left to the Houses themselves. This had been recommended by the joint committee. The committee recommended the adoption of resolutions to give guidance in dealing with contempts, as well as to provide for the protection of witnesses. In February 1988 the Senate adopted a comprehensive set of resolutions—including one which established a right of reply procedure (http://www.aph.gov.au/Senate/pubs/odgers/pdf/app02.pdf).

The House was much slower to act: it adopted a right of reply procedure in August 1997 (http://www.aph.gov.au/house/committee/pmi/right.htm#resolution) and a resolution for the protection of witnesses before the Committee

of Privileges was adopted in 2009 (http://www.aph.gov.au/house/committee/pmi/index.htm).[5]

Experience to date

The consideration of the desirability of a bill being enacted in the United Kingdom to deal with the law of privilege reminds us that, in terms of the long history of parliamentary law, 25 years is little more than the blinking of an eye. Although the Act is a comprehensive statement of the law considered to be necessary for the operation of the Houses and their committees, it has not been the subject of extensive debate or consideration since it was passed. One view would be that this means that the Act is considered appropriate and that it has been effective; another view would be that time will tell.

The specification in section 4 that an act cannot constitute a contempt 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 exercise by a member of his or her duties as a member, has been important. The provision has been cited in reports from the Committee of Privileges and Members' Interests of the House. The policy of restraint reflected in the section is also set out in Senate Privilege Resolution 3, which has been followed carefully by the Senate Committee of Privileges.[6] The section has been cited by successive Speakers in responding to complaints of breach of privilege or contempt, and it is explained in *Odgers' Australian Senate Practice*[7] and *House of Representatives Practice*.[8] The section has been useful in helping to ensure that the power to punish for contempt is not used in trifling or unimportant matters.

There have been no prosecutions for offences against witnesses or prospective witnesses as provided for by section 12. It seems that, given the commitment to, and interest in, the protection of witnesses by the House Committee of Privileges and Members' Interests and by the Senate Committee of Privileges, the well-established practice of dealing with these matters within the relevant House will be continued in preference to prosecution in court. This expectation is reinforced by the fact that, although there have been statutory provisions for

[5] Despite the fact that the House has been much slower to adopt resolutions, the treatment of witnesses had been guided by the recommendations of the joint committee since 1988.

[6] See summary of experience set out in Senate Committee of Privileges 125th Report, *Parliamentary Privilege: Precedents, procedure and practice in the Australian Senate 1966–2005*, 19 December 2005.

[7] *Odgers' Australian Senate Practice*, 13th ed., pp 64–65.

[8] *House of Representatives Practice*, 6th ed., pp 749–50.

the protection of witnesses before the Joint Committees of Public Accounts and Audit and Public Works for many years, there has never been a prosecution under either Act. Similarly, there has been no case of a prosecution for an offence under section 13 of the 1987 Act—the unauthorised disclosure of *in camera* evidence.

The most frequently cited provisions of the Act are those in section 16 which define proceedings in Parliament and restrict the use of such proceedings in courts and tribunals. The Judicial Committee of the Privy Council has found that the articulation of the traditional law set out in that section is consistent with what it regards as the proper interpretation of Article IX of the Bill of Rights.[9]

The concise statement of the scope of absolute privilege set out in subsection (2) of section 16 has been helpful to those who work in Parliament, to members, and surely to those who may participate in or be interested in the work of the Houses and their committees. Like many other parliaments, the Commonwealth Parliament has a comprehensive and active set of committees, and section 16 has been helpful in setting down clearly the inclusion of committee proceedings as part of proceedings in Parliament.[10] The provisions of section 16 have been referred to in a number of court decisions, and have been upheld and applied in ways that have not in my view caused problems for the Parliament. In one case of considerable interest, *Laurance v Katter*,[11] the Queensland Court of Appeal held that section 16(3) did not prevent a party from relying on statements made in the House in an action for defamation. This decision has been criticised.[12] It was appealed to the High Court, and a decision would have been of great interest because the validity of section 16(3) would have been considered, but in the event a settlement was reached and the court was not required to decide the matter.

Concluding comments

A review of the law and practice of privilege and an assessment of the needs of modern Houses of Parliament and their committees and members is surely a healthy thing. The 1987 Act followed such a review. Opinions at the time differed as to what provisions should be included in an enactment. Opposition

[9] *Prebble v Television New Zealand*, (1994) 3 All ER 407–20 at 414.

[10] It is not suggested that there was ever significant doubt about the coverage of committee proceedings, but the 1987 Act is a useful and concise confirmation of the law on this point.

[11] *Laurance v Katter*, 1996, QCA 471.

[12] For example, *Odgers' Australian Senate Practice*, 13th ed., p 56.

was expressed to the removal of the power of a House to expel a member. Doubts were expressed about the wisdom of abolishing by law the category of contempt by defamation: the inclusion of this provision reflected a determination at the time to ensure that some of the less substantive matters that had been complained of would not be an issue in future.

A perennial question in law generally is whether the hoped-for benefits of the specification or codification of provisions may be outweighed by the loss of flexibility that is likely to accompany such an exercise. Views will differ as to whether the enactment of the detailed provisions in the 1987 Act has caused necessary or desirable flexibility to be lost. In my view the signs to date are that this has not been the case. If the Act had also specified offences against a House—matters that could be found by a House to constitute contempts—the risk of that outcome could have been greater: it is often said that the class of possible contempts is an open one.

Another general question is whether the enactment of detailed provisions in relation to matters which are so vital to the operation of the Houses of Parliament and their committees increases the risk of judicial intrusion into parliamentary matters. The provisions of section 9 of the Act requiring that where a penalty of imprisonment is imposed, the resolution imposing the penalty and the warrant for committal must set out the particulars of the matter determined to constitute the offence, was intended to allow a limited review. Based on the inherited law expounded by the High Court in 1955,[13] it was intended that recourse could be had to the High Court to determine whether a matter found to have constituted a contempt was capable in law of constituting a contempt. In addition, the offence provisions in sections 12 and 13 necessarily require court involvement. Those particular matters aside, it is not clear that the existence of the Act has itself increased the likelihood of court involvement. Should the Act have gone on to set out the details of contempts the likelihood of this could have been greater. The possibility has been raised that section 4 (matters which may be found to be a contempt) could be cited to support a court challenge to the imposition of a penalty by a House on one of its members.[14] Hopefully the exercise by the Houses of their powers will be such that the point will remain the subject of academic interest only.

The number of occasions on which the record of "proceedings in Parliament" has been relevant to court proceedings since 1987 is notable, and is possibly reflected in other jurisdictions. In the case of the Commonwealth of Australia, if the restrictions set out in section 16(3) had not been enacted,

[13] *R v Richards, ex parte Fitzpatrick and Browne* (1955) CLR 162.

[14] Prof Enid Campbell (2003), *Parliamentary Privilege*, pp 211–12.

the interpretation of the inherited provisions would have been subject to interpretation in the traditional way by the courts. That would not necessarily have been a bad thing, but the possibility of varying and inconsistent decisions in a federal system would have been greater.

In summary, to date the provisions of the 1987 Act have been of assistance to the Commonwealth Parliament and to those involved in its work. We have not to date faced problems as a result of the Act, but whether the experience in our Parliament would be relevant elsewhere must remain an open question. Presumably the wisdom of any such exercise elsewhere, both in principle and in detail, must reflect the state of the law in the jurisdiction, including any international legal obligations and the status of any applicable supra-national law, as well as an assessment of the problems that such an exercise would be intended to overcome, and an assessment as to what alternatives may be available.

PARLIAMENTARY PRIVILEGE: A DIGNIFIED OR EFFICIENT PART OF THE CONSTITUTION?

SIR MALCOLM JACK
Clerk of the UK House of Commons, 2006–11[1]

The word "privilege" in our modern, democratic society has awkward connotations. A specific right or advantage; an exemption from a rule or norm which puts its possessor in a different position from everyone else sounds elitist, exclusive, undemocratic and therefore unwelcome. In an age when Ortega y Gasset's revolt of the masses has already taken place,[2] it is not thought proper that one section of society, however distinguished, should *not* be subject to the same restrictions as anyone else. To argue, in the Aristotelian way, that the different treatment of unequals may be just and proper, now falls on deaf ears.

In this article I am concerned with a very particular, technical kind of advantage or privilege—that private law (the *privata lex*) which applies to the proceedings of Parliament and its members. However venerable and even arcane the subject might appear, this article argues that it is vital to understand it if one is to understand the workings of parliamentary democracy. Too little is known about it outside restricted circles of the *cognoscenti*. There is no justification for keeping it secret or hidden.

While this article will show that the *raison d'être* of this privilege is as defensible as ever in modern, parliamentary systems, parliamentary privilege has not escaped some of the suspicion that lingers over the very word in the public imagination. For, in common usage, "privilege" tends to be thought of as an advantage over others gained by someone because of his or her position or status. That is bad enough, but when the public became convinced that Members of Parliament were not behaving as they should, the suspicion hardened into hostility. The bad behaviour of a few made all members seem unworthy of any special protection or immunity from rules which no one else was exempt from. In 2009, the then Government, intent on appeasing public opinion after the expenses scandal, very nearly blundered into serious error in respect of its legislation setting up the new statutory authority dealing with members' pay and allowances—something just averted at the eleventh hour.

[1] This article is based on the Seventeenth Policy & Politics Annual Lecture at Bristol University on 29 March 2012.

[2] Ortega y Gasset, *The Revolt of the Masses* (London: G. Allen & Unwin, 1961).

I observe, in passing, that in other countries (some of our European partners in particular) distrust of the political class as a whole has reached seriously damaging levels—damaging to the very functioning of parliamentary democracy.

Before going any further, let me try to give a clear definition of what I am talking about before turning to its origins, a consideration which is essential in any attempt to understand the function of privilege in modern, democratic parliamentary systems.

Erskine May, the acknowledged "bible" of Parliament, defines privilege in this way—

> "Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the Houses individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute."[3]

So *Erskine May* is explaining that certain rights or privileges, such as freedom from arrest or, more importantly, freedom of speech, belong to the individual members of each House but they do so only because the Houses cannot effectively perform their functions without the unimpeded service of their members. I shall refer to this argument in defence of privilege as the "functionality principle" henceforth. It is certainly the core of a modern justification for a certain setting aside of the law in respect of the proceedings of Parliament. What the principle suggests is that Members of Parliament derive their privilege only as a means to the effective discharge of the collective functions of the House—to scrutinise Government, to air grievances, to legislate. The rights and immunities enjoyed by members are not free-standing.

But there are other rights and immunities—for example the power to punish for contempt (something which I shall return to, particularly in the context of select committee activities)—which belong to each House as a collective body. These powers derive from the historic nature of Parliament as a High Court, as the definition in *Erskine May* states; in modern times they are exercised to ensure that Parliament can function effectively and to protect members of the Houses and those who serve them, as well as witnesses before committees. They are an expression of the unique authority that Parliament as a whole exercises and they place Parliament in a category different from other institutions in the land.

[3] *Erskine May: Parliamentary Practice* (24th edition) (London: Lexis-Nexis, 2011), p 203.

Erskine May goes on to consider what happens when parliamentary rights and immunities are attacked, or in the technical language of procedure, a "breach of privilege" has occurred.[4] There are various ways in which members in the House of Commons can raise alleged breaches of privilege—the most regular being an appeal to the Speaker, who decides whether the matter warrants an immediate debate on the question to refer it to the Committee of Privileges (which the House has recently decided to separate from that on Standards, a wholly welcome development). While the Speaker's role is critical at that point, the actual decision on referral and, in due course, any recommendations that might emanate from the Privileges Committee are matters for the House itself. Each House retains the right to punish contempts—that is actions that in one way or another thwart the Houses in their business and which go wider than an actual breach of one of the defined privileges. How that punishment should be dealt with in the modern context of human rights is a matter I shall return to in this article.

So what exactly are these privileges? I have already identified two, the most important of which is freedom of speech (the other less important one is freedom from arrest); but there are more arcane and remote privileges possessed by the House of Commons—namely freedom of access (to the monarch) and freedom of construction. Let us begin with freedom of speech, by far the most important privilege in the modern context.

Parliament, and in particular the Commons, had been asserting its rights to debate and proceed free of royal interference from the early Middle Ages. I do not want to get embroiled in the arguments surrounding the causes of the civil war of the mid-17th century but, simplistically, we can regard it as an assertion of Commons privilege against the Crown. Eventually statutory expression was given to freedom of speech in the Bill of Rights 1689. The Preamble of the Bill of Rights tells us it was introduced—

> "Because King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him did endeavour to subvert and extirpate the laws and liberties of this kingdom."[5]

The language of the preamble reminds us that the Bill of Rights was a politically motivated document, as most documents heralding constitutional reform are. It is a jumble of various contemporary complaints rather than a comprehensive, constitutional instrument.

[4] *Ibid.*, p 273ff.
[5] Bill of Rights 1689. Preamble, paragraph 2.

The liberty of freedom of speech is asserted in Article IX, which famously provides that, "the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[6]

Lawyers will be pleased at the possibilities of dispute over the meaning of each of these phrases and words—"proceedings in Parliament", "impeaching", "questioning", "court or place out of Parliament". Indeed all these phrases and words have been the subject of much learned and judicial pondering and ruling over the ages. The courts have never hesitated to consider what are, after all, words in a statute—whatever view Parliament itself has taken about its privileges.

An important point to note is that parliamentary privilege long predates anything that we might recognise as a democratic, parliamentary system, which only reached fruition in the case of the House of Commons with universal suffrage in the 20th century and, some would say, has never reached the House of Lords. Nevertheless, I shall argue that parliamentary privilege, hallowed and ancient, is essential to the running of a modern, democratic system even if it long predated it. I am reminded of François Mitterand's aphorism, when he became President of the French Republic in 1981, that while the institutions of the Fifth Republic were not actually made according to his design, they nevertheless worked quite well for him. Privilege predates the kind of democracy we now consider legitimate, but it is well adapted to it.

A second matter worth emphasising is that privilege is shared throughout the Commonwealth by those institutions which, in various ways, have developed from the Westminster model. For the purpose of privilege, the Commonwealth is a community, sharing and exchanging precedent and practice. In the current, 24th edition of *Erskine May* (which I edited and which was published in July 2011) an egregious example of the importance of this connection can be found on page 819, where a recent ruling in the Canadian House of Commons is cited. A special Committee on the Canadian Commission in Afghanistan investigated the Government's refusal to hand over vital papers relating to Afghan detainees to a parliamentary committee on the ground that to do so would endanger national security. The committee concluded that the refusal amounted to a *prima facie* breach of privilege. At some moment, when presumably the Government whips were caught napping, the Canadian House of Commons itself adopted the committee's special report. However, the Government still refused to hand over the papers. At this point the Canadian Speaker, Mr Milliken, ruled to the effect that the Government itself had com-

[6] *Ibid.*, Article IX.

mitted a *prima facie* contempt. Arrangements were put in hand to negotiate the handing over of the documents to the committee.[7] There is no recent British precedent that so clearly establishes the right of a parliamentary committee to force the production of papers from a reluctant administration; the Canadian Speaker's ruling is there to be cited in future wrangles at Westminster.

To return to freedom of speech: put simply, it enables a member of either House to say whatever he or she thinks fit in debate. However offensive or injurious those remarks may be to a named individual they will have no recourse to the courts—at least to the British courts—since they will not be able to take out any action for defamation.

The publication of parliamentary debates and proceedings in the Official Report (Hansard) is also protected; any reporting of them which is fair and accurate in the media attracts qualified privilege a matter of common law rather than parliamentary law (the same applies to the reporting of court proceedings). The principle behind this qualified protection is that there is an advantage to the public interest in the publication of facts which outweighs any private injury that it might cause, with the important proviso that publication does not involve malice. So far as the reporting of parliamentary proceedings is concerned, the protection is afforded by the Parliamentary Papers Act 1840, which followed a considerable trial of strength between Parliament and the courts in the cases around *Stockdale v Hansard* in the late 1830s. However, in a recent public pronouncement the Attorney General warned that the freedom to report is not set in stone. While he acknowledged that fair and accurate reporting (certainly of Hansard) probably is covered by the Act, he warned about lack of context in which such reports are made.[8] Some of the doubt surrounding this matter results from the obscure wording of the Act itself; there is a case for rewriting it in clearer, modern language, as the Joint Committee on Privacy and Injunctions recommended.[9]

I qualified my observations on absolute (parliamentary) privilege not being challenged in the British courts because the situation in Europe is different: in 2002 a case relating directly to the words spoken by an MP was heard in the European Court of Human Rights. A Member of Parliament, during one of the daily adjournment debates (which are invaluable opportunities for airing constituency problems), had been highly critical of one of his constituents, describing her as a "neighbour from hell" when advancing the grievances

[7] *Erskine May*, p 819.

[8] Speech to City University School of Journalism, 1 December 2011.

[9] Joint Committee on Privacy and Injunctions, "Privacy and Injunctions", session 2010–12 (HL Paper 273, HC 1443), paras 232–41.

against her of another of his constituents. Supported by Liberty, an action was taken out by the aggrieved constituent claiming that this use of parliamentary privilege infringed article 6 of the European Convention on Human Rights (namely that everyone is entitled to a fair hearing by an independent tribunal established by law) and article 8 (respect for private and family life). The action was against the UK Government and, in recognition of the importance of the principle at stake, the UK was joined in defence by eight other member states. The European Court did not hesitate to hear the case (unlike any British court), but came to the conclusion that the use of parliamentary privilege did not impose a disproportionate restriction on the right of access to a court or in respect of private and family life and therefore that neither article of the Convention had been violated.[10]

While this ruling was a vindication of the absolute nature of parliamentary privilege, not all the judges concurred. What is more, the presiding judge made comments which were not uncritical of the exercise of privilege without recognition of modern, human rights. The shared view of the judges was that a system of redress for citizens who felt unfairly treated should be incorporated into the procedures of national parliaments. This has not so far been done in the UK (although a Commonwealth parliament—the Australian—has such a mechanism), but it is something that I believe needs addressing. I had to deal with the case of *A v the UK* from the Commons and the budding, and in the event triumphant, young QC acting for us told me that he would rely more on what I have called the "functionality argument" (i.e. that privilege is a necessary part of the way parliaments must work) than on citing Article IX of the Bill of Rights 1689. Venerated in the UK, counsel's view was that an antique statute, in obscure language, was less likely to impress European judges than the functionality argument: a modern statute or constitutional provision, free of late 17th-century cant, would have cut even more ice if it had existed.

Other privileges—freedom from arrest and favourable construction—although seemingly antique, still resonate in the proceedings of certain modern states where the notion of a parliament outside the absolute control of the executive is still fairly fragile. To get a proper understanding of these areas of privilege one needs to journey back into history. The early struggles between Parliament—in particular the House of Commons—and the Crown lent a certain urgency to the notion of freedom from arrest. The King, like modern dictators, was fond of locking up people who opposed him, including critical Members of Parliament. By the early Middle Ages the Commons had devel-

[10] See Malcolm Jack, "*A v the UK* in the European Court of Human Rights [2002]" *The Table* 73 (2003) pp 31–36.

oped its protection from executive interference of this sort by making it the first duty of a member to attend and participate in the proceedings of the House. Incidentally, this call to duty has never protected a member from the operation of the criminal law (in ancient times summed up as treason, felony and breach of the peace).

In a well-known recent case several members of the Commons and a peer tried to claim the protection of parliamentary privilege in the face of serious criminal charges. Not only did the courts dismiss the plea but Parliament itself (and I was personally involved in these matters) made no attempt to play the privilege card. It would have been quite wrong to do so.

Even in its earliest form, freedom from arrest was linked to a member's duty to attend (the functionality argument in another guise): in 1340 the King was obliged to release an imprisoned member so that he could attend the House. But it was not all smooth sailing—there were setbacks. A century later, in 1452 when the Speaker of the House of Commons himself was imprisoned, the Commons gave way to the Crown and proceeded to appoint another Speaker in his place. In its modern, etiolated form, freedom from arrest enables a member (via the Speaker) to ignore a *sub poena* to attend in court if the House is sitting; nor can a member be arrested in the chamber when the House is sitting. A dramatic example of the limitation of this immunity occurred in 1814 when Lord Cochrane (a member of the House of Commons) was arrested while sitting on the benches in the chamber when the House was not in session.

Another antique privilege gone into desuetude but which would resonate in the ears of opposition leaders in many modern, undemocratic states is that of "favourable construction". Through that privilege the House sought the sovereign's indulgence for any unfortunate interpretation of proceedings that might reach the royal ears. There is a deliciously regal and chilling response to Speaker Sir Thomas Gargrave's petition to Elizabeth I to allow favourable construction in which the Queen, agreeing to its terms, adds a word of warning to the Speaker telling him it is allowed provided that, "your diligence and carefulness be such, Mr Speaker that the defaults in that part be as rare as may be."[11]

After the Bill of Rights 1689 the struggle over parliamentary privilege moved to a new battlefield—that between Parliament and the courts. It is important to remember that the Bill of Rights is a statute, however venerable, and one which the courts have never hesitated to interpret. Originally there was a considerable lack of clarity about what the status of privilege, the *lex parliamenti*, really was; indeed the courts claimed not to recognise it at all. Once there was a statutory expression of privilege, then the courts started to regard

[11] *Erskine May*, p 216.

it as their duty to interpret its meaning. By the middle of the 19th century Parliament, more particularly the House of Commons, had given up its claim to determine whether a privilege existed: that task was ceded to the courts. But the ambits of privilege and the area within which the House maintained exclusive cognisance had to be delineated; this came about through a series of cases, not always with complete clarity. Paradoxically, most of these cases were settled on first principles, with only a glance at Article IX. As time went on the courts were drawn into broader areas of public life so that they became less attached to a self-imposed rule which excluded from their consideration, when interpreting statutes, parliamentary material, including debates, relevant to the legislative history of a statute. A number of cases decided by the House of Lords in its (former) judicial capacity significantly varied this rule. As a result of opinions in the case of *Pepper v Hart* in 1992, the courts now feel free to refer to parliamentary material where legislation is considered to be ambiguous or obscure, or leads to an absurdity. In such cases, parliamentary material can be used to elucidate the meaning of statute.

The rumblings of the dispute over jurisdiction between Parliament and the courts have not entirely abated, although the then Attorney General, in an important memorandum in 2009, tried to draw a line under it. Her statement—that that the determination of whether material was admissible in a criminal trial by virtue of Article IX was a question of law for the courts, not a determination to be made by Parliament or any of its organs—is not hugely controversial; indeed it matches the principle that privilege does not protect members from the operation of the criminal law. What might be less palatable to some parliamentarians is her conclusion that—

> "There is a risk that the principle of comity would be undermined by a purported attempt by the House to determine such questions [of law relating to parliamentary privilege] and thus usurp the determinative role of the courts."[12]

A series of dilemmas face us in the modern context of privilege (including in the operation of select committees) and need to be considered. First, from the parliamentary side of the fence, there are breaches of privileges and contempts, and the question of what Parliament can actually do about them. After that we will return to two themes already mentioned: how privilege can take account of human rights requirements, and whether there should be a modern privileges statute.

[12] Memorandum by the Attorney General, 3 April 2009. See First Report of the Committee on Issue of Privilege, session 2009–10 (HC 62), Ev131.

When any of the rights and immunities of Parliament are attacked or disregarded, the offence committed is known as a breach of privilege, which the Houses have a right to punish. Each House also claims the right to punish contempts which, while not breaches of any specific privilege, in some way obstruct or impede Parliament in its proceedings. For a long time Parliament has adhered to the principle that its penal powers should be exercised sparingly; in the modern context that has become even more expedient since it is doubtful to what extent the Houses could exercise those powers.

One important aspect of the notion of contempt is that actions may be treated as contempts for which there have been no precedents. A recent example of this is the referral of 'phone hacking to the then Committee on Standards and Privileges, following a complaint by a member of the House that hacking was inhibiting him in his parliamentary work. In giving evidence to the committee I suggested that, in order for hacking to be regarded as a contempt, it would be necessary to establish exactly how it interfered with a member performing his or her duty: did it for example make a member less likely to pursue a matter in debate or decide not to table a parliamentary question? A difficult line has to be drawn in the matter of an MP's constituency work, since correspondence with constituents and matters pursued locally, unless related to proceedings in the House, are not covered by parliamentary privilege. I also raised the rather philosophical point about how the action of hacking could affect a member's performance if he or she did not know it was going on? Bishop Berkeley's argument in favour of the existence of God was foremost in my mind. In its conclusions the committee came to the view that hacking, by creating an atmosphere of insecurity generally in the House or in one of its committees or among a group of members, could amount to a contempt. It invited the House to consider a definition of contempt in a new parliamentary privileges bill.[13]

The notion that the penal powers of Parliament must be used sparingly (reiterated by the Joint Committee on Parliamentary Privilege in its landmark report of 1999, which we shall return to[14]) is a recognition that Parliament can no longer behave as a court, even the highest court in the land. But the other side of this dilemma is the real weakness of Parliament in the face of deliberate obstruction. Let us consider the most striking and topical example: how does a select committee deal with a witness who refuses to attend or, having attended, is reluctant to contribute fully to a committee's questioning? At the

[13] Committee on Standards and Privileges: "Privilege: Hacking of Members' Mobile Phones", 14th report, session 2010–12 (HC 268).

[14] Joint Committee on Parliamentary Privilege, session 1998–99 (HL Paper 43, HC 214).

simplest level things are not too difficult: if for example someone interrupts proceedings (with or without a plate of foam) that person is simply removed from the room where the hearing is taking place. Under the existing standing orders of the House, the Serjeant-at-Arms has the power to take any offender into custody on instruction from the chair of the committee. The offender is kept in custody for the rest of the day unless a criminal offence has been committed, in which case he or she is handed over to the police. Under another standing order, a committee may decide to sit in private. Such a decision will lead to the clearing of the room by everyone except parliamentary staff supporting the committee. So far so good: but what about dealing with a witness who is deliberately obstructive or evasive or, even more seriously, gives false evidence?

Erskine May lists all sorts of behaviour in this kind of situation which may be regarded as contempts.[15] Examples range from refusal to produce documents, through insolence (on one occasion, in 1852, fuelled by intoxication) to giving false evidence. But what power of enforcement does the committee have: the answer is, I fear, little. What the committee must do is to report the matter to the House; the House has then to decide whether a contempt has been committed and how to deal with it. In olden times (and I use the adjective deliberately) this could involve persons being summoned to the Bar of the House to be admonished or given some other punishment. This last happened in respect of an outsider in 1957, although in 1968 a member of the House was reprimanded for leaking a select committee report by Speaker Horace Mawbray King, decked up in black tricorn hat and full bottomed wig. This kind of theatre is unlikely to happen again. Nor is it held possible for the House of Commons to impose a fine, this last having been done in 1666; the power is therefore regarded as lapsed. The House of Lords has the theoretical power to fine, but the power has not been used since the 19th century.

On the whole, of course, it is much better that these matters are settled without confrontation. When some acknowledgment of error has been made or a letter of apology received, then it is both gracious and politic for the House to accept the gesture and move on. But what powers does the House have to take more drastic action if all else fails? The answer is precious little. Because I think that the emperor has no clothes—any *ad hoc* punitive action would probably receive a hostile public reaction—I think it is time that the House had something in the armoury. The Australian Parliamentary Privileges Act gives the House of Representatives the power to imprison offenders for up to six months (with provision for such a decision to be rescinded). It also enables the

[15] *Erskine May*, p 251ff.

House to impose fines on anyone trying to intimidate or in any way influence witnesses. In a recent case in the House of Commons, when a witness was leaned on by her employer for the evidence she gave to a committee, the only redress was a letter of apology (from of all people the Minster of Justice); had that not been forthcoming, what could the House have done? Probably it could do nothing more than pass a disapproving resolution. When the matter was considered by the Joint Committee on Parliamentary Privilege in 1999 it noted that wilful obstruction of business had been made a criminal offence (punishable by a fine not exceeding level 5 of the standard scale) in the legislation establishing the devolved assemblies.[16] The power to fine seems reasonable; imprisonment possibly disproportionate.

Before returning to the complicated and controversial matter of a new statute, let me in passing make two comments on recent occurrences in the House of Commons which raise the general question of the balance between the important principle of freedom of speech and the notion of human rights.

The first occurred in November 2011 when a member of the House of Commons used parliamentary privilege to name a builder who allegedly botched a constituent's loft conversion. The member accused the builder of substandard work which rendered the property of his constituent virtually unsalable. The builder strenuously denied the claims, stating also that the MP had refused to see him to hear his side of the story. That individual, named in the House and dependent on his good name for his livelihood, had no redress whatsoever. Such a situation should not be allowed to continue. This is not to suggest in any way that a member should be inhibited in what he says about an individual in the House (though I always advised members to be extremely careful in what they said when they did name someone), but I do not see why an individual so named should not have some avenue for making his own case and making it in public. That avenue of complaint should be kept within Parliament—it could be via the new Committee of Privileges. Having such a platform might not lead to any concrete result but it would give the appearance of justice being seen to be done. If restricted (say to cases of actual naming an individual), it would not, it seems, lead to a spate of complaints, as opponents of the idea in the House have suggested. Moreover, a mechanism of this sort is exactly the sort of modern acknowledgment of rights which, as remarked earlier about *A v the UK*, would be welcomed by the judges of the European Court of Human Rights.

The second incident also occurred in autumn 2011. In the middle of examining a witness the Public Accounts Committee, without any private deliber-

[16] Joint Committee on Parliamentary Privilege, *op. cit.*, p 81.

ation or any warning to the witness, suddenly forced the witness to take the oath and continued the questioning on that basis. My strong advice when I was a clerk was always that rough handling of witnesses never produced good effects—far better to lull witnesses into a false sense of security in which they would talk more freely and probably spill the particular beans that the committee was hoping would be spilt. I do not think that that action was reasonable. To be clear: I understand what the committee is trying to do—elucidate the sometimes murky details of government spending—but if it really wants to pick a fight, that should ultimately be done with the minister, not his civil servants—the only exception being Accounting Officers, who are directly personally responsible for their actions. If it is a fashion for ministers to blame civil servants, Parliament should speak out against that and put the blame where it should be: on ministers.

To return to the matter of a privileges statute upon which a Government green paper is at the time of writing awaited: I mentioned my experience in the case of *A v the UK* and counsel's decision to rely on the functionality argument rather than on a 17th-century document whose words have never been clearly defined. When the Joint Committee on Parliamentary Privilege considered the matter a few years before, it made the important point that there was a need for greater transparency in the area of parliamentary privilege and that this would only be achieved in the form of a modern statute. Clearer, modern language would assuage modern public opinion, with its aversion to the arcane and obscure. An act would also make the law more accessible: it would provide a coherent framework in which Parliament would exercise its legitimate privilege openly. The committee envisaged that the statute would define such key terms as "proceedings in Parliament", "place out of Parliament", etc. There would also be a definition of contempt (although it should be noticed that the Australian Act proceeds by saying what "essential" elements of an offence are and their limits, rather than attempting a head-on definition). The power to fine would be incorporated into the statute. Anachronisms, such as freedom from arrest, immunity from *subpoenas* and the privilege of peerage would be swept away.[17]

There are several areas which have come more to the fore since the joint committee's report. The first is the increased reliance of the courts on using select committee reports. I have alluded to the implications of *Pepper v Hart*, but in recent years there have been quite a number of occasions when the Speaker of the House of Commons had to intervene to seek the laying aside of privileged material. Sometimes the intention to intervene was enough to dis-

[17] *Ibid.*, pp 95–97.

suade parties from proceeding to rely on such materials; at other times strongly worded intervention was needed. The principle lying behind Article IX is a separation of judicial and legislative functions. If such material is used in evidence to question or impeach what happens in Parliament, there will be a chilling effect on debate. Obviously there must be an exception in the case where a minister explains reasons to the House for certain decisions and these fall to be judicially reviewed, but that exception does not negate the general principle of separation.

Next there is the area of "anonymised injunctions" (loosely referred to as "super injunctions") and what the Master of the Rolls referred to as the unacceptable "flouting" of court orders by members raising cases in the House. The problem here is that a single member of the House can interfere directly with a judgment of a court, arrived at with great care and detailed consideration of evidence. Parliamentary committees have examined this question in the past. The Procedure Committee of 1996, having said that the onus lies with members, individually and collectively, to maintain high standards, went on to say that it would support limitation on freedom of speech if proceedings in the House represented a serious challenge to the due process of law. Exactly how such a restriction would operate is unstated.

Nor is an answer given to Enoch Powell's inescapably logical statement that—

> "a privilege which cannot be abused is no privilege, for that which constitutes abuse is a matter of opinion and it is part of the privilege of this House to be able to say in this place not only what they could not say outside without risk of prosecution but to be able to say that to which grave objection is taken by every other hon. Member."[18]

While each House retains control over the conduct of its members, there has been reluctance to take action against a member who does behave in a way that others may find undesirable. That is regarded as a disproportionate and damaging response, a view with which I have much sympathy. Nevertheless, the present situation is far from satisfactory. In evidence to the Joint Committee on Privacy and Injunctions, David Howarth (an ex-MP) made the interesting observation that the two important sets of values—freedom of speech, on the one hand, and the rule of law, on the other—may not be compatible. His conclusion, a very British one, is that it is necessary to make sure that "one does not beat the other permanently."[19] He and other distinguished witnesses before the

[18] HC Deb, 2 May 1978, vol 949, cols 43–44.

[19] Oral evidence to the Joint Committee on Privacy and Injunctions, 19 December 2011, Q972.

joint committee urged Parliament to instigate a self-denying rule, like the *sub judice* rule, to deal with breaches of injunctions by reference in debate in the Houses. While they struggled with how the mechanism of such a rule would work, I agree with the principle they are advocating. The Joint Committee on Privacy and Injunctions, in its report, stood back from this proposal on the ground that so far breaches have been too infrequent to justify such a rule being put in place in each House.[20]

It would be wrong in any consideration of the need for a new statute to ignore the risks that might come with having one. First, my long training as a clerk has taught me to wait for delivery of the words on paper. Governments (of all hues) often express their intentions in hyperbolic language, but when they come forward with proposals, these often turn out to be very convenient for the executive. I do not blame them for that, but let us first have a full and vigorous debate and let Parliament scrutinise and the public comment on any detailed provisions the Government produce.

Secondly, there is the question of how and in what ways a statute might affect the constitutional balance between Parliament and the courts. A new statute might encourage judicial inventiveness toward re-interpretation of the principles of privilege, setting aside all that has been determined by the courts since 1689. Some say that the existence of a Supreme Court would encourage this new judicial activism, with the result that the flexibilities in our existing system would be lost. However carefully drafted, the provisions of a statute would come under scrutiny and lead to disputes which would have to be resolved in the courts. I do not regard the probability of this risk too highly, though I accept that the impact of a direct clash could be significant. My optimism in this matter stems from recent judicial decisions and pronouncements which suggest that the judges understand the need to keep out of the internal affairs of Parliament. The most striking of these pronouncements was in the Supreme Court. In *R v Chaytor* the judgment, whilst concerned with the limits of parliamentary privilege in relation to criminal matters, recognised Parliament's exclusive cognisance of its own affairs. That suggests that a clearer statement of parliamentary privilege would not lead to judicial intervention but would make the law—because as mentioned the Bill of Rights is a statute—more transparent and defensible in other contexts such as that of human rights. Australian experience also suggests that the existence of a privileges statute has not led to undue interference in parliamentary affairs from "any court or place out of Parliament", to revert to the language of the Bill of Rights.

Let me conclude by returning to answer the question I used as the title for

[20] Joint Committee on Privacy and Injunctions, *op. cit.*, paras 210–31.

this article: parliamentary privilege must, in Walter Bagehot's language, be both a dignified and an efficient part of the constitution.[21] To be the former, which means that it is trusted and accepted by the public, the language of privilege must be understood in modern, unambiguous terms; to be the latter—that is to be effective in a modern society recognising human rights—individuals should have some right of redress when they consider they have been unfairly maligned in parliamentary debate. At the same time, for the efficient working of Parliament and its committees, penalties for contempt need to be strengthened, and Parliament itself must impose some discipline on members who use privilege to flout the rule of law. Some of these measures imply legislation; others reform within Parliament itself.

These are difficult, complex matters, but it is important to get them right, for parliamentary democracy cannot function effectively without these freedoms and immunities. To be crystal clear: privilege is essential; what matters for the future is how it is best safeguarded and what steps need to be taken to ensure it remains in the very fabric of our modern parliamentary life. The Government's green paper and draft bill provide an opportunity for detailed, public debate as well as full parliamentary scrutiny of this vitally important subject.

"On all great subjects, much remains to be said and of none is this more true than of the English Constitution."[22]

[21] Walter Bagehot, *The English Constitution* (Oxford: OUP 1968), p 4.
[22] *Ibid.*, p 1.

PUBLIC BODIES ORDERS—THE FIRST YEAR OF SCRUTINY IN THE HOUSE OF LORDS

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Introduction

A recurrent theme in British political discussion for at least 30 years has been the role of non-departmental public bodies ("NDPBs").[1] Reviews of these bodies were carried out under the Conservative and Labour administrations of 1979–97 and 1997–2010 respectively, and their numbers have gone up and down like ladies' hemlines.

On 14 October 2010 Mr Francis Maude MP, Minister for the Cabinet Office, made a written statement in the House of Commons on "Public Bodies Reform".[2] He said that the coalition Government (in office since May 2010) had carried out a review of 679 NDPBs (as well as 222 other statutory bodies, such as some non-ministerial departments and some public corporations). The Government proposed that 192 would cease to be public bodies; 118 would be merged down into 57 bodies; and 171 were proposed for substantial reform while retaining their current status. "To enable these proposed changes, the Government will shortly introduce a Public Bodies Bill, which will give Ministers power to make changes to named statutory bodies".

The Public Bodies Act 2011

The bill was introduced into the House of Lords at the end of October 2010, and attracted much controversy during its passage through the Lords, in particular in respect of the breadth of delegated powers proposed in the original print. It received Royal Assent, in a much amended form, on 14 December 2011. The Public Bodies Act 2011 gives ministers the power by order to abolish, merge or modify a number of public bodies and offices. All of the 285

[1] NDPBs are sometimes called "quangos": quasi-autonomous non-governmental organisations.

[2] HC Deb, 14 October 2010, col 26WS.

bodies listed in Schedules 1 to 5 to the Act were originally established in primary legislation; the Act allows their abolition, merger or modification by secondary legislation.

A number of significant amendments were made to the bill during its consideration in the House of Lords, in particular—

- setting out new arrangements for parliamentary scrutiny of public bodies orders ("PBOs") made under the Act (section 11);
- inserting a number of statutory tests that must be met before draft PBOs can be laid (section 8) together with a requirement on the minister to consult before bringing forward a draft PBO (sections 10 and 11(3));
- removing the ability to amend (other than by primary legislation) any of the entries in Schedules 1 to 5 which list the bodies that may be abolished, merged or reformed; and
- inserting a sunset provision so that any entry in Schedules 1 to 5 ceases to have effect five years after the Act is brought into force.

The statutory tests to be met for a PBO are that the minister considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency; (b) effectiveness; (c) economy; and (d) securing appropriate accountability to ministers. In addition, a PBO may not remove any necessary protection; and it may not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. Under section 11(2)(b) of the Act, the minister must set out why he considers that these tests have been met, in the explanatory document laid with the PBO.

Scrutiny of Public Bodies Orders in the House of Lords

In the House of Commons PBOs are considered by the relevant departmental select committee. In the House of Lords, the Secondary Legislation Scrutiny Committee[3] (SLSC) is charged with scrutinising all PBOs. The scrutiny mechanism set out in the Act states that—

- once a draft PBO is laid before both Houses by the minister, together with an explanatory document, a 40-day scrutiny period is initiated, after which the draft PBO can be put to both Houses for approval;
- during the first 30 days of the scrutiny period, the scrutiny committee in

[3] The committee adopted this name at the start of the 2012–13 session. It was previously called the Select Committee on the Merits of Statutory Instruments.

each House, or either House itself, can trigger a 60-day "enhanced affirmative" procedure;
- if the 60-day enhanced affirmative procedure is triggered, the scrutiny committee in either House can make recommendations on the draft PBO, or either House can pass resolutions relating to the draft PBO; and the minister must have regard to those recommendations or resolutions;
- once the 60-day period is completed, the minister may either submit the draft PBO in its original form for approval by resolution of each House of Parliament or, if he wishes to make material changes to the draft PBO, he may lay a revised draft before both Houses together with a statement summarising the changes proposed.

In a report published in January 2012, the Lords SLSC set out how it intended to approach this new scrutiny role.[4] The committee published a further report in December 2012, one year on from Royal Assent to the Act, setting out the progress that the Government had achieved against their own timetable for reform, and describing its experience of how the scrutiny system had operated in the House of Lords.[5]

In all, 285 bodies were listed in the 2011 Act; the Government had envisaged that this would lead to a total of 58 PBOs (since some PBOs would deal with more than one public body). The Government estimated that in the first year following Royal Assent 39 PBOs would be brought forward, reforming 60 public bodies.

By 13 December 2012, however, the committee reported that only 19 PBOs had been laid, reforming 37 public bodies. The committee obtained an explanation from the Government of why fewer than 50 per cent of the expected draft PBOs had been laid. The reasons given were—

- 10 draft PBOs had been deferred to a future year;
- five draft PBOs fell into the category of "policy and/or vehicle under consideration"; and
- three draft PBOs fell into the category of "policy to be achieved by other means"—that is, not using provisions in the 2011 Act.

So much for quantity. The committee was more concerned with the quality of those PBOs and the accompanying material that had been laid before Parliament since December 2011. Drawing on comments made in individual reports on the PBOs, the committee stated in its report that it had seen cause to raise concerns in a number of areas, namely—

[4] 50th report of session 2010–12 (HL Paper 250).
[5] 19th report of session 2012–13 (HL Paper 90).

- the robustness of the Government's case for individual PBOs;
- the evidence provided to show that the statutory tests in the 2011 Act had been met;
- the Government's approach to consultation and ongoing engagement with stakeholders; and
- the arrangements that the Government had put in place to ensure the future monitoring of reforms and in some cases continued assurances to Parliament.

As explained above, the 2011 Act requires a minister to provide an explanatory document (ED) alongside a PBO, setting out the Government's case for the proposed reform. The most significant example where an ED lacked a persuasive explanation arose from the two draft PBOs relating to the British Waterways Board (BW), which were laid in March 2012. The Government proposed to place state-owned waterways in England and Wales in trust for the nation through the establishment of a new waterways charity: BW was to be replaced by a new Canal and River Trust.

Neither the ED nor further written information from the Government persuaded the committee initially that the Government had made the case for reform. So the committee triggered the 60-day enhanced affirmative procedure and called the minister to give oral evidence. That evidence made it clear that a key part of the case for reform was the significant increase in volunteering which would result from the organisation transferring to charitable status. Had this been explained effectively in the original ED, the draft PBO could have been cleared under the 40-day procedure.

As regards the statutory tests of *efficiency* and *effectiveness*, in the committee's first report on a draft PBO (relating to the National Endowment for Science, Technology and the Arts (NESTA)), it commented that "given that the new governance arrangements will be central to NESTA's effectiveness as a charity, the Committee would have expected to see a greater explanation of these arrangements".[6] Similarly, in reporting on the draft PBO relating to Water Supply and Water Quality Fees, the committee said: "We are not, however, clear that the statement in the [explanatory document] about effectiveness applies with any greater force to the proposed charging scheme than to current arrangements ... We recommend that the Government give a clearer explanation of the ways in which they expect the [draft PBO] to promote effectiveness and economy in the delivery of DWI's functions".[7]

[6] 51st report of session 2010–12 (HL Paper 254).
[7] 13th report of session 2012–13 (HL Paper 57).

On the statutory test of *economy*, the Government reasonably decided that a full impact assessment would have been disproportionate for a number of PBOs. Nonetheless, in these circumstances, the Government still have a responsibility to provide enough financial evidence to enable Parliament to judge whether the new arrangements will be more efficient or economic. In the case of the draft PBO to transfer the Consumer Advice Scheme function from the Office of Fair Trading, however, the committee noted that the ED was silent on the consideration of economy; and, because this omission meant that the ED did not comply with the requirements of the 2011 Act, the committee recommended the 60-day enhanced affirmative procedure.[8]

As regards the test of *accountability*, a number of PBOs have provided for a body, or the function it is carrying out, to be taken into the relevant department, thereby enhancing accountability to ministers. Conversely, some PBOs have raised issues of independence as well as accountability. In reporting on the draft PBO proposing to abolish the Advisory Committee on Hazardous Substances and transfer its functions to a new committee within the Department for Environment, Food and Rural Affairs, the committee recommended that "the Minister may wish to use the debate [on the PBO] to set out exactly how the Government will ensure that the newly constituted committee will be able to, in the words of the Code of Practice, 'operate free of influence from the sponsor department officials or Ministers, and remain clear that their function is wider than simply providing evidence just to support departmental policy.'"[9]

The committee has taken a close interest in *consultation* undertaken in preparation for laying draft PBOs. It had particular concerns about the consultation on the proposed PBO to abolish the Disability Living Allowance Advisory Board, and pressed the minister in the Department for Work and Pensions (DWP) to explain why she had not consulted "such other persons as appear to the Minister to be representative of interests substantially affected by the proposal", as required by section 10(1)(b) of the 2011 Act. The committee received supplementary evidence from the minister, and accepted that it provided an explanation for why DWP considered it was not under a legal obligation to consult. However, the committee said that it "[did] not consider the Minister's approach is necessarily in keeping with the spirit of the consultation requirement."[10]

[8] 24th report of session 2012–13 (HL Paper 107). The committee considered this PBO in January 2013.

[9] 56th report of session 2010–12 (HL Paper 274).

[10] 15th report of session 2012–13 (HL Paper 66).

The 2011 Act contains no specific provision on *monitoring* new arrangements where a PBO transfers or merges functions, but the committee has seen occasion to press on this issue. In reporting on the draft Public Bodies (Abolition of Courts Boards) Order 2012, it suggested that in the debate "the Minister may wish to give the House more specific assurances about what provision will remain to monitor and influence how court services are tailored to the needs of the local area."[11] Similarly, in relation to the draft PBO abolishing the Environmental Protection Advisory Committees, the committee recommended that "the Government re-consider the need for formal monitoring and evaluation of the successor arrangements … to enable interested parties to be engaged in the delivery of the Environment Agency's objectives".[12]

Conclusions

In December 2012 the Government published their directory of "Public Bodies 2012", in which they describe a "substantial programme of reform ... to bring order to [the] landscape [of public bodies] ... we have simplified the landscape too with over 130 bodies abolished and more than 150 others merged into fewer than 70."[13] Use of the powers conferred by the Public Bodies Act 2011 is only part of the Government's wider programme.

It is clear, though, that the Government have not made as much progress in deploying PBOs as they hoped when the 2011 Act was introduced. To have laid 19 PBOs may be seen as a fair achievement; the original ambition of laying 39 PBOs may in retrospect appear unrealistic.

It would not, however, be reasonable to suggest that any shortfall in progress is attributable to the process of parliamentary scrutiny. In the 12 months following Royal Assent to the 2011 Act, for draft PBOs that proceeded under the 40-day affirmative procedure, the committee on average reported to the House within 10 working days (17 calendar days) from the date when the PBO was laid. In the same period, the 60-day enhanced affirmative procedure was triggered only three times by the committee, and in the case of those PBOs, the committee's reporting time was within 32 working days (57 calendar days) of the date of laying.

The committee took oral evidence from a minister only once, and on that occasion made formal recommendations, which the minister then had a statutory duty to have regard to under the 60-day enhanced affirmative procedure.

[11] 53rd report of session 2010–12 (HL Paper 262).
[12] 4th report of session 2012–13 (HL Paper 14).
[13] "Public Bodies 2012" (Cabinet Office): Ministerial Foreword.

On the remaining draft PBOs considered to the end of 2012, the committee either made informal recommendations or comments, or cleared the draft PBO without substantial comment.

It remains to be seen whether the pace of laying PBOs increases or decreases in 2013, now that the Government have experience of the thoroughness with which the committee applies the tests. It is interesting to note that the Government have decided to abolish certain public bodies originally listed in the 2011 Act by alternative mechanisms: is it possible that the challenge posed by parliamentary scrutiny of PBOs has played a role in this decision?

MISCELLANEOUS NOTES

AUSTRALIA

House of Representatives

Addresses by foreign leaders

On 20 June 2011 the Right Honourable John Key, Prime Minister of New Zealand, addressed members and senators in the House of Representatives chamber. It was the first address by a Prime Minister of New Zealand to the Australian Parliament.

On 17 November 2011 the Honourable Barack Obama, President of the United States, addressed members and senators in the House of Representatives chamber. It was the fourth such address by a President of the United States.

Procedurally, each address was to a sitting of the House of Representatives to which senators were invited to attend as guests, as distinct from a joint sitting of the two Houses. The Speaker presided and the standing orders of the House applied.

Resignation of Speaker and election of new Speaker and Deputy Speaker

On 24 November 2011, the last sitting day in 2011, Speaker Harry Jenkins announced his intention to tender his resignation as Speaker to the Governor-General. Mr Jenkins then left the chair, and resigned as Speaker later that day; he remains a member of the House. This was only the fourth time a Speaker has announced during a sitting of the House his or her intention to resign.

Upon the Governor-General's invitation to elect a new Speaker, the House later elected the Deputy Speaker, Mr Peter Slipper, as Speaker. Mr Slipper was a member of the opposition and, following his election, resigned from his party and became an independent. The election of the new Speaker left the position of Deputy Speaker vacant, and Ms Anna Burke, a member of the Australian Labor Party, was elected to the position in a ballot against a second nominee from the Opposition, the Hon Bruce Scott. Mr Scott was appointed Second Deputy Speaker.

Draft code of conduct for Members of Parliament

In November 2011 the House Committee of Privileges and Members' Interests presented a discussion paper on a draft code of conduct for Members

of Parliament. A copy of the discussion paper can be found at: http://www.aph.gov.au/house/committee/pmi/cocreport.htm

The discussion paper was in response to a reference from the House in November 2010 for the committee to examine the implementation of a code of conduct for members. The committee decided not to reach a concluded view on the merits of implementing a code, but wished to present the evidence it had taken on all the issues to do with a code.

Although it did not reach specific conclusions, the committee's preferred views on two issues were significant. First, the committee considered that, if a code were to be implemented, it would be preferable for it to be broad in nature and reflect key principles and values as a guide to behaviour, rather than a detailed, prescriptive code. The committee included in its report a possible draft code of conduct.

Second, the committee considered any code should be adopted by resolution of the House rather than being implemented by statute. The committee was concerned that a statutory code could open up the conduct of members to scrutiny by the courts. The committee considered it essential that the conduct of members should be a matter for the House itself.

The committee also considered the possible role for a Parliamentary Integrity Commissioner and the process for handling complaints under the code.

Parliamentary Budget Officer

During the last period of sittings in 2011 the Parliamentary Service Amendment (Parliamentary Budget Officer) Bill 2011 was passed by both Houses. The Act amends the Parliamentary Service Act 1999 to provide for the appointment of a Parliamentary Budget Officer to head a fourth parliamentary department, the Parliamentary Budget Office (PBO).

The functions of the PBO include—

- preparing policy costings outside, and during, the caretaker period;
- preparing responses to requests from members and senators relating to the budget;
- preparing submissions to parliamentary inquiries; and
- conducting research and analysis on budget and other policy settings.

The Act provides for the Parliamentary Budget Officer to be appointed by the presiding officers for four years. The appointment must obtain the approval of the Joint Committee of Public Accounts and Audit (JCPAA). The JCPAA also has an oversight role in relation to the PBO including—

- considering the work plans of the PBO;
- considering, and making recommendations to both Houses, on the draft estimates of the PBO;
- considering the operations and resources of the PBO;
- reporting to the Houses on any matters to do with the PBO; and
- ensuring that there is a review of the PBO to be completed within nine months after the end of the caretaker period for an election.

Private members' business—impact of reforms introduced in 2010

In September 2010, following the formation of a minority government, a number of procedural reforms were introduced to the House. These included substantial changes to the arrangements for private members' business, in particular—

- the time allocated for private members' business each week increased to three and a half hours in the chamber and five hours in the Main Committee (later renamed the Federation Chamber), compared to one hour in the chamber and 35 minutes in the Main Committee in the previous Parliament; and
- voting took place on items of private members' business (the items to be voted on were recommended by the Selection Committee which was re-established, with increased powers, in 2010); these votes took place in government business time.

The impact of these reforms was demonstrated by the end of 2011. The percentage of House time taken up by government business—including government legislation, motions and ministerial statements—was 55 per cent in 2011, compared to 65 per cent in 2009 (the closest non-election year). The time for private members' business—legislation, motions (including suspension motions) and statements—increased in 2011 to 11 per cent from 3 per cent in 2009. In terms of items of private members' business (bills and motions) proposed and debated, 60 were debated in 2009, compared with 132 in 2011. There was no vote on a private member's bill or motion (other than a suspension motion) in 2009, whereas in 2011 the House voted on 61 matters of private members' business, with 42 motions being supported, and four private members' bills (including 1 private senator's bill) passing at third reading.

Senate

New Senate

In September 2010, following a general election, Prime Minister Gillard entered into various agreements with cross-bench members to enlist their support for the formation of a minority government. Those agreements—dubbed "parliamentary reform agreements"—contained a number of elements which affected the Senate during 2011, including by providing a regular opportunity during the Senate's routine of business each week for the consideration of private senators' bills and increasing the number of committees on which senators served because of the advent of a number of joint committees to inquire into matters which were the subject of some of those agreements.

The terms of state senators elected at that election began on 1 July 2011. The Senate scheduled a sitting week commencing 4 July, during what would traditionally be the winter break. This posed some logistical challenges for the department in managing the departure of 12 outgoing senators and accommodating their 12 replacements essentially over the course of a weekend. In the end, careful planning and the cooperation of all involved saw a successful changeover.

The Senate department organises an orientation programme to provide new senators with introductory information about the procedures and operations of the Senate and its committees. This has grown over the past 20 years into an intensive three-day programme comprising presentations, discussions and simulations of both Senate and committee proceedings. Topics include the constitutional position of the Senate; its roles and functions; the legislative process; and resources available to assist senators in their work. Because of the unusual sitting pattern, the programme was held after, rather than before, the new senators' first sitting week. To accommodate this change, the department produced additional resources, including a dvd on the essentials of Senate and committee procedures and practices, and a newsletter to keep senators-elect abreast of the work of the Senate leading up to their swearing-in. It appears that the experience of a week of sittings prior to the orientation programme enhanced the value of the programme, particularly by sharpening the focus of their questions on procedural matters and lending better context to many of the sessions.

Access to information

Broad questions about the Senate's right to access information continued to occupy the attention of the Senate and its committees during 2011.

Orders directed at statutory officers

A dispute over the extent of the Senate's power to require information of statutory officers remained unresolved during the year. In 2010 the Australian Information Commissioner, an independent statutory officer, declined to comply with a Senate order to produce a document, on the basis that its production was not encompassed by the functions conferred upon his office by statute. The Productivity Commissioner took a similar approach in declining to produce another document ordered by the Senate. The Senate ordered both commissioners to reconsider their positions, citing the numerous precedents of statutory officers responding to orders to produce documents and noting that neither of the statutes establishing their offices contained any explicit limitation on the powers of the Houses under section 49 of the Constitution, which would be required if the Parliament had intended to limit itself in this regard.

The response from the Australian Information Commissioner questioned the extent of the Senate's power to make such orders, while the response from the Productivity Commissioner attached advice from the Australian Government Solicitor similarly querying the Senate's power. The positions of the Senate and the commissioners were also explored during estimates hearings.

A more rational basis for declining to produce such documents—that an agency cannot be compelled to create a document based on information that it does not have—was occasionally hinted at, but has not been extensively explored. There is no suggestion in the Senate's orders that its powers extend to conferring information-gathering powers upon these agencies, despite some apparent misunderstandings on this point.

Guidelines inquiry

The Senate referred to the Privileges Committee a wide-ranging inquiry into the adequacy and appropriateness of current guidance available to officers giving evidence to committees and providing information to the Senate. A similar reference had lapsed at the end of the previous parliament.

The broad terms of reference enable the committee to explore the issues in dispute with the two commissioners. The legal advice referred to above was also provided to the Privileges Committee as part of a government submission to this inquiry. The submission and a response to it by the Clerk of the Senate have been published on that committee's website.

Public interest immunity claims

In 2009 the Senate adopted by resolution a protocol by which claims could be made by officers and ministers seeking to withhold information from Senate

committees on the basis of public interest immunity. The protocol is intended to ensure that committees are provided with considered and well-founded explanations which enable committees—and ultimately the Senate—to determine such claims. It provides the only recognised process by which such claims to withhold information ought to be made, but the year saw many examples of the lingering belief among many officers—

- that there remains an independent discretion to withhold information, particularly on the basis of supposed conventions never accepted by the Senate. These are notoriously raised in relation to legal advice, sometimes citing "legal professional privilege", which has no parliamentary status. Similar claims are sometimes made in relation to any information with the most marginal connection to cabinet processes, rather than being reserved for documents on which proper claims of cabinet confidentiality might be made.
- that processes which apply outside of the parliamentary environment constrain the powers of the Senate and its committees, exemplified in attempts by officers to apply the criteria which apply to freedom of information processes to decisions about providing information to Senate committees.
- that they have the right to pre-determine matters which are properly for the Senate itself to determine, for instance by claiming that answers "could not be provided" as matters were *sub judice*. The rights of senators to ask questions apply regardless of whether a matter is before the courts.

Perhaps the most disturbing example of the misunderstanding of the relevant principles was the refusal to produce, in response to Senate orders, material otherwise released in response to freedom of information requests.

The terms of reference of the "guidelines" inquiry to the Privileges Committee enable that committee to look at the awareness among agencies and officers of the operation of the 2009 order and the principles involved in its application.

Legislation implementing referrals of power

A package of bills arising from the referral of state powers was the subject of extensive comment by two Senate committees. The Government argued that they could not be amended because the referral of powers was based on specific agreed text and that any alteration would result in the failure of the agreement to establish the Vocational Education and Training Regulator, an office for which there was widespread support. The Senate Education, Employment and Workplace Relations Legislation Committee recommended the prepara-

tion and reference of exposure drafts in future to enable examination of proposals before they were locked into the terms of intergovernmental agreements.

During debate on the bills, several senators commented on the hijacking of normal parliamentary processes by bills such as these which are presented to Parliament as a fait accompli. Although they were supportive of the aims of the legislation, they were concerned by the usurpation of parliamentary scrutiny which is an inevitable by-product of uniform national legislative schemes and legislation giving effect to intergovernmental agreements. Tellingly, the legislation committee recommended that certain provisions of the legislation be amended once they had been enacted (and the text-based referral of powers had been effected).

Disagreement over the allocation of committee chairs

For most of the period since 1994 the standing orders of the Senate have provided for the chairs of its standing committees to be allocated among government and non-government senators. For most of that time the standing orders divided the "references committee" chairs between the opposition and the largest minority group in the ratio of 6:2. Under current arrangements, however, the allocation is left for determination by agreement and, in the absence of agreement duly notified to the President, by the Senate. Since 2009 the agreed allocation formula was 7:1 but when the Australian Greens increased their numbers from 1 July 2011 there was pressure for the allocation to return to the old ratio.

The absence of an agreement was notified to the President and, subsequently, to the Senate. The government moved a motion to provide for the chair of the Legal and Constitutional Affairs References Committee to be elected by committee members from members nominated by minority groups or independent senators. It was agreed after somewhat acrimonious debate and unsuccessful attempts to amend the motion to substitute, and then add, the chair of another committee, the Environment and Communications References Committee.

Reference for Senators' Interests Committee

The Senators' Interests Committee received a reference on the development of a code of conduct for senators, another outcome of the agreements on parliamentary reform and referred in parallel with similar reference to the equivalent committee of the House of Representatives with the stated aim of developing a uniform code and uniform implementation processes.

Attempts to develop a code of conduct go back many years and were part of the original endeavours to establish regimes for the registration of pecuniary interests. The Senate did not adopt its resolutions on senators' interests until 10 years after the House and there are some significant differences in the application of the rules between the Houses, including in relation to the interests of spouses, partners or dependent children (which are confidential in the Senate but public in the House). Although the House committee produced a discussion paper during the year the Senate committee had not reported at the end of 2011.

New South Wales Legislative Council and Legislative Assembly (joint entry)

Restriction on prorogation of Parliament prior to an election

In May 2011 Parliament passed the Constitution Amendment (Prorogation of Parliament) Act 2011. The Act amended section 10A(2) of the Constitution Act 1902 (NSW) to provide that the Premier or Executive Council may not advise the Governor to prorogue the Legislative Council and Assembly for the six months prior to 26 January in the year in which an election is due to be held.

This provision effectively prevents the Executive Government from proroguing Parliament early in the lead up to an election in an attempt to prevent parliamentary scrutiny of its activities.

This amendment to the Constitution Act 1902 was made in response to the prorogation of Parliament on 22 December 2010, three months prior to the election of 26 March 2011. At the time, the former Government was accused of using prorogation to attempt to avoid an inquiry by the Legislative Council's General Purpose Standing Committee No. 1 into the Government's sale of state electricity generators.

New South Wales Legislative Assembly

New committee structure for the 55th Parliament

The development of the committee system of the New South Wales Legislative Assembly has been ad hoc and previously comprised a number of statutory oversight committees, traditional committees such as the Public Accounts Committee, a scrutiny of bills committee, and a number of standing committees on specific policy subject areas, such as a standing committee on road safety.

The incoming Government determined that in addition to the statutory and subject-specific committees previously established in each Parliament, the committee system should more broadly reflect the areas of responsibility of

the state Government and mirror the committees of the Legislative Council. The committee system was also expanded to accommodate the increased Government backbench members. The committees for the 55th Parliament that are administered by the Legislative Assembly are as follows:

Statutory committees

- Committee on Children and Young People
- Committee on the Health Care Complaints Commission
- Committee on the Independent Commission Against Corruption
- Committee on the Office of the Ombudsman and the Police Integrity Commission
- Legislation Review Committee
- Public Accounts Committee.

Standing Committees previously established

- Joint Standing Committee on Electoral Matters
- Joint Standing Committee on Road Safety (Staysafe)
- Joint Standing Committee on the Office of the Valuer-General
- Standing Committee on Parliamentary Privilege and Ethics
- Standing Orders and Procedure Committee.

New committees established for the first time

Two new types of standing committees have been appointed:

Specialist Standing Committees

Three Specialist Standing Committees have been appointed by the Legislative Assembly for the current Parliament. These committees are able to report on any proposal, matter or thing concerned with the subject area of the committee. These committees may be referred inquiries by the House or in writing from a minister or they may initiate an inquiry on their own motion. The committees should not duplicate any inquiry under examination by a portfolio committee or another standing committee of the House.

The Specialist Standing Committees are:

- Legal Affairs Committee
- Social Policy Committee
- State and Regional Development Committee.

Portfolio Standing Committees

Five Portfolio Standing Committees have also been appointed by the Legislative Assembly. These Portfolio Standing Committees are able to examine, inquire into and report on (a) matters concerning their subject areas that may be

referred to them by the House; (b) any relevant policy, bill or subordinate legislation; (c) any relevant financial matter; and (d) any relevant portfolio issue. Accordingly, these committees have a number of functions—

- Legislative scrutiny—including evaluating the policy impact and consequences for each portfolio of any relevant bill, existing legislation or subordinate legislation.
- Financial matters—review of government financial management, by considering the financial documents, expenditure, performance and effectiveness of any relevant government department, agency, statutory body or state-owned corporation.
- Examination of annual and other reports—including the adequacy and accuracy of all financial and operational information, and any matter arising from these reports concerning the efficient and effective achievement of the agency's objectives.
- Public works—considering any matter concerning public works relating to the portfolio area.

The committees may initiate inquiries on referral from the House or a minister and, with the exception of bills, may also initiate an inquiry on its own motion. Consideration of bills is by way of referral from the House in accordance with standing order 323.

The Specialist Standing Committees and Portfolio Standing Committees are able to appoint sub-committees, consisting of three members, and to refer to a sub-committee any of the matters which the committee is empowered to consider. These sub-committees may be responsible for conducting hearings, briefings, visits of inspections and other activities but cannot make decisions concerning the conduct of an inquiry, such as the selection of witnesses, and the committee's reports.

Legislative Assembly restructure

The Department of the Legislative Assembly embarked upon a fundamental restructure in 2009, following the completion of an employee opinion survey, the imposition of budget constraints and the establishment of the new Department of Parliamentary Services. The restructure was completed in April 2011.

In responding to these drivers, in particular to the staff survey, the major focus of the restructure has been to create a flexible workforce that is capable of being deployed across the Department to meet operational needs and to meet the professional development needs and aspirations of staff. Another key

objective is to strengthen staff knowledge and give them experience in key areas of work.

A Staff Assignment System and new policies on Training and Development, Work Performance and Development and Staff Induction have been developed and approved to support these initiatives.

A key feature of the restructure has been to offer appointments to staff as generic positions at grade across the Department, rather than appointment to a specific position, and subject to their adoption of the Staff Assignment Policy. This policy allows the Clerk to make short-term temporary assignments and rotations of staff and to assign staff into ongoing roles in any business unit. The aim of the policy is to foster greater opportunities for career diversity and skill development and to provide greater flexibility for staff deployment in times of need.

Overall there are more positions than existing staff and the Department has commenced the process of recruiting additional staff. Offers of voluntary redundancy were made to some staff who expressed an interest and whose positions are no longer on the establishment.

Under the structure new directors are now managing the day to day operations of the new Business Units (except the Office of the Clerk). The new Business Units are the Office of the Clerk, Committees, Procedural Research and Training, Table and Chamber Services and Corporate Services. There are two directors in Committees, where staff will not be appointed to particular committee secretariats but will be allocated to committee inquiries as they are announced. A risk-management process will be conducted before each inquiry and staff allocated according to the nature and depth of the inquiry. Each inquiry will have a separate budget.

The two Clerks-Assistant respectively manage the directors and strategically manage the Business Units.

To support the restructure and to provide the Department with ongoing expert assistance, a new position of Knowledge and Information Manager has been created and filled. The role of this position will be to ensure that the information that staff need in order for them to rotate around positions on the establishment is available and that systems are in place for all staff to share and transfer knowledge and to promote innovative practices.

New South Wales Legislative Council

Time limits for debate on Government bills

In August 2011 the Council adopted a sessional order limiting time for debate

on Government bills, including in committee of the whole. The time limits provide that:

- Where there is debate on the second or third reading of a government bill, the lead Government and lead Opposition speakers may not speak for more than 40 minutes, and other members and the mover in reply may not speak for more than 20 minutes, although a member may move that his or her time limit may be extended by not more than 10 minutes.
- In committee of the whole, members may speak more than once on the same question, provided that each contribution does not exceed 15 minutes, although where the speech of a member is interrupted by this provision, the member may seek the leave of the House to continue speaking for not longer than 15 minutes.

The introduction of these time limits on debate on Government bills followed the passage through the House in May and June of the highly controversial Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011. Throughout debate on this bill, the Government repeatedly accused the opposition and minor parties of filibustering to delay the bill's passage, there being no time limits on debate at the time. It is believed that the longest continuous speech (5 hours 58 minutes) was delivered in the House by Mr David Shoebridge, a member of the Greens, on 2 June 2011 during debate on the bill.

The introduction of time limits on debate on government bills was controversial. Traditionally, it has been the view that Council members should not be unduly constrained by limiting the time available to them to debate important pieces of Government legislation. Prior to August 2011, there had been three previous occasions when time limits were imposed on debate on Government bills, but on each occasion the time limits subsequently lapsed.

Postscript: The time limits are still in place at the end of the 2012 sitting year. Since their introduction in August 2011, no member has yet sought to extend their time limit in the second reading of a bill or during committee of the whole. Members frequently avail themselves of the opportunity to speak more than once on the same question in committee of the whole.

Magistrates appear at the Bar of the House

Under Part 9 of the Constitution Act 1902 (NSW), and the provisions of the Judicial Officers Act 1986, the Parliament is responsible for considering the removal of a judge or magistrate where the Conduct Division of the Judicial

Commission has provided a report expressing the opinion that the conduct of the officer could justify such an action.

During the reporting period, two magistrates, Magistrate Jennifer Betts and Magistrate Brian Maloney, appeared before the Bar of the Legislative Council to address the House on concerns raised by the Judicial Commission of NSW (the Commission) about their conduct as judicial officers. It was only the second and third time that a judicial officer had been required to defend their conduct before the House. The previous judicial officer to do so was Justice Vince Bruce in 1998.

The House ultimately declined to recommend to the Governor the removal of both Magistrate Betts and Magistrate Maloney, although the question of an Address to the Governor for the removal of Magistrate Maloney went to a division (and was defeated 15:22).

Queensland Legislative Assembly

Committee of the Legislative Assembly

The Committee of the Legislative Assembly (CLA) was initially established as a select committee by resolution of the House in early 2011 primarily to consider issues arising from the 2010 Report of the Committee System Review Committee. The Parliament of Queensland Act 2001 was later amended and established the CLA as a statutory committee with the following areas of responsibility—

- the ethical conduct of members (but complaints about a particular member not complying with the code of ethical conduct for members may only be considered by the Assembly or the Ethics Committee);
- parliamentary powers, rights and immunities;
- standing rules and orders about the conduct of business by and the practices and procedures of the Assembly and its committees; and
- any other matters given to it under the standing rules and orders.

Significant changes to the Parliamentary Service Act were also made during the year, transferring management responsibility for the service from the Speaker to the CLA and the Clerk. The CLA is now responsible for—

- deciding major policies to guide the operation and management of the service;
- preparing budgets;

- deciding the size and organisation of the Parliamentary Service and the services to be supplied; and
- supervising the management and delivery of services.

Under standing orders the CLA is also responsible for monitoring and reviewing the—

- business of the Assembly to ensure the effective and efficient discharge of business; and
- operation of committees, particularly the referral of bills to committees, and where appropriate varying the reporting times.

The CLA's membership originally comprised the following (or an alternate nominated by the relevant member)—

- Leader of the House,
- Premier,
- Deputy Premier,
- Manager of Opposition Business,
- Leader of the Opposition, and
- Deputy Leader of the Opposition.

(The Speaker was a member only when the committee dealt with a matter relating to the Standing Rules and Orders. This has since changed and the Speaker is now chair of the committee but without any voting rights.)

Portfolio committees

A major feature of the new system was the establishment of seven statutory portfolio-based committees. The portfolios are designed to cover all areas of government activity, with each committee—

- considering proposed legislation and subordinate legislation;
- considering Appropriation Bills (budget estimates function);
- performing a public accounts and public works role for matters falling within the portfolio; and
- dealing with any issues referred by the Assembly.

Initially each committee had six members but this was increased to eight in 2012. The chair of each portfolio committee is a government member.

Consideration of bills

The Parliament of Queensland Act 2001 provides that a portfolio committee

is responsible for examining each bill and item of subordinate legislation in its portfolio area, to consider—

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles to the legislation;
- the lawfulness of each item of subordinate legislation.

The legislative process in the House has changed to accommodate the referral to committee stage. Upon introduction the minister (member in charge of the bill) reads the long title, tables the bill and explanatory notes, nominates the portfolio committee to examine the bill and delivers a speech explaining the principles of the bill (formerly this was done at second reading). The question is then put "that the Bill be now read a first time". If the question succeeds, the bill stands referred to the portfolio committee for examination and report. If the question fails, it proceeds no further. To date all bills have passed this stage.

The default reporting period is six months; however this can be (and is) varied by the CLA or the Assembly. The CLA considers requests from ministers for reducing reporting times and, if agreement can be reached, the House is notified of the change. If the CLA cannot reach agreement, the Assembly determines by way of a motion which can be debated.

When a bill has been reported on by a committee it is then set down for its second reading. Sessional orders were amended to reduce members' speaking times when a bill had been examined by a committee as indicated in the following table:

	Bill reported on by committee	**Bill not referred /reported on by committee**
Second reading		
Minister	1 hour	1 hour
Leader of Opposition or nominee	1 hour	1 hour
Member of reporting committee	20 mins	NA
All other members	10 mins	20 mins
Minister in reply	30 mins	30 mins
Consideration in detail		
Minister	No limit	No limit
Leader of the Opposition or nominee on each question	3 mins	(3 times) 1 x 10 mins and 2 x 5 mins
All other members	3 mins	(2 times) 2 x 5 mins

In 2011, 49 Bills were referred to committees and 30 reports were tabled—all within the prescribed timeframes.

Technical scrutiny of legislation

Previously all bills and subordinate legislation was examined by the stand-alone Scrutiny of Legislation Committee. This committee ceased operating in 2011 following the enactment of changes to the Parliament of Queensland Act. The technical examination of bills and subordinate legislation is now undertaken by the relevant portfolio committee. In this task, the committees are supported by a technical scrutiny of legislation secretariat, which provides advice to the relevant portfolio committee examining a bill on any issues concerning fundamental legislative principles. This advice is included in the tabled report. The secretariat also provides advice on subordinate legislation.

Estimates process

Previously, the estimates process was undertaken by committees established on an annual basis solely for that purpose. Each portfolio committee now undertakes this role. Other changes to the estimates hearings process in 2011 included—

- direct questioning of certain chief executive officers at hearings (previously committees could only directly question the minister);
- a move away from the previous rigid hearing process (which had included time limits on questions and answers, and the allocation of blocks of questioning time alternating between government and non-government members);
- an overall increase in hearing times.

Other committee functions

Each portfolio committee has a "public works" and "public accounts" function for the portfolio. This role, previously undertaken by two separate stand-alone committees, involves—

(a) assessing the integrity, economy, efficiency and effectiveness of government financial management by—
  (i) examining government financial documents, and
  (ii) considering the annual and other reports of the auditor-general;

(b) considering works (public works) undertaken by an entity that is a constructing authority for the works; and

(c) considering any major GOC works.

Additionally, some portfolio committees have an oversight role of independent statutory entities.

Queensland floods

The devastation of the Queensland floods and natural disasters in December 2010 and January 2011 dominated the sittings of the Legislative Assembly in the early part of the year. The unprecedented events saw the shocking loss of 35 lives in the floods. Approximately 70 per cent of the state was flooded, including a number of Brisbane suburbs. More than 78 per cent of Queensland was declared a disaster zone.

Impact on the parliamentary service

One member's electorate office, west of Brisbane, was extensively damaged through flood inundation, with floodwaters rising to the ceilings. Some northern regional electorate offices sustained damage due to cyclonic activity and lost power for an extended period.

In addition to the significant impact on the members and electorate officers concerned, and their communities, the resources of the parliamentary service were tested in the task of relocating, repairing and re-establishing electorate offices.

The Clerk directed parliamentary service staff to remain away from duty at the parliamentary precinct for three days during the worst of the Brisbane floods, when access to parts of the Brisbane CBD was severely restricted or closed.

Fortunately, flooding of the parliamentary precinct was restricted to the staff and visitor car parks located adjacent to the Brisbane River. These were inundated. The resultant thick layer of mud and silt caused damage to the car park surface, perimeter fencing, CCTV security systems and barriers. The flooding also caused damage to the card swipe access system, the automatic boom gates and the associated electrical and communication systems within each car park. Full restoration of the parliamentary car parks was completed at the end of February. A grant from the Queensland Reconstruction Authority offset repair.

Condolence motion

On return from its summer recess on 15 February, the House immediately suspended all business to enable the Premier to move a condolence motion on the natural disasters. As a mark of respect, the debate on the motion began with a

minute's silence. The condolence motion, which was the only item of business, continued until 9.32 pm that day. Debate on the motion resumed on Wednesday afternoon. 77 members spoke to the motion during the 16-hour debate.

Queensland Reconstruction Authority Bill 2011

On 16 February the Premier introduced the Queensland Reconstruction Authority Bill 2011, which established the Queensland Reconstruction Authority and provided for other measures to assist with the rebuilding and recovery of Queensland communities affected by the disaster. The House had resolved earlier that day to treat the bill as urgent under standing orders.

The bill passed all its stages on 17 February and received Royal Assent on 21 February.

Queensland Floods Commission of Inquiry

On 17 January 2011, in response to the scale of the disaster, the Premier established the Commission of Inquiry into the Queensland floods of 2010–11 under the provisions of the Commissions of Inquiry Act 1950.

The Clerk of the Parliament provided copies of tabled reports from the parliamentary archives in relation to past floods dating back to the 1890s, together with an evidentiary certificate prepared in accordance with section 55 of the Parliament of Queensland Act.

The Commission was vested with wide-ranging powers and terms of reference and was required to provide the government with an interim report by 1 August 2011 and a final report by 17 January 2012. The final reporting date was later extended to 24 February 2012.

Production of privileged ministerial briefing papers

During the Commission of Inquiry's proceedings an issue arose concerning the production of ministerial briefing papers to the commission by the Minister for Natural Resources and Water Utilities. At the inquiry the minister indicated that he had received advice from Crown Law that as the documents were privileged he could not produce them to the inquiry without a resolution of the Legislative Assembly authorising him to do so. There was considerable media commentary about the matter, where published material from the Clerk four years earlier contradicting the Crown Law advice was discussed. A meeting between the Premier, the Solicitor General, Crown Law representatives and the Clerk of the Parliament resolved the issue.

There was no legal dispute between anybody that parliamentary privilege applied to the documents, which were proceedings in Parliament under section

9 of the Parliament of Queensland Act 2001. The issue was whether the documents prepared for the minister could be released without the consent of the Legislative Assembly. All parties agreed that it was open to the minister to release the documents and to later have the Legislative Assembly by motion acknowledge the release. On 10 May (the first sitting day after the documents had been provided to the commission) the House resolved to ratify the production of the papers to the Commission of Inquiry by the minister and resolved that the minister had not committed any contempt by producing the papers to the commission.

Electoral Reform and Accountability Amendment Bill 2011

This bill, introduced in April 2011, amended the Electoral Act 1992 to make reforms to political donations and election campaign expenditure and funding for state elections. In particular, the bill imposed caps on amounts donors can make to political parties, candidates and third parties for election spending. It also placed caps on certain expenditures by political parties, candidates and third parties in the period prior to an election.

The bill was debated in cognate with a private member's bill (the Electoral (Truth in Advertising) Amendment Bill). That bill sought to prevent deliberately false and misleading electoral advertising being distributed by implementing a penalty regime for persons who authorised the publication of false electoral advertising and for persons who make false and misleading statements during election campaigns. The bill failed on its second reading but the electoral reform bill was passed.

Victoria Legislative Assembly

As part of ongoing work on community engagement, in 2011 the Legislative Assembly began work on a social media strategy. A working party was established with representatives from a wide range of departments and, in conjunction with social media consultancy firm Wholesome Media, a draft strategy was developed for implementation in 2012. The initial focus of the strategy will be engagement via Twitter and Facebook.

CANADA

House of Commons

The House administration, in collaboration with Public Works and Government Services Canada, continued its efforts to meet the key objectives of the

Long-Term Vision and Plan for the Parliamentary Precinct. This plan serves to ensure that members and staff have safe, efficient facilities that meet the demands of a modern workplace while preserving and enhancing this important national heritage setting for all Canadians. As part of this plan, the West Block Building is now closed for repairs and Members of Parliament and their staff were moved into La Promenade Building, situated at 151 Sparks, in January 2011. The first House of Commons committee meetings were held in the newly renovated La Promenade Building on 1 February 2011. Further details about the Long-Term Vision and Plan for the Parliamentary Precinct can be found at: www.parliamenthill.gc.ca.

The first House of Commons Tech Day took place on 22 February 2011. The purpose of the event was to present the Information Management (IM)/Information Technology (IT) Blueprint 2011, which established the House of Commons' IM/IT direction with a five-year horizon. Participants learned about emerging technologies which will be used at the House in the next five years, they were provided with networking opportunities to discuss common IM/IT challenges and solutions and they listened to industry experts and key House of Commons players speak about various IM/IT topics such as social media, information management, productivity tools and future client technologies.

On 29 January 2011 Speaker Milliken celebrated 10 years as Speaker of the House of Commons. Later that year, he announced his retirement to the House. When the 41st Parliament opened on 2 June 2011, Andrew Scheer (Regina-Qu'Appelle) was elected on the sixth ballot, securing his first mandate as Speaker of the House. Mr Scheer, at 32, became the youngest Speaker ever to serve in the House of Commons.

The House of Commons delivered its usual orientation programme to new Members of Parliament in the weeks following the election. The programme assigned Liaison Officers to help newly-elected members during their first few weeks on the Hill to navigate the details involved in assuming office, and provided administrative and procedural orientation days as well as a "service fair". For the first time, transition officers were available to support Members of Parliament who were not re-elected as they closed their offices and made the transition to life after their career in the Commons. Initial feedback from members of the administration and political parties suggests that this service was well received.

In July 2011 Jack Layton, Leader of the Official Opposition, announced that for health reasons he would be taking a leave of absence as Leader of the New Democratic Party. Shortly thereafter, Mr Layton passed away. His death was

met with an outpouring of sentiment from the public and from his fellow parliamentarians. Thousands of Canadians paid their respects as he lay in state in the foyer of the House of Commons, and Mr Layton was honoured at the behest of Prime Minister Stephen Harper with a state funeral in Toronto on 27 August 2011.

Several important bills received Royal Assent in 2011. Among them, Bill C-20, the Electoral Boundaries Readjustment Act amended the Constitution Act 1867 by readjusting the number of members of the House of Commons and the representation of the provinces therein. As a result, 30 new seats will be added to the House of Commons by 2015.

Senate

Royal consent

On 21 March 2011 the Speaker rendered a lengthy decision on a point of order raised by Senator Anne Cools on 9 February 2011. The point of order concerned the possible requirement that Bill C-232, An Act to amend the Supreme Court Act, would require royal consent and the procedure to be followed should this consent be necessary. Senator Cools felt that Bill C-232 would constrain the Crown's power to appoint judges to the Supreme Court by disabling individuals who would otherwise be qualified for the position.

The Speaker began by addressing the issue of when royal consent should be obtained or signified. He reminded senators that there was no prohibition against obtaining consent at the beginning of deliberations on a bill, but it was an accepted practice in Parliament to obtain it only before third reading in order to allow for as full a debate as possible. It is also the common Canadian practice to signify royal consent in one house only—usually the House of Commons, where most government bills originate.

The Speaker also reminded senators of the definition and origins of royal consent. He stated that royal consent is a procedural requirement whenever Parliament considers a bill that concerns the interests of the sovereign, either the Queen herself or the Governor General acting on her behalf. He cited several authors, explaining that a power stops being a prerogative power once it becomes defined by statute law. He determined that since the Supreme Court was created by legislation enacted in 1875, it has its origins in statute law and judges are appointed to its bench based on criteria set down in that law. Prerogative power was therefore not involved in this matter.

He concluded by saying that, if passed, Bill C-232 would simply be another amendment to the Supreme Court Act. This was, in the Speaker's words, "an

exercise of authority under statute law and there is no need to seek royal consent as part of the consideration of Bill C-232."

Royal recommendation

On 10 March 2011 the Speaker ruled on a point of order raised by Senator Gerald Comeau on 1 March. The Senator challenged the consideration of Bill S-223, An Act to amend the Canada Pension Plan (retroactivity of retirement and survivor's pensions), on the ground that it would create new expenditures and therefore required a royal recommendation. The Senator stated that the bill could not originate in the Senate, pursuant to Rule 81.

The Speaker began by defining a royal recommendation based on House of Commons Procedure and Practice: it is an instrument by which the Crown advises Parliament of its approval of a legislative measure involving the expenditure of public funds. A royal recommendation must be obtained by a minister of the House of Commons. Bills requiring a royal recommendation cannot originate in the Senate.

The Speaker ruled that, based on Canadian parliamentary practice, any new or additional legislative authorisation to spend from the Consolidated Revenue Fund must be accompanied by a royal recommendation. Bill S-223 sought to alter the conditions attached to the Canada Pension Plan by increasing the maximum period of retroactivity to five years from one year. The Speaker said that, although spending from the Canada Pension Plan was derived from its own account, it was made through the Consolidated Revenue Fund. He therefore ruled that an alteration to the Canada Pension Plan involving increased spending would require a royal recommendation.

As a result, the order of the day for second reading of Bill S-223 was discharged and the bill was dropped from the order paper.

Miscellaneous developments

Following the 2 May general election two senators who had resigned to run as candidates were appointed to the Senate again, a rare event, although not without precedent. In late June the Senate sat on a Sunday, after being recalled by the Speaker to deal with back-to-work legislation. On 8 December a question of privilege was raised with regards to the study of a bill after a court had found its introduction had violated statute. The Speaker ruled the same day, finding that there was no question of privilege.

British Columbia Legislative Assembly

Harmonised sales tax referendum

The first successful initiative petition in British Columbia's history, calling for the repeal of the new harmonised sales tax, was referred by the Select Standing Committee on Legislative Initiatives to the Chief Electoral Officer to conduct the province's first initiative vote on 24 September 2011 under the Recall and Initiative Act. The legislation, introduced in 1995, permits registered voters to propose new laws or changes to existing laws. The initiative, led by former Premier William Vander Zalm, proposed new legislation to extinguish the 12 per cent harmonised sales tax (HST), which came into effect in British Columbia on 1 July 2010.

On 25 March 2011 the Government announced that it intended to cancel the HST initiative vote and hold a referendum on the HST by mail-in ballot under the Referendum Act instead.

To accommodate the Government's plan, new legislation was required. The Harmonized Sales Tax (HST) Initiative Vote and Referendum Act was enacted in the spring sitting. This Act removed the requirement for the Chief Electoral Officer to conduct the HST initiative vote on 24 September 2011 as stipulated by the Recall and Initiative Act. Without this new Act, the Chief Electoral Officer would have been required to conduct both the referendum on the HST under the Referendum Act during the summer and the initiative vote on the HST under the Recall and Initiative Act in September.

The mail-based referendum was conducted between June and August 2011, and the majority of validly cast votes were in favour of extinguishing the HST and reinstating the provincial sales tax (PST). Pursuant to section 4 of the Referendum Act, the results of the referendum are binding on the Government that initiated the referendum.

This referendum was historic for the level of participation (52 per cent of registered voters in the province) and because it was precipitated by the first citizens' initiative to meet the thresholds of the Recall and Initiative Act.

Speaker's ruling

On 31 October 2011 the Speaker ruled on the admissibility of an opposition motion asking the Legislative Assembly to request, pursuant to the Auditor General Act, that the Auditor General investigate the government's payment of an indemnity of approximately $30 million to a uranium mining company. The wording of the motion, if adopted and based on the statutory provisions

of the Act, would compel the Auditor General to undertake the investigation. The Speaker ruled that the motion contravened standing order 66, which requires that motions resulting in the expenditure of public money be accompanied by a message from the Crown. Noting that the standing orders are clear and founded upon even stronger provisions in the Constitution Act, the Speaker consequently ruled the motion out of order in the hands of a private member.

The Speaker's ruling highlighted an apparent contradiction between the statutory provisions of the Auditor General Act and the historic constitutional position that the initiation of expenditure is a prerogative of the Crown.

Québec National Assembly

Idea of consensus being required to adopt legislative changes regarding elections and notion of parliamentary convention

On 26 May 2011 the President of the National Assembly gave a ruling on certain questions that had been raised following the tabling of a bill respecting electoral representation and amending the Election Act. This bill included changes to the electoral map. When, on 12 May 2011, it was moved that leave be granted to introduce the bill, all the members in opposition had voted against it. Their opposition was primarily due to the fact that it did not result from a consensus among the members of the National Assembly. They also indicated that it was not advisable to introduce such a bill since it would call into question the legitimacy of the electoral map reform process, which is under the responsibility of agencies that are independent of the Assembly.

In his ruling, the President recalled that he is the guardian of the rights and privileges of the Assembly and of its members. However, he cannot go beyond his own jurisdiction and must not be a substitute for the courts in analysing the constitutionality of bills that are submitted to the Assembly for consideration. The chair may only interpret rules of law that concern parliamentary procedure. It may in no way prevent a member from introducing a motion or a bill in the Assembly and, accordingly, prevent the Assembly from debating this motion or bill. The President mentioned that only the Assembly may decide, in its sovereignty, whether it is advisable to introduce a bill, examine it and assess its content.

The President added that the National Assembly's legislative process requires a simple majority vote. However, the members of the Assembly had expressed the will for a broad consensus to be reached in order to amend the Election Act, as evidenced by the representations made before the chair with regard to this matter at the sitting of 17 May 2011. Thus, by analogy with the

concept of constitutional convention, the chair believed that this presented a form of parliamentary convention. Indeed, there was a strong feeling of political necessity to obtain the broadest possible consensus in matters concerning electoral representation. The chair concluded its ruling by stating that it was up to the National Assembly to consider all of these factors so as to ensure that no person in Québec had any doubt as to the legitimacy of its system of representation.

Revision of the electoral map: final decision

The National Assembly was unable to reach a consensus concerning the bill mentioned in the previous section. The revision of the electoral map carried out by the Commission de la représentation électorale (CRÉ) since 2007 therefore continued. On 12 October 2011 the CRÉ unanimously established a new electoral map of Québec. This map contains 125 electoral divisions, the maximum number authorised by the Election Act. The boundaries of 86 electoral divisions were changed. Three new electoral divisions were created in the outlying regions of Montréal, where the population has increased the most, and three electoral divisions in regions having population deficits were removed from the electoral map. This final decision took into consideration, among other things, the proposals made by members during a limited five-hour debate held at the National Assembly on 27 and 28 September 2011 on the second report tabled by the CRÉ on 20 September 2011 concerning this subject. The new boundaries of the electoral divisions entered into force upon dissolution of the National Assembly following the adoption of the new map, on 1 August 2012.

Establishment and maintenance of random draw procedure for the distribution of measures

Owing to the large number of independent members in the National Assembly—currently 10 out of 125—the President of the Assembly gave a directive on 20 September 2011 to test a random draw procedure to make an equitable distribution among the independent members of certain measures to which they are entitled, namely questions during Oral Question Period, business standing in the name of members in opposition, interpellations and statements by members. On 1 November 2011 this random draw procedure was maintained in a new directive from the chair. This method was recognised as an efficient way of objectively distributing the rights of the independent members. It also allowed these members to know beforehand when they could avail themselves of a particular measure.

CYPRUS HOUSE OF REPRESENTATIVES

The law on the election of members of the House of Representatives was amended five times in 2011.

The first amendment adopted provided—

- That a minimum of 30 voters must be allocated to each election centre.
- The possibility of establishing election centres abroad following a request of a minimum of 30 voters from each electoral district, who will be abroad on the day of the elections.
- To increase the maximum sum of personal expenses that a candidate may pay without declaring them, from 300 Cyprus pounds to 5,000 euros.
- To increase the maximum sum of expenses that a candidate and/or his/her polling agent may pay in the framework of the election campaign from 500 pounds to 25,000 euros (in addition to the sum for personal expenses).

The second amendment adopted provided for the reallocation of electoral seats between the six constituencies of Cyprus. Specifically, one seat was transferred from Nicosia district to Larnaca district so as to reflect better the population of these constituencies.

The third amendment adopted increased the fee payable for the submission of a candidacy from 250 pounds to 500 euros.

The fourth amendment adopted provided that—

- A party participating in the elections with fewer candidates than the maximum number of seats for a given constituency may request that a specific slot on the party list remains vacant, by way of exception.
- When the number of candidacies of a party participating in the elections is the maximum for a given constituency, the party may request that, by way of exception, the name of a certain candidate is placed on the ballot paper at a slot other than the one it would have been placed at alphabetically.

This amendment provided that it would cease to exist two months after its entry into force (in April 2011).

The last amendment adopted transferred the time that the election is terminated to 1.5 hours later.

NEW ZEALAND HOUSE OF REPRESENTATIVES

Response to Canterbury earthquakes

A devastating earthquake of 6.3 magnitude struck near Christchurch at 12.51 pm on 22 February 2011 (following an earlier significant earthquake in September 2010), resulting in terrible destruction in and around the city, with many deaths and injuries. When the House met at the scheduled time just over an hour after the earthquake, the Prime Minister announced the disaster and party leaders responded. The House then adjourned at 2.22 pm until the next day.

A state of national emergency was declared under the Civil Defence Emergency Management Act 2002 on 23 February 2011. The House also gave leave for members from the Canterbury region to be considered as attending to official business, and therefore to be regarded as present for the purpose of casting of party votes, for the next month. This meant that members could attend to their constituencies, and to their own situations, without concern for the maintenance of numbers in the House.

A state of national emergency expires after seven days unless it is extended, and can be extended an unlimited number of times. The Minister of Civil Defence informed the House for each week that an extension occurred. As time passed, comments on these ministerial statements increasingly questioned the need for the state of national emergency to be maintained (in preference to a state of local emergency), but the Government considered that special recovery powers needed to be in place before the state of national emergency could be lifted.

Following the first Canterbury earthquake, in September 2010, the Canterbury Earthquake Response and Recovery Act 2010 was enacted. This bill empowered delegated legislation and provided for protection from liability for those responding to the earthquake, but gave rise to concerns about the adequacy of limits and safeguards on those powers and protections. In particular, concern was expressed that the exclusion of judicial review of ministerial decisions removed an important constitutional safeguard against abuse of power.

A second bill, the Canterbury Earthquake Recovery Bill, was passed in the wake of the 22 February 2011 disaster, replacing the first Act. While retaining essentially the same powers for delegated law-making as the 2010 Act, the second Act is a more considered piece of legislation, including powers and institutional arrangements needed for the longer term recovery of Christchurch and other affected areas. It has a focused scope through its

purpose clause, which limits the exercise of powers under the 2011 Act to ensuring that "greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes", and related purposes. A very broad Henry VIII clause has again been included, but the 2011 Act includes a review panel of experts to consider the Orders in Council made under the Act, in addition to the disallowance process. Ministers must take into account the purposes of the Act and the recommendations of the review panel when making a recommendation for an Order.

While standard parliamentary scrutiny of delegated legislation is provided for, as are notification and publication requirements, the jurisdiction of the courts is again excluded in terms of ministerial decision-making. There is some ring-fencing of the delegated law-making power, preventing Orders in Council from exempting from or modifying a requirement or restriction imposed by certain significant statutes, including the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993 or the New Zealand Bill of Rights Act 1990. This leaves a number of significant constitutional statutes that, in theory, could be modified in their application, such as the Official Information Act 1982 or the Human Rights Act 1993.

In September 2011 the Standing Orders Committee recommended to the House that it eventually refer an inquiry to a select committee on the subject of Parliament's legislative response to a national emergency, particularly with regard to how it enables ongoing response and recovery. This recommendation reflects a recognition that the period during or immediately following a state of national emergency is not an ideal time to formulate a legislative regime for recovery that takes full account of all constitutional considerations. It is intended that the inquiry will focus on potential, future contingencies, rather than to act as a reflection on what happened in response to the Canterbury earthquakes. For this reason, it was recommended that the inquiry be referred following a reasonable period to enable the progress of the recovery from the Canterbury earthquakes.

Review of Mixed Member Proportional electoral system

A referendum on the electoral system was held in tandem with the general election on 26 November 2011. The key question asked, "Should New Zealand keep the Mixed Member Proportional (MMP) voting system?" The majority of voters favoured the retention of MMP, with the margin (15 per cent) being double that of the original vote to adopt MMP in 1993.

With the outcome of the referendum favouring the retention of the MMP voting system, the law required the Electoral Commission to conduct a review

of how the voting system works. The Commission conducted an extensive public consultation process, receiving nearly 6,000 written submissions and hearing over 100 oral submissions. A proposals paper was issued in August 2012, and a further report setting out recommendations for changes to the electoral system was presented to the House on 5 November 2012. This included the following key recommendations, addressing some of the more disputed aspects of the current system—

- the one-electorate-seat threshold for the allocation of list seats should be abolished;
- the party vote threshold for the allocation of list seats should be lowered from 5 per cent to 4 per cent;
- candidates should continue to be able to stand both in an electorate and on a party list at general elections;
- political parties should continue to have responsibility for the composition and ranking of candidates on their party lists.

The Government will now consider the recommendations and could introduce legislation to implement some or all of them prior to the 2014 general election.

UNITED KINGDOM

House of Lords

Leader's Group on Working Practices

Introduction

The May 2010 general election not only led to a change of government, the first since 1997, but to the formation of the first peace-time coalition government since the 1930s. This political upheaval followed the crisis of confidence experienced in both Houses as a result of the expenses scandals of 2009.

Against this background, a strong desire was felt across both Houses for Parliament to reform itself, reasserting its central role in the country's political and social life. In the Commons, one outcome was the implementation of many of the recommendations of the House of Commons Reform Committee (the "Wright Committee"),[1] which had been established in late 2009, explicitly in response to the expenses scandal. The House of Lords reacted less

[1] House of Commons Reform Committee, *Rebuilding the House* (1st report, 2008–09, HC 1117).

quickly, but it became clear early in the new Parliament that there was significant interest in conducting a comparable fundamental review of the House's working practices. The then Leader of the House, Lord Strathclyde, initiated a debate on the House's working practices on 12 July 2010, taking the opportunity to announce his intention to appoint a "Leader's Group" with a "wide-ranging remit" to review working practices.[2]

Leader's Groups

Leader's Groups are a familiar feature of the House of Lords.[3] As the name suggests, they are appointed by the Leader of the House, to consider a particular aspect of the House's internal arrangements, and they report back to him or her. Leader's Groups are never appointed unless there is at least cross-party consensus on the need to review a particular issue—though this does not preclude disagreement over the appropriate actions to be taken. Membership reflects the party balance within the House, as for a select committee—though the size of Leader's Groups varies, from as few as six to as many as 12. Leader's Groups are not select committees, and their proceedings are not privileged; they are not obliged to observe formal committee procedure, and can approach their work as they see fit.

On this occasion, the Leader appointed a Group of 12, chaired by the Conservative peer Lord Goodlad. The Group was appointed "to consider the working practices of the House and the operation of self-regulation; and to make recommendations". No time-limit was set on the Group's work.

The Group's inquiry and report

In the event, the Group held 19 private deliberative meetings. The chairman wrote to every member of the House, as well as to several outside bodies, requesting their views on the House's working practices. 74 responses were received, including 68 from members of the House. A summary of these responses was included in the Group's final report, though they were not themselves published. The report was agreed by the Group in early April 2011, and presented to the Leader of the House: it was ordered to be printed on 26 April.[4]

The Group took full advantage of its wide-ranging remit. Its report was structured around the House's three core functions of holding the executive

[2] HL Deb, 12 July 2010, col 517.

[3] Two other recent examples are the Leader's Group on Members Leaving the House of 2010–11 (session 2010–12, HL Paper 83) and the Leader's Group on the Code of Conduct, which reported in 2009 (session 2008–09, HL Paper 171).

[4] Report of the Leader's Group on Working Practices (session 2010–12, HL Paper 136).

to account, scrutinising legislation and providing a forum for public debate and inquiry. The Group's 55 paragraphs of conclusions and recommendations addressed the work of the current, unreformed House of Lords—the Group considered that it would be "fruitless ... to make recommendations for a reformed or even a transitional House, in ignorance of what such a House might look like".

Some of the key recommendations were—

- Transfer, for a trial period, the role performed by the Leader of the House at oral questions (in effect, stepping in as an impartial "umpire" between the parties, when members from more than one party attempt to ask questions at the same time) to the Lord Speaker.
- Establish a "Legislative Standards Committee" to assess the technical and procedural compliance of government bills with best practice in bill preparation.
- Introduce the possibility of an evidence-taking procedure for government bills, prior to the normal committee stage.
- Establish a rule that all government bills introduced in the Commons, apart from major constitutional bills, emergency legislation and other exceptionally controversial bills, should be considered in Grand Committee rather than in Committee of the whole House.
- Appoint a Post-Legislative Scrutiny Committee, to conduct post-legislative review of up to four selected Acts each year.
- The House to adopt a resolution asserting its freedom to vote on delegated legislation, while affirming that it would not vote down such legislation a second time, should it have been re-laid and approved by the House of Commons in the interim.
- Establish a Backbench Business Committee (loosely modelled on the committee appointed by the Commons in 2010) to select specific types of backbench business for debate.
- Establish two additional investigative select committees.

In addition, the Group made a large number of recommendations to simplify or modernise the House's procedures.

Implementation

As noted above, the report was presented to the Leader of the House, and it was therefore for him to take forward the Group's recommendations. His first step was to initiate a general debate, which was held on 27 June 2011, with 43 speakers contributing. He subsequently sought the assistance of the clerks in

putting a number of recommendations before either the Procedure Committee (in respect of changes to formal procedures) or the Liaison Committee (in respect of committee work), so that they could then be put before the House for final decision. Some recommendations, relating to business management, were implemented directly by the usual channels without the need for formal committee consideration.

As a result of these steps, nine propositions based on the Group's recommendations were put before the House for decision on 8 November 2011. The key recommendation on the role of the Lord Speaker during oral questions was rejected by the House, on a division (169:233). Another recommendation, to simplify the House's practice in the use of appellations (such as "the noble Lord" or "the Right Reverend Prelate") was rejected pursuant to standing order 56 following a tied vote (173:173). Other recommendations, mostly relatively minor, were agreed without division.

Another of the major recommendations, on the committal of government bills, was brought forward on 26 March 2012, though at the Leader's suggestion the Group's proposal for specific exemptions to the general rule (for major constitutional bills, and so on) was replaced by a recommendation that there be a "presumption" that government bills introduced in the Commons be referred to Grand Committee, except where the usual channels agree otherwise. An amendment to reject this recommendation, moved by a government backbencher, Lord Cormack, was agreed by the House on division (319:96).

The proposals on committees fared rather better: the Liaison Committee took the opportunity of the Leader's Group's recommendation for new committees to conduct a wide-ranging review of committee activity. The Liaison Committee recommended one new unit of committee activity overall, with the cost of further new committees being met by the scaling back of some existing committees. The emphasis was placed on ad hoc committees, appointed for fixed terms of up to one session, rather than permanent sessional committees. The committee recommended new ad hoc committees to look at public services, and small and medium-sized enterprises. It also recommended, as a trial, an ad hoc committee to conduct post-legislative scrutiny of legislation on adoption. After some debate, the report was agreed without amendment on the same day as the Procedure Committee report on the use of Grand Committees for bills was debated.

After the heavy defeat of the Procedure Committee's recommendation on Grand Committees, the Leader of the House did not put any more of the Group's recommendations before that committee. Thus of the eight key recommendations identified above, at the time of writing (January 2013) four

have been brought before the House in modified form, of which two were rejected and two (the establishment of one new unit of committee activity, and the appointment of an ad hoc committee to conduct post-legislative scrutiny on legislation on adoption) were agreed; four others have yet to come before the House or any committee of the House.

Election of Lord Speaker

Prior to 2006 the Lord Chancellor (a Government minister, responsible for justice and the courts) was also *ex officio* Speaker of the House of Lords. Following the passage of the Constitutional Reform Act 2005, which reformed the office of Lord Chancellor, the House resolved to elect its own Lord Speaker, following a procedure set out in standing order 19. The first such election, for a five-year term, was held in June 2006, and former Labour minister Baroness Hayman was duly elected.

Planning for the second election began in 2010, and proposals were put before the Procedure Committee in March 2011. In its report the committee noted that the wording of standing order 19(1), which set out the timing of the election, was defective. Standing order 19(1) at that time read—

> "**19.**(1)—The first election of the Lord Speaker shall be held no later than 30th June 2006. Thereafter elections shall be held (a) no more than five years after the previous election, or (b) within three months of the death of the Lord Speaker, or his giving notice of resignation, if sooner. If, after a date has been set in accordance with (a) or (b), a Dissolution of Parliament is announced, the applicable deadline shall be extended to one month after the opening of the next Parliament."

The committee's analysis of this provision was as follows: "The date of the election is fixed by reference to the preceding election. The last election took place on Wednesday 28 June 2006; if the next election is to be held on a Wednesday (the day on which attendance at the House is normally highest) the latest possible date would be Wednesday 22 June 2011. Over time, the date would be brought further forward. Moreover, if a Lord Speaker were either to die in office or resign, the timetable for all future elections would be re-set by reference to a one-off, unpredictable event, which might not be convenient for the House as a whole."[5]

The committee concluded that the standing order should specify a fixed date for future elections; and also that in the event of a Lord Speaker dying in office or resigning, subsequent elections after the one required to fill the

[5] Procedure Committee, 4th report, session 2010–12 (HL Paper 127).

vacancy should revert to the normal pattern. The committee also noted that timing the actual handover from one Lord Speaker to his or her successor was not specified in the standing order, and concluded that, in the interests of an orderly transition, there should be a few weeks' interval between the election and the formal handover.

To achieve these objectives, the committee recommended that the standing order be re-drafted to read—

> "**19**—(1) An election of a Lord Speaker shall be held on 13th July 2011. Subsequently, elections shall, subject to paragraphs (1A) and (1B), be held in the fifth calendar year following that in which the previous election was held, on a day no later than 15th July in that year. If the result of the election is approved under paragraph (5), a Lord Speaker elected under this paragraph shall take office on 1st September in the year of election.
> (1A) Where a Lord Speaker (including a person elected as Lord Speaker who has not yet taken office) dies, resigns or is deemed to have resigned pursuant to paragraph (8), an election of a Lord Speaker shall, subject to paragraph (1B), be held within three months of the death, the giving notice of resignation or the deemed resignation. For the purposes of paragraph (1), this election is then "the previous election".
> (1B) Where a Dissolution of Parliament is announced after a date has been set for an election, the election shall take place either on the date originally set, or on a day no later than one month after the opening of the next Parliament, whichever is later."

The committee's report was agreed by the House on 28 April 2011. The following month the incumbent Lord Speaker, Baroness Hayman, announced that she would not seek re-election.

A contested election ensued, in which there were six candidates: Lord Colwyn (Conservative), Lord Desai (Labour), Baroness D'Souza (Crossbench—i.e. independent), Lord Goodlad (Conservative), Baroness Harris of Richmond (Liberal Democrat) and Lord Redesdale (Liberal Democrat).

The election, which was held on 19 July 2011, was conducted using the Alternative Vote system. The votes were as shown in the table opposite.

Thus after four transfers of votes Baroness D'Souza, the former Convenor of the Crossbench peers, defeated the Conservative Lord Colwyn by 296 votes to 285, and was accordingly elected as Lord Speaker. She took office on 1 September, and sat for the first time on the woolsack on Monday 5 September 2011.

Candidate	1st-preference votes	Votes after transfers			
		1	2	3	4
Colwyn, Lord	166	167	193	213	285
Desai, Lord	78	79	92	X	
D'Souza, Baroness	186	188	202	240	296
Goodlad, Lord	145	145	150	168	X
Harris of Richmond, Baroness	62	65	X		
Redesdale, Lord	7	X			
Votes excluded at each stage		0	7	16	40
Total continuing votes at each stage	644	644	637	621	581
Votes needed in order to be elected	322	322	319	311	291

COMPARATIVE STUDY: INVESTIGATING COMPLAINTS ABOUT MEMBERS' CONDUCT

AUSTRALIA

House of Representatives

Background

The House of Representatives does not currently have a code of conduct—for information on the proposed code of conduct which is under consideration see the miscellaneous notes.

Members are not immune from the law and criminal matters involving members are subject to police investigation.

Process for investigating complaints

The House has no formal process for receiving complaints or mechanism for investigating complaints about the conduct of a member. A complaint about a member's conduct could be raised in the House by way of a substantive motion moved by another member.

If a matter relating to a member's conduct were viewed as a matter of privilege (as a potential contempt of the House), it could be referred by the House to the Committee of Privileges and Members' Interests. The committee would report its findings to the House.

Jurisdiction

The House would have jurisdiction over a complaint about a member's conduct raised in the House.

Avenue of appeal for breaches of code of conduct

Not currently applicable (no code of conduct).

Sanctions

The House may express its opinion on a member's conduct by way of a motion of censure. A member could be sanctioned by suspension from the House for a period. The House no longer has the power of expulsion.

Should the House find that a member has been guilty of contempt, possible sanctions could include commitment to prison, imposition of a fine, reprimand, requirement for an apology, or suspension from the House.

Senate

There is no single "code of conduct" which applies to senators, although they are subject to many provisions which may be characterised as regulating their conduct. Such provisions may be found in the Constitution of the Commonwealth of Australia, in the ordinary law of the land (including in provisions applying to holders of public office and in Commonwealth electoral laws), in laws and Senate resolutions relating to parliamentary privilege and in other Senate procedural requirements, including in relation to a regime for the declaration of pecuniary (and other) interests. For the most part, questions arising as questions of law are properly dealt with by the courts, except in a very narrow category of cases which may only be dealt with under the contempt jurisdiction of the Senate itself. Under relevant privilege law and practice, these are restricted to cases where the conduct in question improperly interferes with the authority or functioning of the Senate or a committee, or with the work of senators; and for which there is no other remedy available.

"Conduct" which may be investigated by the Senate

Generally speaking, questions which may be investigated by the Senate in relation to senators' conduct fall into two classes: questions of order and questions of privilege. The Senate has not determined a broader category of "conduct" which may be investigated, although it arguably has the power to do so under section 50 of the Constitution, which provides that the Senate may make rules and orders with respect to—

"(i) the mode in which its powers, privileges, and immunities may be exercised and upheld;
(ii) the order and conduct of its business and proceedings . . ."

Questions of order

Questions of order in the Senate are dealt with in the first instance by the President. The President may report to the Senate that a senator has "committed an offence": that is, an infringement of order. The senator is then called on to make an explanation or an apology. A motion may then be moved, by any senator, that the named senator be suspended from the sitting of the Senate. If such a motion is moved, the question is put immediately without amendment or debate and determined by a majority of the Senate (standing order 203). For a first offence a senator is suspended for the remainder of the day's sitting. Subsequent offences in the same calendar year may lead to a suspension for seven sitting days, for a second offence, and 14 sitting days for a third (stand-

ing order 204). It is rare for these procedures to be invoked and the third-tier penalty has never been applied.

Questions of privilege

A question of privilege may be referred by the Senate to its Committee of Privileges for investigation as a possible contempt of the Senate. That committee makes a recommendation to the Senate as to whether a contempt should be found and, if so, whether a penalty should be imposed. The Senate has, by resolution, provided an indicative list of conduct which may be treated as contempts (see Privilege Resolution No. 6 *Matters constituting contempts*). Many of these offences may apply equally to senators as to any other person. Privilege Resolution No 6(3)—*Senators seeking benefits etc*.—is directly concerned with the conduct of senators. The scope of this possible contempt was considered for the first time in the 150th report of the Privileges Committee, tabled in March 2012.

While the committee may recommend a finding of contempt and may recommend a penalty, those decisions are made by the Senate itself. The contempt jurisdiction of the Senate is subject to limited judicial oversight, by way of the Parliamentary Privileges Act 1987. Pursuant to section 4 of that Act, any conduct may constitute an offence against a House (that is, a contempt) if it amounts to, 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. That definition provides an avenue for the court to consider whether the grounds specified for the finding of contempt are capable of amounting to a contempt under the Act. It is generally accepted that this limited judicial oversight does not involve the court in the investigation of the conduct in question in any particular case. The matter was considered recently in the 150th report of the Senate Committee of Privileges at paragraphs 2.30–2.41.

Registration of interests

An intersection between procedural requirements and the contempt jurisdiction exists in relation to the registration of senators' interests. Since 1994 senators have been required to register publicly their pecuniary and other private interests. A failure to meet the requirements of the relevant Senate resolutions may be treated by the Senate as a contempt, but only (according to the terms of those resolutions) following investigation by the Privileges Committee.

Right of reply

Although not, strictly speaking, a complaints mechanism, the "right of reply" procedure in the Senate provides an avenue by which a person make seek redress for adverse comments made about them in the course of Senate proceedings. A request for a right of reply may be made in writing to the President and referred to the Committee of Privileges. The procedure does not involve an investigation, except to the extent that the President may decline to refer a matter (and the committee may resolve not to consider a matter) which is considered trivial, frivolous, vexatious or offensive. The Committee of Privileges is enjoined by the Senate resolution not to consider or judge the truth of either the comment of the senator, or comments in the response. As long as the response is succinct and relevant and does not contain material which, for example, would reflect adversely on either a senator or any other person, the committee will generally recommend that the response sought be incorporated in the Senate's Hansard.

Code of conduct

Although the development of a code of conduct for senators and members was among the commitments made in the various cross-party agreements which led to the swearing-in of the current minority government in the House of Representatives in 2010, no such code has been adopted. Committees of both Houses have investigated the matter. A discussion paper from the relevant House committee appeared to favour a somewhat subjective, principles-based code of conduct (subsequently endorsed by the House on the last day sitting of 2012) and proposed a complaints procedure and oversight by a committee with responsibility for "members' ethics". The Senate committee declined to endorse such a code. The committee saw value in publishing together the raft of existing provisions relating to the conduct of senators and related obligations.

The areas covered by existing regimes (for instance in relation to avoiding conflicts of interests or use of entitlements) would continue to contain specific, enforceable provisions; whereas the general principles would not form an enforceable code, but would provide a frame of reference against which people could make their own judgements about parliamentarians' conduct. The committee considered that any gaps in the coverage of that framework should be addressed with targeted measures, rather than with a generic and largely unenforceable code.

Sanctions

The Senate may not expel its members from membership. This express limitation on the powers of the two Houses of the Commonwealth Parliament was enacted in section 8 of the Parliamentary Privileges Act 1987.

That Act also makes provision in section 7 and elsewhere for the imposition of penalties for offences against either House, being fines of up to $5,000 or imprisonment for six months for natural persons, or fines for corporations of up to $25,000. No such penalty has been imposed by the Senate since the passage of that Act.

Sanctions by way of suspensions from the sittings of the Senate for infringement of order are referred to above.

New South Wales Legislative Assembly and Legislative Council (joint reply)

The two Houses of the Parliament of New South Wales, the Legislative Council and the Legislative Assembly, have a number of mechanisms that regulate the conduct of members.

Standing orders

A number of the Legislative Council's and Legislative Assembly's standing orders govern the conduct of members and in some instances set out the process for suspending or removing a member for disorderly conduct in the House.

Code of conduct

Since 1998, the conduct of members of both Houses of the Parliament has also been regulated by a Code of Conduct for Members. The provisions of the Code cover—

- disclosure of conflict of interest
- bribery
- gifts
- use of public resources
- use of confidential information
- duties as a Member of Parliament
- secondary employment or engagements.

The Code has been adopted by both Houses for the purposes of section 9(1)(d) of the Independent Commission Against Corruption Act 1988. Under that Act,

the Independent Commission Against Corruption, a NSW statutory authority established to investigate and expose corrupt conduct in the NSW public sector, has jurisdiction to investigate and make findings of "corrupt conduct" against members where there has been a substantial breach of the Code. Enforcement of the Code, however, is the responsibility of the individual Houses.

Pecuniary interest disclosure regime

Members of both Houses are required to disclose their pecuniary interests through regular disclosure returns. The returns are recorded in the Register of Disclosures by Members of the Legislative Council and the Register of Disclosures by Members of the Legislative Assembly. The Registers are publicly available.

The pecuniary interest disclosure regime is established under section 14A of the Constitution Act 1902 and the Constitution (Disclosures by Members) Regulation 1983.

Section 14A(2) of the Constitution Act 1902 provides that if a member of either House wilfully contravenes the Constitution (Disclosure by Members) Regulation, the House may declare the member's seat vacant, if it is of the opinion that the contravention is of such a nature as to warrant such a declaration.

A member knowingly making a false declaration in a pecuniary interest return is also a contempt that, depending on the nature of the contravention, the House may determine should be punishable by a lesser sanction than declaring a member's seat vacant.

Constitution

Sections 13, 13A and 13B of the New South Wales Constitution Act 1902 stipulate a number of conditions that disqualify a person from being elected to the Council or a member from continuing to hold his or her seat in the Council. For example, the seat of a member is declared vacant if the member concerned—

- fails for one whole session to give his or her attendance in the House, unless excused in that behalf by the House;
- becomes bankrupt;
- becomes a public defaulter;
- is convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of five years or more, unless the conviction has been quashed on the determination of an appeal lodged within the prescribed period.

What is the process in your chamber or parliament for investigating complaints about members' conduct?

There are a number of avenues by which an investigation of a complaint about a member's conduct may be initiated in either House—

a) Any member may give notice of a substantive motion calling for another member to be sanctioned for (alleged, reported or confirmed) conduct that occurred in or outside the House. The motion may subsequently be moved and debated in the House.

b) The House can refer a member's conduct to the Privileges Committee for investigation for possible contempt. The committee may make a finding and, in reporting back to the House, recommend what sanction, if any, the House might consider taking against the member concerned. It is then for the House to take note of the report and decide what action to take.

c) The Houses can jointly refer a matter to the Independent Commission Against Corruption (ICAC) for investigation. In such cases, the ICAC is duty bound fully to investigate the matter.

Following an investigation into allegations of corrupt conduct, the ICAC provides a report to Parliament, detailing its findings on the evidence of corrupt activity and any recommendations for action, including that consideration be given to disciplinary action or dismissal. Where the ICAC finds that the relevant conduct could also amount to a criminal offence, the report may recommend obtaining the advice of the Director of Public Prosecutions with respect to a prosecution.

Reports to the Parliament from the ICAC relating to a member's conduct can include recommendations to the effect that Parliament should consider terminating the service of one of its members. However, it is for the House to take action against the member.

d) Any person may make a complaint to the ICAC about a matter that concerns or may concern corrupt conduct involving a member. However, in such cases it is for the ICAC to determine whether the matter warrants investigation.

The ICAC can itself initiate an investigation of the conduct of a member if the conduct falls within the scope of the code of conduct or is corrupt conduct as defined within the ICAC Act. The ICAC has no authority to investigate matters to which parliamentary privilege applies.

Between 1988 when the ICAC was established and 2011, the ICAC published 16 reports dealing at least in part with the conduct of members. The investigations referred to in those reports can be classified into two broad

groups: those which concerned members' use of parliamentary entitlements; and those which concerned other conduct.

Does your chamber or parliament exercise exclusive jurisdiction over such complaints, or do other bodies (e.g. the courts) adjudicate?

The Legislative Council and Legislative Assembly do not exercise exclusive jurisdiction over complaints about member's conduct. As noted earlier the Independent Commission Against Corruption can be involved in investigating, and making findings and recommendations on, such complaints. However, except where criminal conduct is involved, it is the responsibility of the House to take action against the member.

The courts may become involved if the member concerned seeks to challenge the action taken by the House or the findings made by the ICAC (see next section).

Is there an avenue of appeal when a member is found to have breached a code of conduct (or similar document)?

If a House adjudges a member guilty of misconduct or contempt, there is no avenue of appeal against the finding of guilt. However, there have been occasions where the validity of the resulting sanction applied by a House has been challenged in the courts.[1]

While there is no obligation to do so, there has been a case where the Legislative Council provided a member the opportunity to respond to a finding of corruption made by the ICAC. In 2003 a report of the ICAC included a finding that a member had engaged in corrupt conduct in relation to the use of entitlements. Notices of motion for the expulsion of the member were given. Before considering a motion for expulsion, the House resolved that the member be invited to address the House strictly in relation to the matters contained in the ICAC report. The member gave a speech to the House about the findings and allegations made against him by the Commission. However, about two weeks later the member tendered his resignation as a member of the Council, before the House could proceed to the expulsion motion.

There has been a recent instance where a member has sought a judicial review of a 2010 finding of corruption against her by the ICAC. In the appeal the member's counsel submitted that the ICAC had "acted without jurisdiction by making findings for which there was no evidence, or alternatively, no rationally probative evidence". The appeal was dismissed. In 1992, the former

[1] For example, *Armstrong v Budd* (1969) 71 SR (NSW) 386 (regarding expulsion of a member); *Egan v Willis* (1998) 195 CLR 424.

Premier also appealed findings of corrupt conduct by the ICAC in the NSW Court of Appeal,[2] precipitating changes to the ICAC Act to overcome a limitation in the ICAC's jurisdiction.

What sanctions (e.g. expulsion, suspension or fine) are available when a complaint about a member's conduct is upheld?

The two Houses of the New South Wales Parliament have a common law power to discipline members adjudged guilty of misconduct or conduct unworthy of the House. However, this common law power is "protective" and "self-defensive" only and cannot be used in a punitive manner.

There are difficulties in establishing a boundary between the "necessary" and "self-defensive" application of the disciplinary power of the Houses of the NSW Parliament and its "punitive" application. What is punitive and therefore beyond the power of the Houses depends on both the nature of the action taken and its purpose or objective—in particular whether the action is for the defence of the institution itself.

The most common punitive powers of other parliaments—the powers to fine or imprison—are almost certainly beyond the power of the NSW Parliament, regardless of the motivation.

The two Houses have available the following sanctions to discipline their members—

- reprimand and admonishment
- apology by the member (and withdrawal of the words spoken)
- censure
- suspension
- expulsion.

Suspension

The Council has exercised its power to suspend members sparingly over the last 20 or so years. Two members were suspended for the remainder of the sitting day—one in October 1989 and the other in November 1991—for refusing to withdraw words when directed to do so by the chair. In May 1996 the Treasurer and Leader of the House was judged guilty of contempt and suspended from the House for the remainder of the sitting day for failing to table papers.[3] The same member was also suspended twice in 1998, again for failing

[2] *Greiner v ICAC* (1992) 28 NSWLR 125.

[3] The suspension became the trigger for the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* and in turn the High Court decision in *Egan v Willis*.

to table documents ordered by resolution of the House. On the first occasion the member was suspended for five sitting days and on the second for the remainder of the session, which amounted to three days. In June 2007 a member was suspended from the House until the conclusion of question time for failing earlier in the day to withdraw remarks that had been ruled offensive. In November 2008 two members were together suspended for the remainder of question time after each being called to order three times.

The Assembly has not exercised its power to suspend a member for a specified number of sitting days since 2005. On this occasion a motion censuring a member and suspending the member for eight sitting days was agreed.

However, generally and in accordance with the standing orders, the process of suspension is initiated by the Speaker in the Assembly with the Speaker naming the member and then immediately putting the question to the House, "That the member be suspended". The duration of a suspension is two sitting (and all intervening) days for the first time the member is suspended that session, four days for the second time and eight days for each subsequent time. The incomplete portion of the sitting day during which the member was suspended counts as one sitting day. When a member is suspended from the service of the House the member is excluded from the chamber and from the precincts of the Parliament.

Given the ramifications of a suspension, the current Speaker and her immediate predecessor have preferred to use other procedures such as removing a member from the House for the remainder of the sitting for disorderly behaviour. However, between 1995 and 2005 at least one member was suspended from the service of the House for a number of sitting days each year. In most cases members were suspended from the House for obstructing the business before the House or for disregarding the authority of the chair.

Expulsion

The only case of expulsion in the Council occurred in 1969. This was when a member was expelled for "conduct unworthy of a member" following judicial comments that the member had been a party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge. The member unsuccessfully challenged the validity of the House's actions in the New South Wales Court of Appeal.[4]

Under the Assembly's standing orders, a member adjudged guilty of conduct unworthy of a member of Parliament may be expelled by vote of the

[4] *Armstrong v Budd* (1969) 71 SR (NSW) 386.

House and the member's seat thereupon declared vacant. As the cases below show, while the House can expel a member, the public ultimately can determine at the ballot box whether a member's conduct has made them unworthy of being a member.

Since 1856, three resolutions expelling a member from the Legislative Assembly have been passed. One of those resolutions was subsequently rescinded. The need to expel a member has on a number of occasions been unnecessary, with members who have been adjudged guilty of conduct unworthy of a member or found to have acted corruptly by the ICAC resigning before a motion to expel them has been moved. The circumstances surrounding the three expulsions were—

- On 8 November 1881 Mr EA Baker was expelled after the House concluded that evidence produced by a Royal Commission proved that Mr Baker, "by agreeing with others to benefit himself in an improper manner out of a sum of money appropriated by Parliament ... has been guilty of conduct unworthy of a member ..." Having been granted a mineral lease near Cowra on land which had already been sold by the Crown, Mr Baker was found by the Royal Commission to have received money in compensation "under circumstances of concealment and false statement, evidencing a consciousness on [his] part, that such appropriation was unauthorised and unjustifiable." Mr Baker was later brought to court. However, the case was dropped and the House rescinded the resolution passed in November 1881 on 1 May 1883. Mr Baker was re-elected to the Legislative Assembly in November 1884.
- On 12 November 1890 a resolution expelling Mr WP Crick was passed after he was found guilty of contempt for repeatedly abusing other members verbally, disobeying the chair and resisting removal from the chamber. Mr Crick was subsequently re-elected in December 1890.
- On 17 October 1917 the House passed a motion finding Mr RA Price guilty of conduct unworthy of a member and expelling him from the House for a gross abuse of the parliamentary freedom of speech. This arose from allegations made in the Assembly by Price on 13 December 1916 and 5 September 1917 against the Minister for Lands and Forests. A Royal Commission was appointed to investigate the allegations and concluded that Mr Price had "wantonly and recklessly" made allegations against a minister. He was re-elected at the subsequent by-election less than a month later.

Queensland Legislative Assembly

What is the process in your chamber or parliament for investigating complaints about members' conduct?

Standing orders provide procedures for members raising complaints.

Standing order 269(2) provides, "A member should write to the Speaker at the earliest opportunity stating the matter and requesting that the matter be referred to the ethics committee". Members are required to "formulate as precisely as possible the matter, and where a contempt is alleged, enough particulars so as to give any person against whom it is made a full opportunity to respond to the allegation" (SO 269(3)).

The Speaker then makes a determination about whether the matter should be referred to the ethics committee (SO 269(4)). In considering the matter, the Speaker "may request further information from the complainant, the person the subject of the allegations or any other person" (SO 269(5)).

After the Speaker has made a decision, he informs the House that he is referring the matter to the ethics committee, or that no matter arises or is "technical, trivial or vexatious" and is not going to be referred to the committee (SO 269(6)). If the Speaker determines not to refer the matter, a member may move that the matter be referred (SO 269 (7)).

Once a matter has been referred to it, the ethics committee then considers the matter to determine whether it warrants further attention. If it does, the committee will request a written explanation from the person the subject of the complaint in relation to any allegations (SO 270(1)). The committee may also give the person an opportunity to be heard, and seek information from other parties. Generally, evidence is taken in private, but may be in public if it is in the public interest (SO 270(2)).

The ethics committee will make a report recommending any action that should be taken (SO 270(5)). The House may consider any charge of contempt and determine any punishment (SO 277). Members the subject of the contempt matter may be heard in their place, but must then withdraw while the House considers the charge (SO 276).

Does your chamber or parliament exercise exclusive jurisdiction over such complaints, or do other bodies (e.g. the courts) adjudicate?

Section 8 of the Parliament of Queensland Act 2001 provides—

"(1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.

(2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection."

So there is no jurisdiction for another body to adjudicate over such complaints. However, standing order 273 provides—

> "Where a matter that is referred to the ethics committee discloses a possible criminal offence, or it appears to be a matter more appropriately investigated by another agency, the ethics committee may refer the matter to the Director of Public Prosecutions, the Queensland Police Service, the Crime and Misconduct Commission or other appropriate agency."

The Crime and Misconduct Commission is responsible for investigating any official misconduct by a member that is conduct capable of amounting to a criminal offence. Some complaints that may be matters of contempt may also be offences under the Queensland Criminal Code. For example, providing false evidence before Parliament and witnesses refusing to attend, answer questions or produce a thing before the Legislative Assembly or an authorised committee are offences under the Criminal Code (sections 57 and 58).

Generally, where the ethics committee is aware that another body is investigating a matter, the committee will wait until the matter is determined by the other body before it proceeds with its investigation.

Is there an avenue of appeal when a member is found to have breached a code of conduct (or similar document)?

No. As discussed earlier, section 8 of the Parliament of Queensland Act 2001 limits the ability of other bodies to consider matters determined by the Assembly.

What sanctions (e.g. expulsion, suspension or fine) are available when a complaint about a member's conduct is upheld?

Standing order 277 provides that the House may impose a fine not exceeding $2,000 and set a reasonable time for payment.

Generally, contempt findings in relation to sitting members recommend imposing a suspension on the member for a number of days.

South Australia House of Assembly

As well as protecting words spoken in debate, the Bill of Rights 1688 forbids any "proceedings in Parliament" from being called into question outside the Assembly.

Code of conduct

There is currently no code of conduct for House of Assembly members, although several motions have been moved in the House to introduce one.

Privilege

Any member may rise at any time to speak on a matter of privilege suddenly arising. A matter of privilege takes precedence over and suspends other business being considered by the Assembly. The Speaker may, with the concurrence of the Assembly, defer a decision on the matter (SO 132).

The normal practice is for a member to seek the call "on a matter of privilege" and to outline the complaint briefly. The Speaker then responds that he or she will consider the matter and report back to the Assembly. Later (possibly the same day), the Speaker makes a statement to the Assembly on the matter. If satisfied that the matter has been raised at the first available opportunity, and that there is sufficient substance to it (a *prima facie* case), the Speaker states that he or she will allow priority to a motion on the matter. Usually the member concerned then moves that the matter be referred to a privileges committee, although other motions are possible. Alternatively the member might advise the Assembly that he or she does not wish to take the matter further.

Debate on any motion moved may take place immediately, or may be adjourned.

If the complaint of a breach of privilege relates to a statement in a newspaper, book or other publication, the member is required to give all details that are reasonably possible and be prepared to submit a substantive motion declaring the person or persons in question to have been guilty of contempt (SO 133).

Contempt

While contempts are often loosely referred to as "breaches of privilege", they are not confined to breaches of privilege. An action which obstructs the Assembly may be a contempt even though it does not breach any established privilege.

It has always been considered that the South Australian Houses of Parliament have power to punish for contempt and breaches of privilege and that the public has no redress in a court. However, as the House of Commons may, in addition to or in substitution for its own proceedings, direct the Government Law Officer to prosecute an offender, it is presumed that the South Australian Parliament also possesses this power.

Tasmania House of Assembly

The House may, by motion, refer a complaint to the Privileges Committee for investigation and report. The Integrity Commission Act 2009 provides for complaints of "misconduct" by a member to be made to the Tasmanian Integrity Commission. Any such complaint is referred pursuant to section 8(1)(g) to the Speaker of the House of Assembly "for action". Whilst there have been no instances of this occurring, the matter may then be referred by the Speaker to the House for consideration.

There is no avenue of appeal for a member found to have breached the Code of Ethical Conduct and Code of Race Ethics which are respectively prescribed in standing orders 3 and 4, and there are no prescribed sanctions. Sanctions would be a matter for the House to consider.

Victoria Legislative Council[5]

Complaints concerning the conduct of members of Victoria's Legislative Council can be investigated and dealt with in a number of ways, some specific to the Council and others applying to both Houses. In general, investigation or penalties associated with a member's conduct will be handled exclusively by their own House, and the member has no recourse to appeal to other bodies.

There are two methods of investigating a member's conduct which are specifically covered by legislation:

Whistleblowers Protection Act 2001

This Act came into effect on 1 January 2002. Part 8 specifically relates to disclosures concerning Members of Parliament. The Act established a system for members of the public to report, verbally or in writing, improper conduct or detrimental actions by a parliamentarian, with these initially being referred to the presiding officer of the relevant House. The improper conduct has to be such that, if proved, it would constitute a criminal offence or reasonable grounds for dismissal. Corrupt conduct includes conspiracy, misuse of information, dishonesty and the exercise of undue partiality.

After receiving notification of a disclosure, the presiding officer must decide if it is a matter that should be referred to the ombudsman. If such a referral occurs, and the ombudsman concurs that the matter is a public interest disclosure and worthy of further investigation, the subsequent findings are reported

[5] The Victoria Legislative Assembly follows a similar process.

to the presiding officer. If the report indicates that the disclosed conduct has occurred, the relevant member is given the opportunity to respond and have this included in the report. This report may be tabled in the relevant House and details of the matter can be forwarded to Victoria Police if appropriate.

As at the end of November 2012, no such disclosure of improper conduct had been made in relation to a member of the Legislative Council. It is anticipated that, prior to the conclusion of the 2012 parliamentary sittings, new legislation will be passed that will result in the repeal of the Whistleblowers Protection Act 2001. The new legislation (the Protected Disclosure Bill 2012) will subsume much of what is within the current Act and will be part of the establishment of an Independent Broad-based Anti-corruption Commission in Victoria.

Members of Parliament (Register of Interests) Act 1978

This Act includes the following code of conduct outlining the basic standards of behaviour expected of all Victorian parliamentarians—

"(a) Members shall—
  (i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;
  (ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament;

(b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty;

(c) a Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member;

(d) a Member shall make full disclosure to the Parliament of—
  (i) any direct pecuniary interest that he has;
  (ii) the name of any trade or professional organization of which he is a member which has an interest;
  (iii) any other material interest whether of a pecuniary nature or not that he has—in or in relation to any matter upon which he speaks in the Parliament;

(e) a Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests;

(f) a Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties."

In addition, the Act establishes a register of interests, to be tabled in Parliament, in which members must declare any personal interests (including shares, landholdings and memberships) which could potentially conflict with their public duties. Section 9 states that any "wilful contravention" of any of these requirements could result in the House imposing a fine of up to $2,000.

In addition, the Legislative Council could follow its usual process under the standing orders for dealing with an alleged contempt of Parliament or breach of privilege. A complainant member would have to submit written notice of the offence to the President as soon as possible after becoming aware of it. The President would then determine as soon as practicable whether the matter justified being given precedence over other business in the Council. If it was so determined, the Council would be advised and the member could move a motion without notice concerning the issue. If the President did not consider the alleged contempt or breach should be given such precedence, the member would be advised in writing, the Council might be advised of this decision, and the member would still be free to give notice of a motion regarding the matter.[6]

When Victoria passed the Act in 1978 it was the first Australian parliament to do so. Up to 2009, when the Law Reform Committee conducted a review of the Act's workings, there had been only five alleged breaches by members of either House, with no findings of misconduct being upheld subsequently.[7]

Parliamentary Salaries and Superannuation Amendment Act 2011

An additional penalty for members was introduced via the Parliamentary Salaries and Superannuation Amendment Act 2011. The specific purpose of this Act was for a fine to be imposed on a member of either House who is named and suspended. The fine is based on a member losing a day's pay for each day's suspension. In the year following its enactment, no member of the Legislative Council had been named.

There are also several methods by which members' conduct can be investigated and/or sanctioned using the normal rules and procedures of the House which are unrelated to a specific Act.

Privileges Committee

One of the potential outcomes of any alleged contempt or breach of privilege would be the House referring such a matter to the Legislative Council's Privileges Committee for further investigation and subsequent report.

[6] See Legislative Council of Victoria standing orders 2010, chapter 21.

[7] For further details see Law Reform Committee, *Review of the Members of Parliament (Register of Interests Act) 1978*, PP No. 251, Session 2006–09, December 2009.

However, in practice this has not occurred; the Privileges Committee was first established in the Council in 1990, but has never met.

Suspension of a member (not initiated by chair)

The Legislative Council may suspend members from the service of the House for a prescribed period for misconduct. This occurred most recently in the previous Parliament, when the Leader of the Government at that time, John Lenders, was suspended on three occasions (November 2007, June 2009 and October 2010) for periods not exceeding one day on any single occasion. However, each suspension related to the Government's failure to produce documents pursuant to a resolution of the House, rather than being due to any personal misconduct. As Government Leader in the Council, Mr Lenders was held to be responsible for this failure.

Other suspensions

Under the standing orders the President may name a member for disorderly conduct. In most cases the member will have been provided with an opportunity to apologise or explain their conduct and, thus, the naming of a member usually reflects wilful and persistent misbehaviour of some kind. Following the naming of a member, the President must put the question "That such member be suspended from the service of the Council during the remainder of the sitting (or for such period as the Council may think fit)". If this motion is agreed to, the member must immediately withdraw from the chamber.

The President also has the discretionary power to order a member whose conduct has been disorderly to withdraw from the chamber for a period of up to 30 minutes. This "sin bin" is utilised far more often than the more serious action of naming a member (which now also has the monetary implications: see above).

Right of reply

In October 1998 the Legislative Council adopted a practice first used in the Australian Senate to afford persons and organisations referred to in the Council by name a right of reply. In order to do so, the applicant must make a submission in writing to the President requesting the right to incorporate a response in the parliamentary record and alleging that they have been—

> "adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that his or her privacy has been unreasonably invaded by reason of that reference."

The President may determine that no further action is required or, alternatively, that a response from the person or organisation should be published by the Council and incorporated in *Hansard*. In making this determination, the President is obliged to inform and confer with the member who made the "offending" comments. The President is not, however, required to assess the truth of any statements made in the Council or in the submission.[8]

Investigations by Victoria Police

If a member's alleged misconduct is of a serious enough nature, investigations can extend outside of Parliament's jurisdiction and could result in adjudication by the courts.

Pursuant to the Parliamentary Precincts Act 2001, the Parliament of Victoria has established a memorandum of understanding (MOU) with Victoria Police. The MOU has created a framework for the exercise of security powers by police officers and protective services officers within the parliamentary precincts, including the capacity to exercise certain powers without the presiding officers' prior consent.

The MOU relates primarily to the conduct of members of the public. It acknowledges parliamentary privilege and states that "unless governed by urgency or the extreme sensitivity of a particular matter, wherever practicable no member of the police force shall:

- conduct any investigation involving;
- execute any process on (e.g. search warrants); or
- interview, arrest or hold in custody

any Member of Parliament or Parliamentary Officer ordinarily employed within the Parliamentary Precincts, without prior consultation with the Presiding Officers."

Despite this requirement, the MOU does not give members immunity from the law. While the presiding officers could choose to intervene if the police wished to exercise coercive actions against a member in relation to "proceedings of Parliament" (for example, to obtain documents used or to be used in a parliamentary debate), the MOU clearly envisages that the presiding officers would only prevent the police from conducting lawful investigations within the precincts in "exceptional circumstances".

In order to clarify further this issue, at the time of writing an agreement had been drafted outlining the protocols and procedures to be followed where Victoria Police proposes to execute a search warrant on premises occupied by

[8] See Law Reform Committee, *Review of the Members of Parliament (Register of Interests Act) 1978*, PP No. 251, Session 2006–09, December 2009.

a member. This was to ensure that members and their staff were provided with a proper opportunity to claim parliamentary privilege in relation to documents in their possession.

Western Australia Legislative Council

The Legislative Council Standing Committee on Procedure and Privileges deals with complaints about the conduct of members of the Legislative Council. Under the Corruption and Crime Commission Act 2003 the Corruption and Crime Commission of Western Australia may also investigate allegations of misconduct by Members of Parliament. Section 8 of the Parliamentary Privileges Act 1891 contains a list of certain contempts of Parliament that may be dealt with summarily by the Parliament or referred to the Attorney General for prosecution in the courts. Certain statutory offences relating to Parliament set out in the Criminal Code are dealt with by the courts. In the case of inquiries into misconduct by the Standing Committee on Procedure and Privileges, the member under investigation will generally have an opportunity to respond in writing to draft findings and to any proposed penalty. The penalties available to the House for dealing with proven misconduct by members include expulsion, suspension with or without pay, admonition, requiring a verbal or written apology, and removal from committee membership (which involves a financial penalty as committee members are paid). If the misconduct was found to be one of a number of listed contempts in section 8 of the Parliamentary Privileges Act 1891, the member may be fined and, if the fine is not paid, imprisoned.

CANADA

House of Commons

What is the process in your chamber or parliament for investigating complaints about members' conduct?

The House of Commons has the right to discipline its members for misconduct and the power to punish anyone for interfering with the conduct of parliamentary business (which it considers to amount to a breach of privilege or contempt). While members are afforded protection from outside interference when engaged in the business of the House, they are also subjected to the disciplinary power of the House for their conduct during proceedings. This power affords the House a wide range of penalties for dealing with misconduct.

Members may be called to order, directed to cease speaking because of persistent repetition and irrelevance in debate, "named" for disregarding the authority of the chair and suspended from the service of the House, incarcerated, or even expelled. The disciplinary power of the House is to some extent regulated through the standing orders so that each case need not be raised formally in the House in order to be dealt with efficiently.

In addition, the conduct of members is regulated in part by the Conflict of Interest Code for Members of the House of Commons. For example, members are required to disclose a private interest in a matter before the House or a committee and to refrain from participating in debate or voting on the question. If a member has reasonable grounds to suspect that another member has not complied with the Code, he or she may ask the Conflict of Interest and Ethics Commissioner to conduct an inquiry into the matter. The Commissioner submits a report on the results of the inquiry to the Speaker for tabling in the House. If the Commissioner concludes that the member has deliberately contravened the conflict of interest guidelines set down in the Code, the Commissioner may recommend appropriate sanctions. The member is then subject to the disciplinary powers of the House, if the House chooses to take action.

Individuals who come within the jurisdiction of the House—whether strangers, staff or members—are subject to its discipline for any form of misconduct not only within the parliamentary precinct but also outside. For example, sittings of a committee outside the precinct would be covered by the disciplinary power of the House.

Does your chamber or parliament exercise exclusive jurisdiction over such complaints, or do other bodies (e.g. the courts) adjudicate?

The privileges of the House of Commons include such rights as are necessary for free action within its jurisdiction and the necessary authority to enforce these rights if challenged. It is well established that, by extension, the House has complete and sole authority to regulate and administer its precinct, without outside interference, including controlling access to the buildings. This privilege extends to the conduct of members.

That said, the House cannot be used to give a member sanctuary from the application of the law. Even the floor of the chamber of the House is not a sanctuary and the application of the law, particularly in criminal matters, is foremost. It is not the precinct of Parliament but the function being carried out which is protected. Members have, in the past, been charged with civil or criminal offences.

Is there an avenue of appeal when a member is found to have breached a code of conduct (or similar document)?

The Conflict of Interest and Ethics Commissioner may be called upon to conduct an inquiry into a member's compliance with the Conflict of Interest Code for Members of the House of Commons. Such an inquiry may be initiated in one of three ways—

- a member may ask the Commissioner to conduct an inquiry into the conduct of another member;
- the House may adopt a motion directing the Commissioner to conduct and inquiry to determine a member's compliance with the Code;
- the Commissioner may initiate an inquiry.

Upon completion of an inquiry, the Commissioner presents his or her report to the Speaker who tables it in the House; the report is also made available to the public. The Commissioner is required to report one of three possible outcomes and to include reasons for any conclusions and recommendations. The outcomes are—

- that the Code was not contravened;
- that there was a mitigated contravention;
- that a member is not in compliance with the Code and appropriate sanctions are recommended.

Within 10 sitting days of the tabling of the report, the member who is the subject of such a report may make a statement in the House. The member notifies the Speaker of his or her intention to do so on a given sitting day. Following Question Period on the designated day, the Speaker recognises the member, who may speak for no more than 20 minutes. No other members are permitted to participate.

What sanctions (e.g. expulsion, suspension or fine) are available when a complaint about a member's conduct is upheld?

The power to discipline affords the House a wide range of penalties for dealing with misconduct. Members may be called to order, directed to cease speaking because of persistent repetition and irrelevance in debate, "named" for disregarding the authority of the chair and suspended from the service of the House.

Individuals may be summoned to appear at the Bar of the House for an offence against the dignity or authority of Parliament, if the House adopts a

motion to that effect. When summoned, the individual stands at the Bar, a brass rod extending across the floor of the chamber inside its south entrance beyond which strangers are not allowed. The House has ordered some members to attend in their places in the House and has also summoned members to the Bar of the House to answer questions or to receive censures, admonitions or reprimands.

The House possesses the right to confine individuals as a punishment for contempt, although it has not exercised this authority since 1913. Parliamentary privilege also holds members responsible for acting in character with the function they fulfil as elected representatives. Disobedience to orders of the House, and actions such as making threats, offering or taking bribes, or intimidating persons, are offences for which members can be reprimanded or even expelled.

Although a keystone of parliamentary privilege, the power of the House to discipline is nevertheless limited. The House has the right to reprimand and to imprison only until the end of the session and it does not have the power to impose fines. Parliament has been reluctant to use these powers, and cases where it has are rare. In the event of incarceration, the accused would remain imprisoned until he or she has complied with the order of the House or until the end of the session.

If the Conflict of Interest and Ethics Commissioner concludes that a member has deliberately contravened the conflict of interest guidelines set down in the Conflict of Interest Code for Members of the House of Commons, he or she may recommend appropriate sanctions. The member is then subject to the disciplinary powers of the House, as described, if the House chooses to take action.

Senate

The Senate of Canada has different processes for investigating complaints about a senator's conduct, depending upon the nature of the breach. As for sanctions, the Senate has the power to reprimand and to remove access to resources and a limited power to expel. Its power to expel is limited to the cases for disqualification set out in the Constitution Act 1867.

Different processes would apply to the following complaints—

- the senator was in a conflict of interest,
- the senator breached the privileges of the Senate or another senator,
- the senator used Senate resources improperly.

Conflict of interest

Breaches of conflict of interest would be processed according to the procedure set out in the Conflict of Interest Code for Senators, available on the internet site of the Senate Ethics Officer. The Senate Ethics Officer and the Senate would have exclusive jurisdiction. Appeals would be to the Standing Committee on Conflict of Interest and eventually the full Senate. Sanctions would be at the discretion of the Senate, as recommended to it.

Breach of privilege

Complaints of breach of privilege would originate in the Senate. The Senate would likely refer a *prima facie* case to the Standing Committee on Rules, Procedures and the Rights of Parliament or, in certain circumstances, to the Senate committee in which the breach occurred. Appendix IV of the Rules of the Senate is entitled "Procedure for Dealing with Unauthorized Disclosure of Confidential Committee Reports and Other Documents or Proceedings". The Senate has exclusive jurisdiction over breaches of its privileges.

Misuse of Senate resources

Under the Senate Administrative Rules the Standing Committee on Internal Economy, Budgets and Administration is responsible for the good internal administration of the Senate; subject to the rules, direction and control of the Senate, the committee has the exclusive authority to determine whether any previous, current or proposed use of Senate resources is a proper use for the carrying out of parliamentary functions. A misuse of Senate resources by a senator would be investigated by the committee. Some sanctions, especially of a kind related to access to resources, are in the power of the committee; other sanctions would need a decision of the Senate. A senator may always appeal a committee decision to the Senate. The Senate has the power to apply administrative remedies such as an order to reimburse. The Senate's power is concurrent to the power of the judicial system in the case of conduct that amounts to a breach of the law, in particular the Criminal Code. The Senate can refer a suspected breach of the Criminal Code to the proper authorities (i.e. the police) for investigation, and has done so. In such a case the process in the Senate would be protected by parliamentary privilege and the police would originate a new and independent investigation. Past police investigations have given rise to charges in the criminal courts and, in one case, charges led to a criminal conviction followed by a resignation.

Alberta Legislative Assembly

Generally speaking, matters concerning members' conduct in the Assembly are dealt with by the Speaker or the other presiding officers during Assembly proceedings. In Alberta, legislation is in place governing conflicts of interests on the part of members. In the case of an alleged conflict of interest by a member, any individual may request in writing that the Ethics Commissioner, an independent officer of the Legislature, investigate any alleged breach of the Conflicts of Interest Act. The Ethics Commissioner may recommend a sanction, which may be imposed by the Legislative Assembly of Alberta, for a breach of the Act. The possible sanctions are that the member be reprimanded; a monetary penalty be imposed on the member; the member's right to sit and vote in the Assembly be suspended for a stated period or until a specific condition is fulfilled; the member be expelled from membership in the Assembly; and that no sanction or a lesser sanction be imposed on the member should the member rectify the breach. The Ethics Commissioner may also recommend that no sanction be imposed.

British Columbia Legislative Assembly

British Columbia does not have a formalised code of conduct; however, provisions on the conduct and discipline of members can be found in the standing orders. In addition to these historic provisions, provisions within the provincial Constitution Act and the Legislative Assembly Privilege Act provide a statutory framework for regulating members' conduct and ensuring the House has the legitimacy to regulate its own proceedings. More specific provisions and processes relating to instances of conflict of interest and to electoral irregularities are addressed in the Members' Conflict of Interest Act and in the Election Act. In practice, the Election Act and the federal Criminal Code of Canada are more comprehensive and effective tools for dealing with transgressions of a criminal nature.

Standing orders

As mentioned, the standing orders authorise the House to discipline members, including the suspension of a member as a member of the House, when a motion is adopted concerning their conduct.

Under standing orders 19 and 20, the Speaker is empowered to deal with a member who disregards his or her authority. The penalties for being "named" (set out in standing order 20) are unique to British Columbia and include a 15-day suspension from the services of the House and its committees and

immediate withdrawal from the House. Should force be necessary "in order to compel obedience", the Speaker may call upon the Sergeant-at-Arms to enforce the Speaker's powers. If force is used, the suspension is extended to 30 consecutive sitting days. It has also been the practice in British Columbia that a suspended member is excluded from the Speaker's Corridor.

Under standing order 26, whenever a matter of privilege arises, it is to be taken into consideration immediately. One of the avenues available to the House is to refer a matter of privilege to a select standing committee for investigation. Such an investigation took place in 2002 when the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills was asked to report on a matter of privilege pertaining to the premature disclosure of a confidential draft report of the Select Standing Committee on Education. Upon release of its report and its findings, the committee recommended that the member, who admitted to the disclosure, make an "unqualified apology in a form satisfactory to the Speaker from her place in the House, as soon as is practicable."

There are no avenues of appeal when a complaint about a member's conduct is upheld; however, standing order 39 permits a member to make a statement and remain in the House during the debate on any motion concerning his or her conduct or right to hold a seat, as well as to participate in any resulting vote.

Legislative Assembly Privilege Act

Section 5 of the Legislative Assembly Privilege Act affirms that the Legislative Assembly has the power to regulate its own proceedings, stating that the Legislative Assembly has the "rights and privileges of a court of record to summarily inquire into and punish, as breaches of privilege or as contempt of court, without prejudice to the liability of the offender to other prosecution and punishment".

Constitution Act

The provincial Constitution Act contains basic provisions about the functions of the legislature and some provisions regarding the conduct of members. For example, section 27 describes the process should one member allege that another member has accepted money for the "supply to the government of any goods, service or work, or money from an office or employment to which the government has appointed the member ..."

The member making the allegation must table a notice of motion setting out the particulars of the allegations and move, without leave under routine proceeding, that the matter be referred to a committee. The committee must

report its findings to the Legislative Assembly and, if the committee reports that the member has contravened section 25 of the Constitution Act and the Legislative Assembly adopts the report, the member ceases to be a member and his or her seat becomes vacant.

Section 34 of the Constitution Act lists the various circumstances that could lead to a member losing their seat in the House—

> "(a) without the permission of the Legislative Assembly, the member fails to attend the Legislative Assembly during a whole session;
> (b) the member takes an oath or makes a declaration or acknowledgment of allegiance, obedience or adherence to a foreign state or power;
> (c) the member does or concurs in or adopts an act by which the member may become the subject or citizen of any foreign state or power;
> (d) the member is convicted of an indictable offence that may only be prosecuted by way of indictment."

Members' Conflict of Interest Act

The Members' Conflict of Interest Act outlines the process should the Conflict of Interest Commissioner (an independent officer of the Assembly) find that a member has contravened the Act, refused to file a disclosure statement within the time provided or failed to comply with a recommendation of the Commissioner. The Commissioner may recommend, in a report that is laid before the Legislative Assembly, that:

- the member be reprimanded,
- the member be suspended for a period specified in the report,
- the member be fined an amount not exceeding $5,000, or
- the member's seat be declared vacant until an election is held in the member's electoral district.

The Legislative Assembly must consider and respond to the Commissioner's report and may either order the imposition or the rejection of the recommendation of the Commissioner; but the Legislative Assembly cannot inquire further into the contravention, nor can it impose any punishment other than the one recommended by the Commissioner.

Election Act

The Election Act contains provisions to address electoral irregularities and includes penalties, as described in sections 255 and 256 of the Act, which deal with bribery and intimidation—

"An individual or organization who contravenes this section commits an offence and is liable to one or more of the following penalties:

(a) a fine of not more than $20 000;
(b) imprisonment for a term not longer than 2 years;
(c) a prohibition for a period of not longer than 7 years from holding office as a member of the Legislative Assembly;
(d) a prohibition for a period of not longer than 7 years from voting in an election for a member of the Legislative Assembly."

While there are no avenues of appeal when a complaint about a member's conduct is upheld, and there is no immunity for members from criminal actions, the Legislative Assembly of British Columbia is of the firm belief that Parliament must protect its right to sanction members for any actions offensive to Parliament.

Manitoba Legislative Assembly

There is no official code of conduct for members beyond what is stated in the Legislative Assembly and Executive Council Conflict of Interest Act or specified in the Rules, Orders and Forms of Proceeding of the Legislative Assembly of Manitoba.

There is conflict of interest legislation that outlines pecuniary or other interests that must be declared or certain financial relationships or obligations that must be avoided. A legal violation of the Legislative Assembly and Executive Council Conflict of Interest Act can be heard by a judge of the Court of Queen's Bench, and penalties for violation include suspension and disqualification from office; and restitution of pecuniary gains in contravention of the Act.

In addition, the Members' Allowances Regulations provide a definition of relatives that MLAs cannot hire or non-arm's-length expenses that cannot be paid by the various allowances members are entitled to.

The Speaker has the duty to ensure proceedings are conducted with the appropriate decorum and may request members to cease certain behaviour in the House or else risk being named for disregarding the authority of the chair. If a member is convicted of an indictable offence for which he/she is sentenced to imprisonment for a term of five years or more, according to the Legislative Assembly Act the member is disqualified.

Ontario Legislative Assembly

In Ontario, the behaviour of MPPs is not governed by a single code of conduct, but by a combination of laws and parliamentary conventions. Members may be held accountable for their conduct by one another, the Assembly as a whole and the courts.

Integrity and conflicts of interest

The Members' Integrity Act empowers the Integrity Commissioner, an officer of the legislature, with jurisdiction over members' pecuniary interests, conflicts of interest and ministers' blind trusts, and the ability to inquire into allegations that a member has contravened the Act or Ontario parliamentary convention. The preamble to this Act lays out a broad framework for members' behaviour, as follows—

> "It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognizing the following principles:
>
> 1. The Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise.
> 2. Members' duty to represent their constituents includes broadly representing their constituents' interests in the Assembly and to the Government of Ontario.
> 3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the Assembly's dignity and justifies the respect in which society holds the Assembly and its members.
> 4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny."

Individual members, the Assembly (by resolution) and the Executive Council may request the opinion of the Commissioner. Referrals to the Commissioner are made in writing and must clearly outline the alleged breach. A copy of a complaint made by an individual member must be provided to the Speaker, who reports it to the Assembly. Cases that have been referred to the Integrity Commissioner may not be considered separately by the Assembly or its committees. The Commissioner reports his or her opinion to the Speaker, who

provides a copy to the member whose conduct is in question, the member who raised the concern, and the leader of each recognised political party. The Speaker also presents the finding to the Assembly. Referrals made by the Executive Council regarding concerns about its members are not channelled through the legislature. In these cases, the Commissioner's findings are reported to the Clerk of the Executive Council.

Referrals to the Integrity Commissioner may result in one of the following possible outcomes, as outlined in the Members' Integrity Act. The Commissioner may refuse to investigate a case should he or she be of the opinion that there are insufficient grounds to warrant an inquiry. Where an inquiry is conducted, the Commissioner may find that no contravention occurred; that a contravention occurred and that the member is not blameworthy; or that a contravention occurred and the member was responsible. Where the latter is found, the Commissioner may recommend that no penalty be imposed; that the member be reprimanded; that the member be suspended from duty in the legislature until certain conditions are met; or that the member's seat be declared vacant. The Assembly must consider the Commissioner's report and respond within 30 days. The Commissioner's recommendation may either be accepted or rejected, but the Assembly may not inquire further or impose a penalty not recommended by the Commissioner. The decision of the House is final and may not be appealed.

Conflict of interest issues may also arise in the chamber and require resolution by the Speaker. Standing order 27 states, "No member is entitled to vote upon any question in which he or she has a direct pecuniary interest, and the vote of any member who has such an interest shall be disallowed". In practice, however, such issues tend to be handled by the Integrity Commissioner exclusively.

The role of the courts

Although certain conduct inside the legislature is protected by parliamentary privilege, members remain subject to the laws governing all citizens. Allegations that members have committed criminal acts are investigated and punished by the police and courts respectively.

Ontario's Legislative Assembly Act makes sole provision for a member to be expelled and the seat declared vacant when a court adjudges, or the Assembly resolves, that a member is guilty of having knowingly taken, directly or indirectly, a payment in exchange for "drafting, advising upon, revising, promoting or opposing any bill, resolution, matter or thing submitted or intended to be submitted to the Assembly or a committee thereof". Immediately after such a deter-

mination is made, the member's election is declared void and the seat is declared vacant. This has never occurred. Contravention of the rules of elections as prescribed by the Election Act may also result in the removal of a member from his or her seat, in addition to any other fines or punishments imposed.

Where there is overlapping responsibility for issues relating to members' conduct, the justice system and the Assembly work to avoid interference in one another's investigations. Standing order 23(g) states, for example, that reference in the House to any matter pending in court or before a judge will be ruled out of order if it poses a danger of prejudice to the court proceedings. The Integrity Commissioner, as an officer of the legislature, must suspend an inquiry into any issue that is being considered by the police or courts, or if it is believed that the Criminal Code or any other Act (other than the Members' Integrity Act) has been breached. Similarly, the authority of the Assembly to inquire into and punish breaches of privilege and contempts of the House exists independently of the courts, and does not affect the liability of an offending member to prosecution under the law.

Prince Edward Island Legislative Assembly

A Conflict of Interest Act exists in Prince Edward Island to assist members and ministers in reconciling their private and public interests such that public confidence in the Legislative Assembly is enhanced. Members of the Legislative Assembly must have the trust and confidence of the public who elected them to discharge their duties. To achieve that trust and confidence, members and ministers must adhere to the provisions of the Act and conduct their duties with integrity. The Conflict of Interest Act provides that members of the Legislative Assembly must serve the public interest when discharging their public responsibilities. Where there is a conflict between the public interest and the member's private or family interest, the public interest should prevail.

The Conflict of Interest Act is administered by the Conflict of Interest Commissioner, who is an independent officer of the Legislative Assembly. The Commissioner has four separate but related roles—

(1) the Commissioner acts as an adviser to members;
(2) each member is required to meet the Commissioner at least annually to review the disclosure of the member's private interests and general obligations imposed by the Act;
(3) the Commissioner prepares a Public Disclosure Statement for each member of the Legislative Assembly. These statements are filed with the

Clerk of the Legislative Assembly and are available for public inspection; and

(4) the Commissioner undertakes inquiries into alleged contraventions of the Conflict of Interest Act. Where a member alleges that another member has contravened the Act, the Commissioner will give an opinion on the matter. Upon completion of the investigation, the Commissioner reports to the legislature through the Speaker. If the Commissioner finds the member in breach of the Act, the Commissioner shall recommend a suitable penalty.

Québec National Assembly

The National Assembly does not have exclusive jurisdiction over complaints about members' conduct. Indeed, this has fallen under the jurisdiction, for certain aspects, of the Ethics Commissioner since the Code of Ethics and Conduct of the Members of the National Assembly fully entered into force on 1 January 2012.

Matters falling within the National Assembly's scope

Pursuant to standing order 315, any Member of Parliament who wishes to impugn the conduct of some other member acting in that capacity must make a motion for this purpose. This is the codification of a fundamental rule that is justified by the fact that a member cannot use his constitutional privilege of freedom of speech at the Assembly to impugn the conduct of a colleague. Under standing order 316 a member may, by means of such motion, complain that some other member has breached the privileges of the Assembly or of one of its members, and impugn an act accomplished by a Member of Parliament in the course of his duties, except for situations that henceforth are covered by the Code of Ethics.

In the case of a complaint of breach of privilege or contempt, the member must first raise a matter of privilege or contempt and then give notice of his intent to move a motion to impugn the conduct of a member. If the President rules that, at first glance, the matter of privilege is in order, the mover of the motion and the member may speak to this question for up to 20 minutes each. The Committee on the National Assembly must then be convened for its inquiry into this matter. In reporting to the Assembly the committee may, in addition to its conclusions on the matter, make recommendations. The Assembly must then dispose of the committee's report not later than 15 days after it has been tabled.

A member complaining of an act of a Member of Parliament in the course of his duties, which is not a breach of the privileges of the Assembly or one of its members, must do so through a motion. However, in such a case, the Assembly may dispose of the motion to that effect without the Committee on the National Assembly's first having been convened. If in either case the complaint is found to be substantiated, the Assembly determines the penalty that is to be imposed, and in so doing it must have regard to any recommendations of the Committee on the National Assembly.

The chair of the National Assembly has already recognised that the fact of impugning the conduct of a member of the Assembly by any procedure other than that which is provided for this purpose may constitute contempt of Parliament. Moreover, any member who makes an unsubstantiated complaint may be found to have breached the privileges of the Assembly or of one of its members.

Matters falling within the Ethics Commissioner's scope

Since the full entry into force of the Code of Ethics and Conduct of the Members of the National Assembly on 1 January 2012, complaints relating to the failure to observe this law are under the responsibility of the Ethics Commissioner. The Code of Ethics includes the rules concerning incompatible offices, conflicts of interest, remuneration, gifts and benefits, attendance, use of state property and services, and the obligation to file a disclosure statement. Post-term rules are also provided for Cabinet ministers.

A member who has reasonable grounds for believing that another member has violated the Code of Ethics may ask the Commissioner to conduct an inquiry into the matter. The Commissioner may also, on his own initiative and after giving the member concerned reasonable written notice, conduct an inquiry to determine whether the member has violated the Code of Ethics. Following an inquiry, the Commissioner produces without delay an inquiry report that includes the reasons for its conclusions and recommendations. This report is tabled in the National Assembly. The Commissioner may recommend that a sanction ranging from a reprimand to the loss of the member's seat in the Assembly be imposed. He may recommend this sanction in relation to both a member who has committed a violation as well as a member whose request for an inquiry was made in bad faith or with intent to harm. Any sanction recommended in a report of the Ethics Commissioner is imposed if the report is adopted by the National Assembly by a vote of two-thirds of the members. The National Assembly is fully competent to apply a sanction.

Saskatchewan Legislative Assembly

In Saskatchewan, members' conduct is dictated in two statutes, the Members' Conflict of Interest Act and the Legislative Assembly and Executive Council Act, and in one code, the Code of Ethical Conduct. The behaviour in question will determine the process which the Assembly will follow in investigating another members' conduct. In most cases, the Assembly exercises its jurisdiction over its members; however, in criminal cases the courts have been involved. There is no appeal mechanism except in a Speaker's determination of a member's use of allowances and disbursements. Sanctions vary based upon the breach, ranging from "name and shame" to monetary fine, suspension, expulsion or imprisonment.

The Members' Conflict of Interest Act is administered by the Conflict of Interest Commissioner, an officer of the Assembly. The Act outlines members' conduct in relation to potential conflicts of interest in their financial and business affairs. The Legislative Assembly, a member or the President of Executive Council (Premier) may request that the Commissioner give an opinion respecting the compliance of another member. There is no appeal mechanism when the Commissioner has given an opinion. The Commissioner may recommend the Assembly impose penalties such as ordering the member to comply with the Act, a fine, suspension from the Assembly and/or declaring the member's seat vacant.

The Legislative Assembly and Executive Council Act outlines the jurisdiction, rights, privileges, immunities and powers of the Legislative Assembly, its members and its committees. A person who is found by the Legislative Assembly to have committed a breach of privilege or contempt could be imprisoned, pay a penalty as determined by the Legislative Assembly and, if a member, be suspended from the Legislative Assembly.

The Act also outlines the consequences if a member is convicted of an indictable offence. On the tabling of a certified copy of conviction for which the member has been sentenced to imprisonment for a term of two years or more, the Legislative Assembly may, by resolution, suspend the member from sitting and voting or declare the seat to be vacant.

The Legislative Assembly and Executive Council Act also gives the Speaker the authority to review a member's use of allowance, disbursement, payment, good, premises or services. If the member disagrees with the Speaker's determination, there is an appeal mechanism. The Speaker or the member may request the Conflict of Interest Commissioner to investigate the Speaker's ruling and render an opinion. If the Commissioner's opinion is different from

the Speaker's, the Commissioner's opinion prevails. The Speaker may direct the member to pay back the amount in question.

The Code of Ethical Conduct adopted in June 1993 is a statement of commitment and declaration of principles that recognises that members must fulfil their obligations and duties responsibly while committing to the highest ethical standards. There is no prescribed method to enforce the code or to administer sanctions.

Yukon Legislative Assembly

The Legislative Assembly exercises exclusive jurisdiction over dealing with complaints about the conduct of members during parliamentary proceedings (in the House and in committees).

The Yukon legislature also has the authority to make laws in relation to "the disqualification of persons from sitting or voting as members of the Legislative Assembly and the privileges, indemnity and expenses of those members" (paragraph 18(1)(b) of the Yukon Act). Sections 5 and 6 of the Legislative Assembly Act (LAA) define the conditions under which a person might be disqualified from becoming a member of the Legislative Assembly or a member might become disqualified following his or her election to the Assembly. Section 10(1) of the LAA stipulates that a determination of disqualification shall be made by a court of law, but section 10(2) says, "Subsection (1) shall not be construed so as to limit any power the Legislative Assembly may have to suspend or expel a member."

Another avenue the Assembly has to deal with complaints against members or ministers is the Conflict of Interest (Members and Ministers) Act. While it provides for an independent investigation of a complaint against a member or minister, the authority to discipline them rests with the Assembly.

The Act provides for a conflict of interest commission to investigate complaints against members and ministers regarding matters covered by the Act. A complaint against a member or minister can only be made by another member or minister. In reporting to the Assembly on an investigation which finds a member or minister in a conflict of interest, the commission can recommend to the member or minister how he or she might remove the conflict of interest. The commission can also recommend a course of action for the Legislative Assembly in dealing with the member or minister. However, the commission does not have the authority to apply a penalty to a member or minister found in conflict. The Legislative Assembly has the right to accept or reject the commission's findings and may, by resolution, "stipulate how the

Member or Minister is to remove the conflict;" and/or "suspend the Member or Minister from sitting in the Assembly or any committee of the Assembly" (section 23(3)(a) and (b) of the Act).

Section 23(7) states, "If the commission reports that a Member complained to it without reasonable grounds, then the Legislative Assembly may, by resolution, find the Member in contempt of the Assembly and suspend the Member from sitting in the Assembly or any committee of the Assembly." Section 23(8) states, "A resolution by the Legislative Assembly under subsection (3) or (7) may be made instead of or in addition to any other power or privilege the Assembly has and whether or not the Member or Minister is still in the conflict of interest."

Finally, section 29 of the Act states, "Nothing in this Act abrogates any power or duty that the Legislative Assembly has apart from this Act to control, discipline or punish its Members."

There is also a code of conduct for ministers. Section 14 of the Conflict of Interest (Members and Ministers) Act empowers the Premier to "make rules of conduct about ethical behaviour and conflict of interest to be followed by Ministers in the exercise of their offices."These rules cannot allow for activity that is prohibited by the rest of the Act.

INDIA

Gujarat Legislative Assembly

Being the representatives of the people, the members of the Legislative Assembly while discharging their duties in the House and their constituencies must observe certain disciplines.

The Legislative Assembly, being the apex institution of the state, possesses exclusive jurisdiction to investigate complaints about the conduct of members whilst discharging their duties in the House or in their public life. On receipt of such complaints, the Speaker initiates a preliminary inquiry through the legislature secretariat. If he finds it necessary to investigate the matter further, he refers it to the Committee of Privileges for investigation and report. The Privileges Committee can, during an investigation, seek the opinion of an expert agency. The Privileges Committee can recommend expulsion or suspension from the service of the House, or pecuniary punishment. In the case of criminal misconduct in the House, the committee can recommend criminal action against the member. Following the recommendation of the committee the Legislative Assembly can pass an appropriate resolution against the

member. The action taken against the member cannot be challenged in any court of law.

The courts adjudicate on criminal proceedings against members and can inflict punishments. Convicted members can approach the Apex Court as the appellate authority.

Rajasthan Legislative Assembly

For any civil or criminal offence complained against a member in his private capacity, due process of law is initiated either by a citizen or the state, as the case may be, in the appropriate court of law. Complaints against a member of the House for breach of privilege by him through his conduct or behaviour are referred to the Privileges Committee, which recommends action against the member concerned, with the House having the final decision.

STATES OF JERSEY

The initial "in principle" decision to introduce a Code of Conduct was taken by the States of Jersey in 2003; the Code and the associated investigation process were included in the new standing orders that came into force in December 2005. Standing order 155 states, "An elected member shall at all times comply with the code of conduct."

The investigation process is as follows.

Under standing order 156 all complaints must be submitted to the Privileges and Procedures Committee (PPC), but PPC cannot accept any complaint: (i) which is made anonymously, (ii) which, in the opinion of PPC is frivolous, vexatious or unsubstantiated, or (iii) from a person who is not a member of the States if the complaint concerns words spoken by, or actions of, an elected member during a States meeting.

Standing order 157 provides that when PPC has information, whether or not received from a complainant, that suggests that a member may have acted in breach of the Code it must, without delay, inform the member concerned and investigate the act. If the complainant or the member alleged to have breached the Code is a member of PPC, that member can take no part in the investigation.

Standing orders provide that the investigation can be undertaken by PPC itself or by a panel of three persons. Standing order 157 states that one of the three members of any such panel must be a member of the States (although

not necessarily a member of PPC) but the other two members do not have to be. The panel must be chaired by a States member appointed by PPC (meaning that if only one States member was appointed to a panel that person would have to be its chairman). Standing order 157(8) makes clear that PPC itself can still undertake any part of the investigation even if a panel has been appointed to investigate. The member who is the subject of the complaint has the right to address the persons investigating the complaint (whether they are PPC itself or a panel) and when doing so has the right to be accompanied by a person of his or her choice.

When the investigation stage is complete and the panel (if any) has reported to PPC the member concerned once again has the right to address PPC (accompanied by any person of his or her choice) and PPC must then decide whether or not it considers that a breach of the Code has occurred. The committee must report its conclusion to the member concerned and may inform the States of the outcome, and any action taken, through a report or statement. Standing orders are silent on the nature of any "sanctions" that can be imposed if PPC concludes that a breach has occurred, but in practice the range of sanctions available include—

(i) a private letter to the member concerned drawing attention to the breach and advising the member to avoid such conduct in the future;
(ii) a public report or statement giving details of the breach but not recommending any further sanction;
(iii) the lodging for debate of a proposition of censure;
(iv) the lodging of a proposition seeking the suspension from the States of the member concerned. Standing order 164(7) sets out the maximum length of any suspension: the periods range from seven days for a first suspension in a three-year term, to 28 days for a third or subsequent suspension during the same term. Standing order 164(4) states that a member loses half of his or her remuneration during a second suspension and all of his or her remuneration during any third or subsequent suspension. (No remuneration is lost during a first suspension.)

MALAYSIA

Negeri Sembilan Legislative Assembly

If a complaint is made by a known source, an investigation committee chaired by the Speaker will be formed. If a complaint is made anonymously, it will be noted by the House and no further action will be taken.

NEW ZEALAND HOUSE OF REPRESENTATIVES

This section describes processes for investigating complaints about members' conduct in the following circumstances:

- The member has allegedly committed a contempt of the House.[9]
- The member has not complied with the obligations to make a return of pecuniary and other specified interests.
- The member has created disorder in the House or its committees.
- A person who is not a member of parliament applies to have the parliamentary record include a response to a reference to that person that has been made by a member in the House.
- A person who is not a member of parliament complains about the behaviour of a member in the House.
- There is a complaint of apparent bias by a member of a select committee.

Allegation of member having committed a contempt of the House

Any allegation of a person, including a member of the House, breaching the privileges of the House or committing a contempt is dealt with according to a process set out in chapter 8 of the standing orders. In summary—

- only a member may raise a matter of privilege;
- a matter of privilege is raised with the Speaker in writing and at the earliest opportunity,
- a copy must be forwarded, as soon as practicable, to any other member involved in the matter;
- the Speaker considers the matter and determines if a question of privilege is involved;
- in considering the matter, the Speaker takes account of the degree of importance of the matter raised, and no question of privilege is involved if the matter is technical or trivial and does not warrant the further attention of the House;
- if the Speaker determines that a matter involves a question of privilege, the Speaker reports this determination to the House (after first informing the member to whom the matter relates);
- a question of privilege stands referred to the Privileges Committee, which must report on it (though no deadline is specified for the report);

[9] Much of the information in this response on the privileges of the House is taken from chapters 45 to 48 of David McGee, *Parliamentary Practice in New Zealand [Third Edition]* (Wellington: Dunmore Publishing, 2005). This work is available on the Parliament website (www.parliament.nz).

- the Privileges Committee must observe natural justice procedures;
- unlike other select committees, the Privileges Committee has the power to send for persons, papers and records (through the issue of a summons);
- the Speaker is not a member of the Privileges Committee;
- in reporting on a question of privilege, the Privileges Committee may find that a contempt occurred, and may recommend sanctions against the person who committed the contempt;
- the House accords priority to considering a report of the Privileges Committee;
- when a report of the Privileges Committee is reached, the chairperson or another member of the committee may move a motion that reflects the committee's recommendation to the House.

Under the above procedure, the Speaker is the sole judge of whether an alleged breach of privilege is a question of privilege that stands referred to the Privileges Committee. The House is involved in the initial stages only to the extent that it is informed that the matter involves a question of privilege and that it stands referred.

Complaint regarding a member's obligations to make return of pecuniary and other specified interests

A member who has reasonable grounds to believe that another member has not complied with his or her obligations to make a return can request that the Registrar of Pecuniary and Other Specified Interests conduct an inquiry into the matter. The office of Registrar is held by a person appointed by the Clerk of the House with the agreement of the Speaker.

The process for the Registrar to consider a request for an inquiry would be as follows—

- the Registrar conducts a preliminary review of the request to determine if an inquiry is warranted, taking account of the degree of importance of the matter and whether it involves a breach of the obligations to make a return, and whether it is technical or trivial;
- if the Registrar determines that an inquiry is warranted, the Registrar conducts the inquiry and may seek assistance from the Auditor-General or any other person;
- the Registrar invites the member who is the subject of the inquiry to provide a response to the matter within 10 working days;
- the Registrar may determine that no further action is required or, in the case of an inadvertent or minor breach of the obligations to make a return, advise the member concerned to remedy the breach;

- the Registrar alternatively may report to the House that the matter under inquiry involves a question of privilege, in which case the question of privilege stands referred to the Privileges Committee.[10]

This procedure was instituted in 2011, but so far no such request for an inquiry has been made. In the six years since the introduction of the obligations for members to make returns of pecuniary interests, only one question of privilege relating to these obligations has been referred.

Disorder

The standing orders contain provisions to address a member's behaviour when it disrupts the House or a committee.

In the chamber

The Speaker may order any member whose conduct is highly disorderly to withdraw immediately for a period decided upon by the Speaker. This may be up to the end of that sitting day. In the event that a member is ordered to withdraw before or during questions for oral answer, he or she may not return to the chamber to ask or answer a question, and no other member may ask a question on that member's behalf.

Where a member's conduct is grossly disorderly, the Speaker may name the member and call on the House to judge the conduct of the member. This would usually result in the member being suspended from the service of the House (see below).

In a select committee

The committee chairperson may order any member, who is not a member of the committee, to withdraw from a meeting if that person's conduct is disorderly. A select committee can resolve to exclude one of its own members for up to the remainder of the meeting held on that day, if the member's conduct is highly disorderly.

Application for response to be incorporated in parliamentary record

The standing orders provide for any person who is not a member to apply to the Speaker in writing requesting that a response to a reference made about that person by a member in the House be incorporated in the parliamentary record.[11] Any application to the Speaker must include a claim that the person

[10] Appendix B, clause 16 of the standing orders.
[11] Standing orders 156–159.

(or organisation) referred to has been adversely affected or suffered damage to that person's reputation as a result of the reference.

The procedure for the application for response process is as follows—

- the submission must be made within three months of the reference having been made;
- the Speaker considers whether the application should be agreed to;
- in so doing, the Speaker takes account of the extent to which the reference is capable of adversely affecting, or damaging the reputation of, the person making the application;
- the Speaker may consult the person making the submission or the member concerned in assessing the application;
- the Speaker informs the applicant if he or she decides that no further action should be taken;
- if the Speaker decides a response should be incorporated, the approved response (which must be succinct, strictly relevant to the original reference and free of anything that may be considered offensive) is presented the House and published under the authority of the House.

While the application for response process is precipitated by a complaint or objection by a person outside the House about something a member has said in the House, this process should not be characterised as an investigation into the member's conduct. The standing orders explicitly state that the Speaker is not to consider or judge the truth of the reference made in the House or of the response to it. An acceptance of a response to be incorporated in the parliamentary record represents careful consideration of the principles of natural justice and the potential harm that may be caused by the reference, rather than a rebuke of the member who made the original reference.

Complaint from a member of the public about conduct of a member in the House

Debates in the House are broadcast via a number of media. On occasion, members of the public will object to a member's conduct in the chamber and write to the Speaker to complain. The Speaker responds to the specific content of each letter but tends to advise the correspondent that the Speaker has sole responsibility for maintaining order and decorum in the House, as and when issues arise. The Speaker has spoken to members in the House in general terms about their behaviour and its potential effect on how people perceive the New Zealand Parliament.

The Standing Orders Committee has on various occasions discussed and

rejected introducing a code of conduct for members. The last review of standing orders in 2011 contained an endorsement of the following comment of the Standing Orders Committee in 2003—

> "We do not condone the trade in personal insults across the floor of the House, and we acknowledge that at times members, through their behaviour, do themselves no favours in the eyes of the public. However, it is not unparliamentary to be adversarial. The House is the primary forum for the rigorous contest of policy positions and political ideals, and for holding the Government to account. We will not curb the free speech of members or the robustness of debate inherent in this environment."[12]

Currently, a member's bill, the Members of Parliament (Code of Ethical Conduct) Bill, has been drafted and is available for introduction to the House if it is drawn in the members' bill ballot.

Complaint of apparent bias on part of member of a select committee

The standing orders relating to the operation of select committees contain detailed natural justice provisions, including one regarding complaints of apparent bias. A member who has made an allegation of crime or expressed a concluded view on any conduct or activity of a criminal nature, and who has identified any person in doing so, cannot participate in an inquiry into that crime, conduct or activity. The exclusion of a member in this way can follow a complaint of apparent bias made by a person whose reputation may be seriously damaged by the committee's proceedings, or by any member of the House. The following procedure applies—

- a complaint of apparent bias is made in writing to the committee's chairperson;
- the chairperson considers any comment or information from the member about whom the complaint is made;
- the chairperson decides whether the member is disqualified from the relevant proceedings for apparent bias.[13]

Does the House exercise exclusive jurisdiction over complaints?

The New Zealand House of Representatives has exclusive jurisdiction over how its proceedings are to be conducted, and the conduct of these proceedings

[12] *Review of Standing Orders*, Standing Orders Committee, I.18B, 2011, p 24, with reference to *Review of Standing Orders*, Standing Orders Committee, I.18B, 2003, p 12.

[13] Standing order 230.

is not subject to judicial examination. It is also exclusively for the House to decide how to discipline its members, and not for the courts to intervene in its decisions on such matters.

There is no legal liability for words spoken or actions taken in the course of parliamentary proceedings, except where this protection has been statutorily abrogated.[14] However, this principle of protection does not mean that criminal acts are exempt from prosecution just because they occur within a parliamentary environment. Certain breaches of privilege or contempts may have wider significance than simply breaches of parliamentary law, and may be treated as criminal offences. The fact that a person has been charged with a criminal offence in respect of an incident does not preclude the House taking its own proceedings against that person on the ground that the incident also constitutes a contempt, but usually the House has left matters of a criminal nature to be dealt with solely by the courts.[15]

What avenues of appeal are available for members subject to complaints?

A decision of the Speaker to refer a matter of privilege to the Privileges Committee for consideration is final. A report of the Privileges Committee is debatable in the House and the House must vote on any recommendations made. A member could dispute the findings of a report during this debate, but no formal mechanism exists for a member to appeal against the contents of the report.

A chairperson of a select committee can decide to disqualify a member on the ground of apparent bias from consideration of a matter before the committee, as described above. Any member disqualified in this way and dissatisfied with the chairperson's decision may refer the issue to the Speaker for decision. The Speaker's decision is final.

What sanctions are available in cases of misconduct by members?

In the event that a member's behaviour in the House is highly disorderly, and he or she is named by the Speaker, a question is immediately put that the member be suspended from the service of the House for a specified period of time—

- on the first occasion, for 24 hours;

[14] See sections 108 and 109 of the Crimes Act 1961 in regard to the crime of perjury.

[15] In 2007 a member was accused of assaulting another member outside the chamber. While the police declined to investigate, a member of the public took a private prosecution against the member accused of assault. The member pleaded guilty to fighting in a public place and paid a fine to a charitable organisation.

- on the second occasion during the same Parliament, for seven days (excluding the day of suspension);
- on the third or any subsequent occasion during the same Parliament, for 28 days (excluding the day of suspension).

If any member who is suspended from the service of the House under these procedures refuses the Speaker's order to leave the chamber, he or she is suspended from the service of the House for the remainder of the calendar year. Any member suspended from the service of the House forfeits his or her rights to enter the chamber, vote, serve on a committee, or lodge questions or notices of motion. The Standing Orders Committee has recommended that legislation provide for members who are suspended from the service of the House to be penalised through the application of a salary deduction.[16]

Various sanctions are available to the House when a member has committed a breach of privilege or contempt of the House. These are set out below.

Suspension

The House may suspend a member for contempt. Three members have been suspended for contempt for remarks reflecting gravely on the conduct of Speakers in their capacity as Speaker. The Privileges Committee recommended that the members be suspended for varying periods, and the House adopted these recommendations.

Censure

The House may consider that a member or other person's conduct deserves formal censure or rebuke. In New Zealand the Speaker has admonished a person at the bar of the House on a question of privilege on one occasion, in 1872, but it has not generally been the practice for a rebuke to be administered in such a formal way. Members have at various times been censured following recommendations of the Privileges Committee, most recently in 2008.[17] In 2001, the House unanimously agreed to a motion moved without notice to censure a member who made obscene statements in the House.[18]

Apology

Most findings of contempt end with the offender tendering an apology, which is accepted by the House. In many cases, the apology or expression of regret is tendered to the Privileges Committee in the course of its investigation into the question of privilege.

[16] *Review of Standing Orders*, Standing Orders Committee, I.18B, 2011, p 6.
[17] *Journals of the House of Representatives*, 2005–08, vol 2, p 1301.
[18] *Journals*, 1999–2002, vol 1, p 305.

In some cases, there may have been no apology delivered to the Privileges Committee during its consideration of the matter. If the committee concludes that an apology is called for, it includes this recommendation in its report for adoption by the House. The apology is then tendered in writing, usually to the Speaker, at some point after the report is presented to the House. Failure to tender an apology when required to do so by the House may also be treated as a contempt.

Expulsion

The House's power to expel a member appears to be intact but its use in New Zealand would be unprecedented. New Zealand follows the Westminster tradition that a member of Parliament, once elected, retains that position unless certain conditions, prescribed by law, result in the member's seat becoming vacant.

In 1990 the Standing Orders Committee recommended that any power of the House to expel a member be abolished in New Zealand. This recommendation has not yet been implemented.

SOUTH AFRICA

Western Cape Provincial Parliament

What is the process for investigating complaints about a member's conduct?

Under the Western Cape Provincial Parliament Code of Conduct Act (Act 3 of 2002), the Provincial Parliament must appoint a Registrar of Members' Interests. The Registrar investigates any alleged breach of the Code of Conduct by a member on receipt of a complaint. The Registrar presents the report to the Conduct Committee for consideration.

Does the Parliament exercise exclusive jurisdiction over such complaints?

Yes.

Is there an avenue of appeal when a member is found to have breached the code of conduct?

Yes. A member found guilty by the Conduct Committee of contravening the Code may appeal to the Appeals Committee. The Appeals Committee consists of the Speaker (who is the chairperson), the Deputy Speaker, the Chief Whip(s) of the governing party or political grouping, and one member per party not otherwise represented.

What sanctions are available when a complaint about a member's conduct is upheld?

The Conduct Committee recommends to the House, the imposition of one or more of the following penalties—

(i) a private warning with a requirement to correct the behaviour complained of;
(ii) a public warning with a requirement to correct the behaviour complained of;
(iii) private censure or reprimand;
(iv) loss of certain privileges of office;
(v) a financial penalty requiring the member to repay in full the amount of the funds misappropriated or funds earned for profit;
(vi) temporary ineligibility of office; or
(vii) declaring the member unfit to hold his or her current position to be a member of the Provincial Parliament.

It is a prerequisite that the Conduct Committee or the Appeals Committee, as the case may be, must report its findings and recommendations as to penalties, if any, to the House. If the Conduct Committee and/or the Appeals Committee recommends a penalty, the House must either accepts or reject the recommendation, or refer the matter back to the committee for further consideration.

UNITED KINGDOM

House of Commons

The House of Commons appoints an independent Parliamentary Commissioner for Standards by a resolution of the House, for a five-year non-renewable term. The Commissioner is independent but his or her work is overseen by the Committee on Standards, which comprises ten members and three lay members. Any MP or a member of the public wishing to complain that a member has not properly declared or registered interests or is otherwise in breach of the Code of Conduct can do so in writing to the Commissioner, setting out the evidence on which their complaint is based. Complaints cannot be made anonymously.

The Commissioner decides whether the evidence is such that the case requires investigation. If the case is trivial, vexatious or repeats already considered matters it will not be considered. If there is sufficient substance to the

complaint and enough evidence has been given then the Commissioner carries out a preliminary inquiry. The Commissioner also has power to initiate investigations.

Once the Commissioner has completed a preliminary investigation, he or she reports to the committee either that the complaint has not been upheld, that suitable remedial action has been taken or, in serious cases, that a full investigation is required.

If the Commissioner decides to carry out a full investigation, he or she can interview the member concerned and others who may be able to give information and collect evidence. Although the Commissioner has no power to compel witnesses to give evidence or to produce documents, the committee has the power "send for persons, papers and records",[19] which it can use to assist the Commissioner where necessary. Members are obliged by the Code to assist the Commissioner with his or her inquiries. If in the course of the investigation the Commissioner considers there is evidence that criminal conduct may have occurred, she will inform the committee and, with their consent, refer the matter to the police. The committee has made a special report to the House in such circumstances.

Once the Commissioner's investigation has been completed the Commissioner submits a memorandum of findings to the committee. If the Commissioner has concluded that the Code of Conduct was breached and the committee agrees with this conclusion, then the committee decides an appropriate penalty. A member can submit evidence to either the committee or the Commissioner in their defence. The committee then reports its findings and recommendation to the House. The lay members do not have a vote on the committee, but they have the right to append their opinion to any report. Sanctions can range from writing a letter of apology to the committee or making a personal statement in the chamber, to suspension or expulsion from the House. Less serious penalties do not need to be confirmed by the House. If the committee recommends suspension, the House considers the motion to suspend the member (the motion is amendable, but it is not the practice to amend it).

If a report on the conduct of a member is debated in the House, the member concerned can be heard as soon as the motion has been moved formally. The convention that members were heard and then withdrew from the chamber has now lapsed, but on some recent occasions the member concerned has made a personal statement the previous day, and has not attended the debate. Standing order 44 allows for members to be suspended from the service of the

[19] Erskine May, *Parliamentary Practice: Twenty-fourth edition*, (2011), LexisNexis, p 799.

House. Standing order 45A, passed in 1998, automatically suspends a member's salary if they are suspended from service. In serious cases members can be expelled. The expulsion of a member does not prevent them from being re-elected. Famously, John Wilkes was expelled three times by the House in the mid-18th century.

House of Lords

Since June 2010 complaints about members' conduct have been investigated by an independent House of Lords Commissioner for Standards. A complaint by a third party is the usual basis for the Commissioner to start an investigation, though he may in exceptional circumstances, and with the agreement of the Sub-Committee on Lords' Conduct (a Sub-Committee of the Committee for Privileges and Conduct), start an investigation at the request of the member concerned or if he by other means becomes aware of evidence sufficient to establish a *prima facie* case. The conduct complained of must have occurred within the last four years.

Complaints must allege a breach of the House of Lords Code of Conduct—such as failing to register or declare relevant interests, or breaching the rules on use of facilities or services, or on financial support. The Commissioner will carry out a preliminary assessment of complaints received, and at that point will filter out complaints which are outside his remit or where insufficient evidence is provided. Where he proceeds to an investigation the Commissioner writes to the member concerned requesting a full and accurate account of the matters in question. He may seek further written information and interview individuals informally or by way of formal oral evidence. All evidence and correspondence relating to an inquiry is covered by parliamentary privilege. The investigative and adjudicative process proceeds in accordance with the principles of natural justice and fairness; and the civil standard of proof is used (that is, an allegation must be proved "on the balance of probabilities").

Once he has assessed the evidence the Commissioner has three options. The first is to dismiss the complaint. The second, which may be available if the breach is minor and has been freely admitted by the member concerned, is to find the member to have breached the Code of Conduct but to agree remedial action with the member. Such action usually takes the form of the member correcting his or her mistake (for instance by registering an interest which has previously not been registered) and writing a formal letter of apology to the chairman of the Sub-Committee on Lords' Conduct. The third option, in

more serious cases, is to find the member in breach but not to propose remedial action. In that instance the case is referred to the Sub-Committee on Lords' Conduct for it to recommend a sanction. The sub-committee cannot, though, change the Commissioner's finding or reopen the case.

Where a member has been found by the Commissioner to have breached the Code and the Sub-Committee on Lords' Conduct has recommended a sanction, the member may appeal to the Committee for Privileges and Conduct against the finding, the recommended sanction, or both. The member may appear in person before the committee, as may the Commissioner.

The committee then reports to the House. If it upholds a complaint the House is invited to agree to the report. The House is the final arbiter of whether a member has breached the Code.

Where appropriate, the committee will recommend a sanction to the House, which again it is for the House to decide upon. The House possesses an inherent power to discipline its members; the means by which it chooses to exercise that power falls within the regulation by the House of its own procedures. The House has the power to suspend members; but such a suspension cannot be for longer than remainder of the current Parliament. That is because the House has no power by resolution to require that a writ of summons, which is issued to each member at the start of each Parliament, be withheld. Therefore, the House possesses no inherent power to expel its members. The House possesses theoretical powers to imprison or fine its members, though such powers have not been exercised in recent times. In recent years the House has also ordered members to repay sums wrongly claimed, and to make a personal apology on the floor of the House.

The House of Lords is responsible for disciplining its own members. It exercises complete jurisdiction over breaches of the Code of Conduct. However, when an allegation of a breach of the Code also amounts to an allegation of criminal misconduct, and the police (or other agencies) begin an investigation, the Commissioner suspends his investigation until those proceedings are at an end. In *R v Chaytor and others* [2010] UKSC 52 the Supreme Court held that each House's jurisdiction could overlap with the criminal courts where the conduct complained of does not form part of the core or essential business of Parliament—which in the case concerned meant that the courts had jurisdiction over charges of false accounting in relation to parliamentary expenses. Moreover, the Supreme Court ruled that it was for the courts to decide the boundaries of Parliament's exclusive cognisance, and therefore where the courts have overlapping jurisdiction over members' conduct. In two cases (those of Lord Hanningfield and Lord Taylor of Warwick, who were both

found guilty of criminal offences relating to false accounting and sentenced to terms of imprisonment) the House subsequently imposed terms of suspension in respect of their breaches of the rules agreed by the House. In so doing, the House followed the procedures outlined above.

PRIVILEGE

AUSTRALIA

Senate

Matter of privilege

For the first time since the Godwin Grech affair in 2009, the President gave precedence to a notice of motion, and the Senate (on 17 August) agreed to the motion moved by the chair of the Rural Affairs and Transport References Committee, Senator Heffernan, to refer a matter of privilege to the Committee of Privileges for inquiry and report. The reference arose from the committee's inquiry into pilot safety and it concerns a possible penalty or injury inflicted on a witness on account of their evidence, and possible improper interference with a witness.

Parliamentary privilege

From time to time senators use the protection of parliamentary privilege to raise serious allegations. There is invariably heated debate in the community about the use of parliamentary privilege for such purposes. In 1988 the Senate adopted several resolutions on the recommendation of the Joint Select Committee on Parliamentary Privilege including Privilege Resolution 9, which enjoins senators to use their great power of freedom of speech responsibly, having regard to a number of factors including the damage that can be done to the reputation of individuals from allegations made under parliamentary privilege and the limited opportunities people have to respond. Having signalled his intention to disclose the identity of a priest who had been the subject of serious allegations, Senator Xenophon named the priest on the adjournment debate on 13 September, after being cautioned by the President, who drew the Senate's attention to Privilege Resolution 9.

While persons in this situation have access to the right of reply procedures in Privilege Resolution 5 it would also be open to the Senate to censure the senator concerned, if there was a view that the senator had overstepped the mark. This is a different issue to a matter that may give rise to an allegation of contempt. Conduct constitutes contempt only if it meets the threshold test in section 4 of the Parliamentary Privileges Act 1987, which involves an improper interference with the ability of a House, committee or member to carry out their functions or freely perform their duties.

The person affected made an application under Resolution 5 and the Senate, on 22 September, adopted the report of the Privileges Committee recommending the incorporation of a response in Hansard.

On 21 September, Senator Williams also used a speech to publish details of the victims of an alleged conman, expressing his frustration at the failure of regulatory authorities to investigate these matters. The speech was reported in the press.

Two other reports recommending the incorporation of a response under Resolution 5 were presented and adopted during the year, including one by a person named in an interjection by a minister at question time and recorded in Hansard and one by the alleged conman referred to by Senator Williams.

New South Wales Legislative Assembly

On 11 August 2011 the Leader of the Opposition raised, as a matter of contempt, that the Premier had made misleading statements during question time. The Leader of the Opposition, in accordance with the standing orders, spoke for 10 minutes as to why he considered the alleged misleading statements to be a contempt. The Speaker ruled that a *prima facie* case had not been established.

On 23 August 2011 the Speaker followed up this issue by making a considered statement on the operation of the standing orders regarding the raising of matters of privilege or contempt. The Speaker noted that members are expected quickly to establish, to the satisfaction of the chair, whether there is a *prima facie* breach of privilege or contempt. There is no requirement for the chair to allow a member to speak for the full 10 minutes provided under the standing order if it is clear there is a *prima facie* case or that one does not exist.

The Speaker advised members that it is not a breach of the standing orders, nor a matter of contempt nor privilege, if a member is dissatisfied with an answer provided during question time. Further, consideration of matters of privilege or contempt raised during question time will usually be deferred until its conclusion.

The Speaker also advised members that under the standing order the chair has the option of allowing the member's motion to be moved immediately; or placing the member's notice on the business paper with precedence; or reserving any decision for later in the sitting or on a subsequent sitting day.

New South Wales Legislative Council

On 15 September 2011 a member of the Legislative Council, Mr David Shoebridge (the Greens), made statements in the House about the New South

Wales Commissioner of Police allegedly seeking to prevent the public release of information about a serial predator in a Sydney park out of concern that it would reflect poorly on police.

On 12 October 2011, on a motion of the Leader of the Government, the House referred terms of reference to the Privileges Committee to inquire into and report on whether the conduct of Mr Shoebridge in relation to this matter constituted an abuse of privilege—namely the privilege of freedom of speech.

There have been two previous cases in the Council where the House has referred the actions of its members in respect of statements made under parliamentary privilege to a committee for inquiry and report. Of note, in 1999 the House referred to the committee an inquiry into statements made by two members. In its subsequent report, the Privileges Committee noted that the House has not identified and adopted appropriate principles to be applied in relation to the exercise of members' freedom of speech. In those circumstances, the committee concluded that "any finding of abuse of privilege under present circumstances could be perceived as an unwarranted restriction on members' freedom of speech".

The committee was guided by this precedent in considering the statements made by Mr Shoebridge. In its report of November 2011, the committee found that, given the paramount importance of preserving the privilege of freedom of speech of members, and noting that the House has not adopted guidelines on what constitutes abuse of the privilege of freedom of speech, it would be unreasonable to adjudge Mr Shoebridge guilty of an abuse of the privilege of freedom of speech.

Two other issues raised during the inquiry were the purported actions of Mr Shoebridge in raising his allegations with the media in advance of his statement in the House, and the subsequent purported distribution of Mr Shoebridge's statement by the media using social networking mediums. The committee noted that any such communications fall under the law of defamation and have no protection under parliamentary privilege.

Queensland Legislative Assembly

Contempt of Parliament—failure to register interests

On 12 May 2011 the Legislative Assembly found a former member guilty of 41 instances of contempt of Parliament for failing to disclose certain payments in the Register of Interests (the background to this matter was detailed in *The Table 2011* comparative study). The House imposed a fine of $2,000 on each

count and ordered that the sum be paid within 12 months. As required, notice of the Legislative Assembly's order of 12 May 2011 was served upon the former member by the Sergeant-at-Arms on 19 May 2011.

Contempt of Parliament—tabling documents identifying a child and breach of the sub judice rule

In the Ethics Committee Report No.118, tabled on 27 October 2011, the committee recommended the House find a member guilty of contempt on two grounds—

1. That the member breached a duty to the House expressed in standing order 35 by failing to ensure documents concerning a child in relation to the Child Protection Act were tabled in a non-identifying manner.
2. That the member breached the duty to the House expressed in standing order 233 by tabling a document that referred to a criminal matter before the District Court at the time.

In relation to first finding, the committee recommended the House suspend the member from the precincts of the House for two sitting days. In relation to the second, the committee recommended suspension for three sitting days. In addition, the committee recommended the penalties for both breaches be applied cumulatively so that the suspension be for five sitting days including the day the House considers the report and recommendations.

On 17 November 2011 the House found the member guilty of contempt on both charges and suspended the member in accordance with the committee's recommendations.

South Australia House of Assembly

One matter of privilege was raised in 2011. An opposition member stated in question time that a patient waited 24 hours for a bed in a public hospital. The Minister for Transport disputed this and stated the waiting time was 1 hour, 20 minutes. The opposition member could not access information to substantiate his original comment and raised a matter of privilege. The Speaker advised the House that raising a matter of privilege is not a device by which members pursue issues that can be addressed by further debate or settled by a vote of the House on a substantive motion. The Speaker also stated that the minister's comments did not meet the test for privilege (deliberately or knowingly misleading the House).

Victoria Legislative Assembly

On 16 August 2011 the Legislative Assembly referred a complaint made by an opposition member in relation to a government member to the Privileges Committee for examination and report.

The complaint alleged that the government member committed a contempt of the house by deliberately misleading the house in a personal explanation given on 29 June 2011 in relation to an incident outside Parliament train station.

After taking evidence from witnesses and making attempts to obtain CCTV footage of the incident in question, the committee found that the member had not deliberately misled the house and the complaint referred to it by the house was not substantiated.

CANADA

House of Commons

On 7 February 2011 Scott Brison (Kings—Hants) raised a question of privilege concerning the failure of the government to produce documents related to corporate profits and taxes and the costs of various justice bills which had previously been ordered by the Standing Committee on Finance. Noting that the Standing Committee had earlier that day presented its 10th report—which dealt with this matter—Mr Brison argued that the government's claim that the information sought by the committee was a matter of Cabinet confidence was without merit, and its refusal to provide the information constituted a breach of privilege.

On 17 February 2011 the House debated an opposition motion ordering that the same documents demanded by the Standing Committee on Finance be tabled by 7 March 2011. During that day's sitting, the government tabled documents that it stated constituted "information on our government's low-cost and tough-on-crime agenda as requested by certain members of Parliament". Mr Brison responded that the documents tabled were insufficient. On 28 February 2011 Tom Lukiwski (Parliamentary Secretary to the Government House Leader) presented his case on the question of privilege. Later that day, on a deferred division, the House adopted the opposition motion, thus setting a deadline of 7 March 2011 for the production of the documents in question.

On 9 March 2011 the Speaker (Peter Milliken) ruled on Mr Brison's question of privilege. Quoting from his ruling of 27 April 2010, on the Afghan detainees documents, he concluded that the power of committees to order papers was undistinguishable from that of the House. Without judging the quality of the documents tabled in the House by the government in response to the committee's request, he found that, on its face, they did not appear to provide the information which had been ordered. Consequently, the Speaker found that there were sufficient grounds for a finding of *prima facie* breach of privilege. Mr Brison then moved a motion that the question be referred to the Standing Committee on Procedure and House Affairs and that the committee report back no later than 21 March 2011. After debate, the motion was agreed to.

The committee reported its findings to the House on 21 March 2011 and concluded that "the government's failure to produce documents constituted a contempt of Parliament". Concurrence in the report was moved and debated on 23 March.

On 25 March 2011 the Leader of the Official Opposition Michael Ignatieff (Etobicoke—Lakeshore) moved the following motion—

> "that the House agree with the finding of the Standing Committee on Procedure and House Affairs that the government is in contempt of Parliament, which is unprecedented in Canadian parliamentary history, and consequently the House has lost confidence in the government."

As this was the last day of supply of the period, Mr Ignatieff's motion was put to a vote on the same day it was moved, and the House adopted the motion by a vote of 156 to 145. Immediately thereafter, the Prime Minister, Stephen Harper (Calgary Southwest), moved that the House adjourn. On 26 March 2011 Mr Harper requested that Governor General David Johnston dissolve Parliament and an election was called for 2 May 2011.

Also on 9 March 2011 the Speaker delivered a ruling on the 17 February 2011 question of privilege of John McKay (Scarborough—Guildwood) stemming from the presentation of the sixth report of the Standing Committee on Foreign Affairs and International Development and the allegedly misleading statements made by Bev Oda (Minister of International Cooperation). Reviewing the events which led to the question of privilege, including the sixth report, the 13 December 2010 question of privilege and the 10 February 2011 Speaker's ruling thereon, as well as a 14 February 2011 reply by Ms Oda, the Speaker clarified the role of the chair in the matter and ruled that sufficient doubt as to the facts existed to warrant a finding of *prima facie* privilege in this case. Mr McKay moved that the matter be referred to the Standing Committee

on Procedure and House Affairs and that the committee report back no later than 25 March 2011. The matter was still being considered by that committee when the House was dissolved on 26 March 2011.

Senate

On 8 December 2011 a question of privilege was raised with respect to parliamentary consideration of a bill. This arose after a court gave a ruling indicating that the provision of a statute had been violated when the bill was introduced in the House of Commons. The Speaker ruled that a *prima facie* question of privilege had not been established, and debate continued.

Manitoba Legislative Assembly

At the start of the sitting day on 15 April 2011 the Official Opposition House Leader raised a matter of privilege regarding a presumed attempt deliberately to mislead the House on the true costs of the Bipole III transmission line. The Opposition House Leader claimed there was contradictory information on the cost of Bipole III. In particular, the government maintained the cost was a certain amount, while Manitoba Hydro and other estimates gave a different picture. Speaker George Hickes ruled no *prima facie* case of privilege, noting that in order to find allegations of deliberately misleading the House as *prima facie* means proving that the member purposely intended to mislead the House by making statements with the knowledge that these statements would mislead. He also said that a burden of proof exists that goes beyond speculation and conjecture and involves providing absolute proof—including a statement of intent by the member involved—that the stated goal is intentionally to mislead the House. In this case, there were no statements provided or made by the Minister of Finance or the First Minister to indicate a purposeful intent to mislead the House. Nor did the statements given by the two members in the House create sufficient doubt and confusion to justify finding a *prima facie* case of privilege or that an action of contempt occurred. The Speaker encouraged all members, if they inadvertently provide incorrect information, to advise the House accordingly, and to correct the error as soon as possible, as it is important for members to be apprised of factually correct information.

Prince Edward Island Legislative Assembly

On 13 May 2011, during Oral Question Period, the Leader of the Opposition, Olive Crane, made the following statement, "Premier, why do you continually mislead and deceive this House ..." Speaker Kathleen Casey advised that the use of these words was unparliamentary and directed the Leader of the Opposition to withdraw her remarks, which she refused to do. Speaker Casey requested the retraction an additional three times and each time was refused. She then advised that pursuant to the Rules of the Legislative Assembly (rule 38), she had no choice but to name the Leader of the Opposition for disregarding the authority of the chair. Madam Speaker addressed the Leader of the Opposition as Olive Crane, and then requested a motion to suspend the member from the service of the House, declaring a brief recess for members to consider the matter. Following the recess, Madam Speaker entertained interventions from the Premier and the Leader of the Opposition, after which she called on Sonny Gallant (Government House Leader) who moved, seconded by Wes Sheridan (Finance and Municipal Affairs), that the Leader of the Opposition be suspended from the service of the House for the remainder of the sitting day. The motion was carried in the affirmative, and the Sergeant-at-Arms escorted Olive Crane from the chamber.

Naming occurs rarely in the Prince Edward Island chamber. Prior to this occasion, a member was last named and suspended from the service of the House on 5 December 2001, when the then Leader of the Opposition, Ron MacKinley, was suspended for the remainder of that sitting day.

Québec National Assembly

Granting of permit to dismantle a refinery when matter being examined by parliamentary committee

On 28 September 2011 the chair ruled on a matter of privilege raised by a member of the official opposition. The member alleged that a former minister had acted in contempt of Parliament with respect to statements she had made regarding the dismantlement of a refinery in east-end Montreal while she was still a minister. It was alleged that the statements in question suggested that the permit for the dismantlement of this refinery would not be delivered so long as the report from the parliamentary committee examining this issue was not tabled. It was also alleged that the permit had been delivered by the minister during the summer though the committee's report had not yet been tabled. This matter of privilege was broached by the member of the official opposition

from two angles: that the minister knowingly misled the House and that she had ridiculed the House.

On the first point, the chair recalled the presumption in parliamentary law whereby no member shall refuse to take another member at his word. This presumption can only be rebutted if the member, during an address, misleads the Assembly and subsequently recognises having deliberately done so, thus committing contempt of Parliament, or if the Assembly receives two contradictory versions of the same facts from a minister. In this case, there was nothing to suggest that the minister had recognised having deliberately misled the House or that she had given two contradictory versions of the same facts.

On the second point, the chair's decision was based on the concept of an offence against the authority and dignity of the Assembly. The general rule is that the executive branch is not bound by the legislative branch, unless expressly stated in legislation or in an order adopted by the Assembly within the limits of its prerogatives and authority. The minister therefore was not required to wait until the committee had tabled its report to take a decision concerning the granting of a permit to dismantle the refinery, this decision being the Government's prerogative. Accordingly, the minister could not have been in contempt of Parliament at first glance. The chair nevertheless stated that it hoped that any minister who himself links his decision to a committee's proceedings will not subsequently act as though the committee's role was of secondary importance.

Non-compliance by chairman of board of directors with summons to appear before committee

On 4 October 2011 the chair gave a ruling on a point of privilege raised by a member on 27 September 2011. The member alleged that the chairman of the board of directors of a public agency was in contempt of Parliament by failing to appear before a parliamentary committee after having been summoned to do so. The chair stated that, owing to the committee's constitutional authority to summon a witness to come before it, this non-compliance to appear constituted contempt of Parliament at first glance. This witness could not of his own volition decide not to comply with this obligation. The chair recalled that the senior officers of public agencies must always keep in mind that the Assembly has the authority to exact accountability and that they have the duty to comply. They must, by their behaviour, refrain from undermining the proper conduct of Assembly proceedings. While the chair may have come to the conclusion that there was, at first glance, contempt of Parliament, no action was taken, since no motion asking the Assembly to rule on the conduct of the witness was

moved. The chair nevertheless underlined that it hoped that its decision would serve as a warning to any person who would choose to disobey an order to appear before a parliamentary committee.

Hydro-Québec contracts (continuation and conclusion)

On 8 November 2011 the chair gave an update on the situation regarding the production of documents by Hydro-Québec, to which reference was made in the privilege section of *The Table 2011*.

In summary, on 23 November 2010 the chair recognised that Hydro-Québec had, at first glance, committed contempt of Parliament owing to the fact that it had not complied with an order adopted by the Assembly on 29 September 2010. This order stated that Hydro-Québec was to transmit to the Assembly, as soon as possible, any information relating to all contracts granted from 2000 to 2010. However, contempt proceedings had been suspended to grant Hydro-Québec an additional period of time to transmit the documents in question.

Between November 2010 and November 2011 Hydro-Québec produced several documents as had been requested in the order adopted by the Assembly, and several meetings were held during this same period between the members and the senior officers of the corporation. Under these circumstances, and after consultation with the parliamentary groups and independent members, the chair considered the matter of privilege closed.

NEW ZEALAND HOUSE OF REPRESENTATIVES

Statements preparatory to parliamentary proceedings

In September 2011 the Supreme Court, in its decision in *Attorney-General and Gow v Leigh*, held that statements made by an official to a minister for the purpose of replying to questions for oral answer are not themselves parliamentary proceedings. Such statements can therefore be the subject of court proceedings (in this case, defamation proceedings) as they are not protected by absolute privilege.

The Speaker of the House of Representatives, as intervener, argued that the official's statements were protected by parliamentary or absolute privilege because of their close connection to parliamentary proceedings. Such protections are required, it was argued, in order to protect the provision of free and frank advice to ministers and members by officials and parliamentary staff, for the purpose of supporting the effective conduct of the business of the House.

The Supreme Court took a narrower approach, holding that a necessity test applies. In other words, the question is whether the protection of the advice by absolute privilege is necessary for the proper functioning of the House. The Speaker has determined that a question of privilege is involved in the court's decision, and has referred the question to the Privileges Committee for consideration.

Agreements with police and intelligence service

In recent years, Speakers of the House of Representatives have entered into three agreements that have potential to raise issues affecting the privileges of the House. They are—

- agreement with New Zealand Police on policing functions within parliamentary precincts;
- agreement with New Zealand Police on procedures for execution of search warrants on premises occupied or used by Members of Parliament;
- memorandum of understanding with New Zealand Security Intelligence Service on collection and retention of information on Members of Parliament.

In September 2012 the Speaker determined that the agreements involve a single question of privilege and referred the question to the Privileges Committee.

STANDING ORDERS

AUSTRALIA

Senate

There were no amendments to the standing orders during the year, although a number of temporary amendments to the standing orders were in force. These included provision for an additional time on sitting Mondays for government legislation, and a routine opportunity to consider private senators' bills each sitting Thursday. Trial arrangements for a different allocation of time to questions and answers, including supplementary questions, were also in force throughout the year.

New South Wales Legislative Assembly

When the Parliament met for the first time on 3 May 2011 a number of sessional orders were adopted which changed the routine of business in the Legislative Assembly.

Change of sitting pattern

The main change was that the Assembly went from having business conducted on Tuesday, Wednesday, Thursday and Friday each sitting week to having four sitting days each week (Tuesday, Wednesday, Thursday and Friday in the first week and Monday, Tuesday, Wednesday and Thursday in the second week).

Accordingly, the routine of business was amended by sessional order to provide for a first, second, third and last sitting day each week. This meant that the business to be considered on the first sitting day of the week is the order that business will be considered on the Tuesday of the first week and the Monday of the second week and so on.

A significant change was the introduction of question time on the last sitting day of the week. The House now has question time at 2.15 pm on each day it sits. The sessional order also altered the time the House adjourns. The sitting times for the Legislative Assembly under the routine adopted for 2011 were as follows—

First sitting day of the week: 1.00 pm until 7.30 pm.
Second sitting day of the week: 10.00 am until 7.30 pm.
Third sitting day of the week: 10.00 am until 7.30 pm.
Last sitting day of the week: 10.00 am until 4.30 pm.

A number of other sessional orders were required to provide for consequential changes to the standing orders relating to the routine of business.

Debates on petitions

In addition to these sessional orders, a new procedure was introduced to provide for a discussion on the subject matter of a petition received by the House, which has been signed by 10,000 or more persons. The sessional order provides—

"(1) The subject matter of every petition received by the House and certified by a Member and announced by the Speaker as having been signed by 10,000 or more persons, shall be automatically set down as an Order of the Day for discussion on a future day.

(2) The Order of the Day shall take the place of and be called upon at the time for consideration of the Matter of Public Importance on the Third Day of the next sitting week.

(3) Any further petitions received before the first Order of the Day is disposed of shall be set down on succeeding Third Sitting Days in the order in which they are presented.

(4) The following time limits shall apply:
First speaker – 7 minutes
Member next speaking – 7 minutes
Two other Members – 5 minutes each
Total – 24 minutes

(5) If a Member does not seek the call when the Order of the Day is called on, the Order of the Day will lapse.

(6) The Order of the Day cannot be amended and at the conclusion of the discussion no question shall be put."

The procedure has proved popular with members with a petition being discussed each sitting week.

Substitution of committee members

A new sessional order was adopted by the Legislative Assembly on 22 June 2011 for the current Parliament to allow for the substitution of members on the newly established Portfolio and Specialist Standing Committees. The new sessional order provides—

"That during the current session, unless otherwise ordered, the following sessional order be adopted:

(1) Where a member of a Portfolio or Specialist Standing Committee finds they are unable to continue to sit on the Committee temporarily they may stand down for a period of time, or for a particular inquiry, and a member may be appointed by the House as their substitute for the period concerned.
(2) If the House is not sitting, the member unable to attend a meeting of the Committee may, in writing to the Chair of the Committee, nominate a member to act as a substitute member at that meeting.
(3) If the member is incapacitated or unavailable, a letter to the Chair of the Committee nominating a member to act as a substitute member of the Committee may be signed on behalf of the member by the office holders responsible for nominating members to the Committee.
(4) The substitute member has all the rights of a Committee member, including to participate in all Committee proceedings and to vote on any question before the Committee."

New South Wales Legislative Council

The standing orders were not amended in 2011 and there was no major review undertaken.

The Procedure Committee completed two reports in 2011, both arising from recommendations made by the Joint Select Committee on Parliamentary Procedure in 2010.

In June 2011 the committee reported on the management of private members' business and the sitting days and routine of business. Based on recommendations made by the committee, a number of sessional orders were subsequently adopted to address operational difficulties with the existing system of private members' business. These sessional orders remain in force. The second report, tabled in November 2011, related to the merits of further reforms to the operation of question time. However, no specific recommendations for change were made in the report.

Queensland Legislative Assembly

The standing orders were amended on 16 June 2011 to accommodate the new committee system and legislative process. In summary the key changes were—

- All bills introduced to the Parliament will now be referred to the relevant portfolio committee to examine and report on. There is an exception for bills declared urgent.

- The default reporting period is six months; however this may be varied by the House or the Committee of the Legislative Assembly (the CLA).
- Reduction of speaking times during second reading debate and consideration in detail if a bill has been reported on by a committee.
- Portfolio committees will conduct estimates hearings (previously this was done by select committees).
- Committees may directly question chief executives at estimates hearings.
- Removal of time limits on questions and answers at estimates hearings.
- Committee reports (with some exclusions such as reports on bills and Ethics Committee reports) are automatically set down on the notice paper for debate.

On 2 August 2011 the House adopted new standing order 194A to provide that committees are to hold briefings from departmental officers and hearings in public. The House amended standing order 211 and adopted new standing order 211A to provide for the strict confidentiality of proceedings for committees. The House also adopted new standing order 194A regarding committees with oversight responsibility to have specific functions where there is no statutory provision outlining the oversight of the entity.

On 7 September 2011 the House adopted new standing order 135A and amended standing order 136 regarding the role of the CLA. Under the amendments, the CLA must (a) monitor and review the business of the Legislative Assembly to aim for the effective and efficient discharge of business, and (b) monitor and review the operation of committees, particularly the referral of bills to committees, and where appropriate vary the time for committees to report on bills or vary the committee responsible for bills.

Standing order 62A was adopted on 15 November 2011 and provides that the Premier shall make a statement relating to advice of a member of the Australian Military having been killed in action whilst on active service overseas. At the conclusion of the statement, the Premier may move, "That the House take note of the statement" and, if so, the Leader of the Opposition or their nominee shall be given equal time to reply to the statement. The House indicates its agreement with the motion by observing one minute's silence. The amendment is the result of a private member motion debated and agreed on 11 October 2011. The House also adopted new standing order 194B to provide that the CLA will refer Auditor-General reports tabled in the Assembly to the relevant portfolio committee for consideration.

Victoria Legislative Assembly

Following the 2010 state election, sessional orders were adopted in early 2011. Several new orders were introduced, including—

- Responses to adjournment matters: if the minister responsible for a matter raised in the House during the adjournment debate is not present to respond, a written response to the matter will be provided within 30 days.
- Condolence motions: following a condolence motion, the House may adjourn for one hour.
- Question time (time limit on answers): the time limit for answers to questions without notice is four minutes. Subsequently, the Speaker made a ruling that the clock could be stopped for points of order during answers.

CANADA

House of Commons

No major or permanent changes were made to the standing orders, with the exception of a few motions adopted by unanimous consent. The first was that the House hold 30-minute bells, instead of the usual 15-minute bells, for votes on Tuesdays, Wednesdays and Thursdays in 2011 in order to allow members more travel time from some of the new off-site committee facilities to the chamber. The second, adopted in June 2011, stated that all standing committees would consist of 12 members.

Senate

The *Rules of the Senate* were amended in late 2011 with respect to provisions dealing with leaves of absence and suspensions. In November the Standing Committee on Rules, Procedures and the Rights of Parliament presented a report recommending a fully revised set of Rules. That report was adopted in June 2012, and the revised Rules took effect on 17 September 2012. Although their substantive content was only minimally changed, the Rules were reorganised and the language made clearer.

Québec National Assembly

On 4 October 2011 the National Assembly adopted permanent amendments to its standing orders. These amendments were primarily linked to the adoption of the *Code of Ethics and Conduct of the Members of the National Assembly.*

To this end, standing orders 8.5, 294, 316, 317 and 323 were amended. The deadline to hand in notice for business standing in the name of members in opposition provided for in standing order 97.1 was also changed.

Yukon Legislative Assembly

Pursuant to Government Motion #46, adopted by the Assembly on 13 December 2011, standing order 76 has been amended by adding standing order 76(7). Standing order 76 now reads—

"**Procedures at Conclusion of a Sitting**

76(1) On the sitting day that the Assembly has reached the maximum number of sitting days allocated for that Sitting pursuant to Standing Order 75, the Chair of the Committee of the Whole, if the Assembly is in Committee of the Whole at the time, shall interrupt proceedings at 5:00 p.m. and, with respect to each Government Bill before Committee that the Government House Leader directs to be called, shall:

(a) put the question on any amendment then before the Committee;
(b) put the question, without debate or amendment, on a motion moved by a Minister that the bill, including all clauses, schedules, title and preamble, be deemed to be read and carried;
(c) put the question on a motion moved by a Minister that the bill be reported to the Assembly; and
(d) when all bills have been dealt with, recall the Speaker to the Chair to report on the proceedings of the Committee.

(2) On the sitting day that the Assembly has reached the maximum number of sitting days allocated for that Sitting pursuant to Standing Order 75, the Speaker of the Assembly, when recalled to the Chair after the House has been in the Committee of the Whole, shall:

(a) call for the report from the Chair of the Committee of the Whole;
(b) put the question, in the usual fashion, on the motion to concur in the Chair's report on the proceedings of Committee of the Whole;
(c) with respect to each Government Bill on which debate has been adjourned at the Second Reading stage and designated to be called by the Government House Leader, put the question, without further debate, on the motion that the bill be read a second time, and, if that motion is carried, order that the bill stand immediately ordered for Third Reading; and
(d) with respect to each Government Bill standing on the Order Paper

for Third Reading and designated to be called by the Government House Leader,

(i) receive a motion for Third Reading and passage of the bill, and

(ii) put the question, without debate or amendment, on that motion.

(3) On the sitting day that the Assembly has reached the maximum number of sitting days allocated for that Sitting pursuant to Standing Order 75, the Speaker of the Assembly, if in the Chair at the time, shall interrupt proceedings at 5:30 p.m. and shall:

(a) with respect to each Government Bill on which debate has been adjourned at the Second Reading stage and designated to be called by the Government House Leader, put the question, without further debate, on the motion that the bill be read a second time, and, if that motion is carried, order that the bill stand immediately ordered for Third Reading; and

(b) with respect to each Government Bill standing on the Order Paper for Third Reading and designated to be called by the Government House Leader,

(i) receive a motion for Third Reading and passage of the bill, and

(ii) put the question, without debate or amendment, on that motion.

(4) The Assembly shall then proceed with any routine business associated with the end of a Sitting including receiving the Commissioner to grant assent to bills and passing an end-of-Sitting adjournment motion.

(5) The normal time of adjournment shall not apply if it is reached during the course of the proceedings identified in this Standing Order. Further, a motion to adjourn the House shall not be permitted on the last sitting day of a Sitting until such time as all business identified in this Standing Order has been completed.

(6) The provisions of this Standing Order shall apply in any situation in which this Standing Order may be found to be in conflict with any other Standing Order.

(7) The provisions of this Standing Order shall apply to an interim supply appropriation bill on the final sitting day prior to the end of the fiscal year in which the bill is introduced."

NEW ZEALAND HOUSE OF REPRESENTATIVES

Amendments to standing orders—new ways to arrange House's business

The House adopted amendments to the standing orders with effect from the day after the dissolution of the 49th Parliament. These amendments were

recommended by the Standing Orders Committee following its triennial review of the standing orders.

Chaired by the Speaker, the Standing Orders Committee recommended amendments that focused on improving the effectiveness of the House in its various functions. The main theme arising from the review was the need to balance the Government's desire for more time to progress its legislative programme, with proper legislative scrutiny and opportunities for debate. The committee's approach was to seek to promote constructive engagement and negotiation in the cross-party Business Committee about the House's business. While the Government's ability to move for urgency remains intact, the changes provide incentives for government and opposition parties to negotiate so that the time of the House is used effectively.

The most significant innovation is the provision (in standing order 54) for extended sitting hours. There are two mechanisms for this. The Government will be able to move for extended sitting hours by motion without notice, which will extend that sitting so that it can continue from 9 am to 1 pm on the next day. However, there are safeguards: such a motion can be moved only if the Business Committee was notified the previous week; only one such motion can be moved in any one week; the business to be considered in the extended sitting must be specified; and only business set out on the order paper can be included. This will generally mean that bills can proceed only one stage during such an extended sitting.

The second mechanism for extending sitting hours is by Business Committee determination. Sittings extended in this way can include Thursdays (which thus would extend into Thursday evening and Friday morning), and there can be more than one extended sitting in the same week if the Business Committee agrees. While this would make more time available for the Government, it could also allow opposition parties to have greater scope to debate business of high political importance for them. Alternatively, arrangements could be made to deal with non-controversial bills at such times. These are matters for negotiation. In the initial months of the 50th Parliament, there have been several extended sittings, most of which have been arranged by the Business Committee for the purpose of progressing non-controversial bills.

In tandem with the improved flexibility for the Business Committee to manage the House's hours, there are a number of changes that increase options for arranging the way the House deals with legislation. These include—

- Cognate bills (SO 266)—two or more bills that the Business Committee determines may be debated together at any or all of their first, second and

third readings. Such a determination may be made before or after the bills are introduced, and can reduce the need for significant related legislative initiatives to be combined in a single, omnibus bill.

- Select committee consideration (SOs 286, 291(1) and 187(4))—instructions that reduce the time for select committees to report on bills to less than four months are now debatable. The purpose of this change is to reduce the frequency with which the period for select committees to consider bills is significantly reduced (the default period is six months).
- Arrangements for committee stage (SO 297 and 303(4)–(5))—the Business Committee will be able to determine how a committee of the whole House will deal with a bill, so that debate is not necessarily part by part. Such a determination can be made before or after a bill is introduced and could, for example, allow a committee of the whole House to take a bill as a single question or on an issue-by-issue basis. The Government is now required, where practicable, to notify that it intends a bill to progress to committee stage in the following sitting week. This greater notice encourages members to prepare amendments and have them printed on supplementary order papers as coherent alternative propositions. The chairperson can now group and select amendments to maximise time spent on debate, rather than on voting. A new development is the circulation of a schedule so members can keep track of proposed amendments.

A further change to legislative procedures relates to the proposal of members' bills (SOs 274 to 277), which are selected for introduction by ballot. Members who wish to propose members' bills can now lodge them at any time, and fair copies of proposed bills will be posted on the Parliament website. They are thus available to the public before they are drawn in the ballot. This addresses a problem that had emerged whereby members, on winning the ballot, had postponed the House's consideration of their bills while taking steps to promote them through social networking websites and other electronic means. The limit of one proposed bill per member remains. Members can indicate support for proposed members' bills, and these indications of support will appear on the website.

Another significant amendment relates to matters subject to judicial decision. Members who wish to refer to matters before the court, or matters suppressed by a court order, must inform the Speaker in writing before doing so (SO 112). The purpose of this requirement is to enable the Speaker to decide how to exercise his or her discretion to allow such references to be made. Knowingly referring to a matter suppressed by a court order, contrary to the standing orders, is now listed as an example of a contempt (SO 407(y)).

SOUTH AFRICA

Western Cape Provincial Parliament

On 28 October 2011 the House adopted the recommendation of the Rules Committee to amend standing rules. Some of the noteworthy changes include—

- Including in the standing rules the sequence of proceedings during the sitting of the House. Although the House had been following the sequence, this was not included in the standing rules.
- Increasing them time allocated to questions for oral reply from 45 minutes to 60 minutes.
- Limiting supplementary questions to four per question. Initially, there was no limit on how many supplementary questions members could ask per question; this led to a lot of time spent on answering few questions on the question paper because of the number of supplementary questions being asked.
- Establishing the Committee on Local Government Oversight. The committee was established, *inter alia*, to review (i) annual reports submitted to the Provincial Parliament in terms of the Local Government: Municipal Finance Management Act 2003 (Act 56 of 2003), (ii) oversight reports adopted by the respective municipal councils on those annual reports, (iii) any reports issued by the Auditor-General on the affairs of any municipality in the province, (iv) the consolidated statements on the state of municipalities' budgets referred to it, and (v) any other report or statement concerning the affairs of a municipality referred to the committee by the House. The committee may also report on any of those reports or statements to the House, and must perform any other function assigned to it by legislation, standing rules or resolution of the House.
- The sitting day of the House was also changed from Tuesdays to Thursdays.

UNITED KINGDOM

House of Commons

On 7 July 2011 standing order 152G was amended so that references to the Committee on Members Allowances were changed to the Committee on Members Expenses, and to deal with changes under the Parliamentary Standards Act 2009 and the operation of the Independent Parliamentary Standards Authority.

On 30 November 2011 standing order 152H modified the powers of the committee created to consider National Policy Statements so that a committee only exists for the duration of consideration of a National Policy Statement.

On 14 December 2011 standing orders 80A and 80B were passed to allow carry-over of bills brought in upon Ways and Means Resolutions in certain circumstances. Standing order 77 was amended to allow third reading of bills brought in upon Ways and Means Resolutions to be taken at the same sitting as report stage (in practice this had almost always happened anyway by means of a motion to disregard SO 77).

Standing orders 54 and 55 were amended to alter the procedure relating to estimates as a result of the Fixed-term Parliaments Act 2011, which meant that parliamentary sessions would now begin in spring rather than autumn. Standing orders 15 and 41A were amended in consequence.

SITTING DAYS

Lines in Roman show figures for 2011; lines in *italic* show a previous year. An asterisk indicates that sittings have been interrupted by an election in the course of the year.

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	TOTAL
Ant & Barb HR	*1*	*0*	*2*	*1*	*1*	*1*	*1*	*1*	*1*	*1*	*3*	*3*	*16*
Ant & Barb Sen	*0*	*1*	*2*	*1*	*1*	*1*	*1*	*0*	*1*	*2*	*2*	*2*	*14*
Aus H Reps	0	8	7	0	9	9	4	7	8	4	7	0	63
Aus Sen	0	3	7	0	3	7	4	7	8	4	12	0	55
Aus ACT	*0*	*6*	*6*	*0*	*3*	*5*	*1*	*6*	*3*	*6*	*3*	*3*	*42*
Aus N Terr													*33*
Aus NSW LA*	0	0	0	0	8	16	0	12	8	8	8	0	60
Aus NSW LC*	0	0	0	0	14	10	0	12	8	8	7	0	59
Aus Queen LA	0	3	6	3	6	4	0	6	3	6	5	1	43
Aus S Aus HA													48
Aus S Aus LC	*0*	*8*	*7*	*1*	*9*	*6*	*5*	*0*	*7*	*8*	*8*	*4*	*63*
Aus Tasm HA	0	0	6	6	6	10	3	2	7	5	6	0	51
*Aus Tasm LC**	*0*	*0*	*0*	*0*	*1*	*9*	*4*	*2*	*5*	*3*	*7*	*0*	*31*
Aus Vict LA	0	3	6	3	7	8	0	5	4	6	6	3	51
Aus Vict LC	0	3	6	3	7	8	0	5	4	6	6	3	51
Aus W Aus LA	*0*	*3*	*6*	*3*	*9*	*6*	*0*	*6*	*9*	*6*	*9*	*0*	*57*
Aus W Aus LC	0	6	6	6	6	6	0	8	10	6	8	1	63
Bangladesh	*1*	*15*	*6*	*0*	*4*	*15*	*7*	*0*	*9*	*0*	*5*	*0*	*62*
Belize House	*2*	*1*	*1*	*0*	*0*	*1*	*0*	*1*	*1*	*0*	*1*	*2*	*10*
Belize Senate	*1*	*2*	*2*	*0*	*0*	*1*	*0*	*1*	*0*	*1*	*1*	*2*	*11*
Berm House	*0*	*4*	*7*	*1*	*2*	*5*	*4*	*2*	*0*	*1*	*4*	*2*	*32*
Berm Sen	*0*	*1*	*7*	*0*	*1*	*2*	*4*	*4*	*0*	*1*	*2*	*2*	*24*
Botswana	*0*	*20*	*19*	*9*	*0*	*0*	*4*	*16*	*0*	*0*	*20*	*10*	*98*
Canada HC*	1	15	14	0	0	14	0	0	10	16	17	11	98
Canada Sen*	0	9	11	0	0	12	0	0	3	9	11	9	64
Canada Alb	0	3	15	11	4	0	0	0	0	2	7	4	46
Canada BC	0	4	0	2	16	2	0	0	0	13	11	0	48
Canada Man	0	0	0	11	17	10	0	0	0	8	1	0	47
Canada N Bruns	*8*	*15*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*5*	*12*	*40*
Canada Newf	*0*	*0*	*8*	*12*	*16*	*6*	*0*	*0*	*0*	*0*	*7*	*9*	*58*
Canada NWT	*3*	*18*	*7*	*0*	*8*	*0*	*0*	*0*	*0*	*11*	*4*	*0*	*51*
Canada Ontario*	0	4	15	12	13	1	0	0	0	0	7	5	57
Canada PEI*	0	0	0	14	8	0	0	0	0	0	6	0	28
Canada Québec	0	9	9	9	13	7	0	0	6	9	14	6	82
Canada Sask*	0	0	16	12	12	0	0	0	0	0	0	8	48
Canada Yukon*	0	14	16	0	0	0	0	0	0	0	0	9	39
Cayman Island	*0*	*0*	*13*	*0*	*0*	*7*	*0*	*0*	*10*	*0*	*15*	*0*	*45*
Cook Islands													
Cyprus	4	4	5	3	0	5	3	1	3	4	5	5	42
Dominica	*0*	*0*	*0*	*3*	*1*	*3*	*4*	*0*	*1*	*0*	*3*	*2*	*17*
Falklands	*1*	*0*	*1*	*0*	*5*	*0*	*1*	*0*	*1*	*1*	*1*	*0*	*11*
Ghana	*13*	*16*	*13*	*0*	*13*	*18*	*16*	*4*	*0*	*18*	*18*	*11*	*140*
Gibraltar	*5*	*3*	*1*	*1*	*3*	*2*	*4*	*1*	*0*	*2*	*1*	*3*	*26*
Grenada Reps	*4*	*4*	*1*	*0*	*2*	*1*	*1*	*1*	*2*	*0*	*1*	*1*	*18*
Grenada Sen	*1*	*1*	*0*	*1*	*1*	*2*	*1*	*0*	*0*	*1*	*1*	*1*	*10*
Guernsey*	5	4	4	3	1	1	1	0	2	3	2	3	29
India LS	*0*	*5*	*10*	*12*	*5*	*0*	*5*	*21*	*0*	*0*	*14*	*9*	*81*
India RS	*0*	*5*	*10*	*12*	*5*	*0*	*5*	*21*	*0*	*0*	*14*	*9*	*81*
India Gujarat	0	4	26	0	0	0	0	0	2	0	0	0	32
India Haryana	*0*	*0*	*16*	*0*	*0*	*0*	*0*	*0*	*3*	*0*	*0*	*0*	*19*
India Him Pr	*0*	*26*	*0*	*0*	*0*	*0*	*0*	*5*	*0*	*0*	*0*	*4*	*35*
India Kerala	*0*	*1*	*12*	*0*	*2*	*0*	*12*	*0*	*19*	*0*	*7*	*0*	*53*

India Maharash													*7*
India Nagaland	0	0	6	0	0	0	0	1	0	0	0	0	
India Orissa	*0*	*0*	*12*	*0*	*0*	*12*	*3*	*0*	*0*	*0*	*0*	*7*	*34*
India Punjab	*0*	*0*	*13*	*0*	*0*	*0*	*0*	*2*	*0*	*0*	*0*	*0*	*15*
India Rajasthan													19
India Sikkim													
India Tamil Nadu	*5*	*0*	*7*	*16*	*6*	*0*	*0*	*0*	*0*	*0*	*5*	*0*	*39*
India Uttar P													*13*
IoM Keys	*1*	*3*	*4*	*1*	*3*	*2*	*0*	*0*	*0*	*1*	*5*	*1*	*21*
IoM LC	*1*	*3*	*4*	*1*	*1*	*2*	*0*	*0*	*0*	*1*	*5*	*1*	*19*
IoM Tynwald	*1*	*3*	*1*	*2*	*1*	*1*	*3*	*0*	*0*	*2*	*1*	*1*	*16*
Jamaica HR	*3*	*3*	*3*	*7*	*6*	*8*	*7*	*1*	*5*	*3*	*6*	*3*	*55*
Jamaica Senate	*0*	*4*	*3*	*1*	*3*	*4*	*4*	*0*	*2*	*0*	*4*	*4*	*29*
Jersey	2	5	3	2	5	3	5	0	7	5	7	6	50
Kenya	*0*	*0*	*6*	*12*	*5*	*12*	*13*	*7*	*0*	*13*	*13*	*5*	*86*
Lesotho	*0*	*0*	*16*	*0*	*1*	*18*	*3*	*1*	*16*	*17*	*9*	*0*	*81*
Malawi													
Malaysia Reps	*0*	*0*	*12*	*6*	*0*	*8*	*0*	*0*	*14*	*19*	*5*	*0*	*64*
Malaysia Sab	*0*	*0*	*0*	*4*	*0*	*0*	*0*	*1*	*0*	*0*	*0*	*6*	*11*
Malaysia Sara	*0*	*0*	*0*	*7*	*0*	*0*	*0*	*0*	*0*	*0*	*1*	*6*	*14*
Malaysia Sen	*0*	*0*	*0*	*11*	*0*	*0*	*6*	*0*	*0*	*0*	*12*	*0*	*29*
Malaysia Melaka	*0*	*0*	*5*	*0*	*0*	*0*	*0*	*2*	*0*	*0*	*3*	*0*	*10*
Malaysia Negeri Sembilan	0	0	0	3	0	0	0	1	0	0	3	0	7
Montserrat													
Namibia													
NZ H Reps*	0	8	9	4	9	9	6	7	9	3	0	2	66
Nigeria Borno	*20*	*19*	*24*	*10*	*10*	*20*	*25*	*18*	*28*	*20*	*6*	*2*	*202*
Northern Ireland Assembly	*6*	*8*	*9*	*4*	*6*	*10*	*1*	*0*	*6*	*6*	*9*	*3*	*67*
Pak MWFP	*0*	*5*	*0*	*0*	*0*	*25*	*3*	*0*	*10*	*0*	*0*	*0*	*43*
Pak Pun Lah	15	0	13	2	1	13	1	1	6	1	0	15	68
St Lucia	*0*	*1*	*1*	*3*	*1*	*0*	*1*	*1*	*1*	*0*	*1*	*1*	*11*
St V & G	*1*	*0*	*0*	*1*	*1*	*1*	*0*	*2*	*0*	*0*	*0*	*4*	*10*
Samoa	*10*	*0*	*0*	*4*	*1*	*12*	*0*	*0*	*0*	*1*	*0*	*2*	*30*
Scotland	*8*	*6*	*8*	*5*	*9*	*6*	*0*	*0*	*8*	*6*	*8*	*6*	*70*
Seychelles NA	*0*	*5*	*4*	*2*	*2*	*4*	*5*	*0*	*4*	*4*	*4*	*4*	*38*
Singapore	*6*	*2*	*9*	*4*	*1*	*0*	*4*	*1*	*1*	*2*	*1*	*0*	*31*
S Africa NA	*0*	*4*	*6*	*1*	*5*	*2*	*0*	*9*	*6*	*3*	*9*	*0*	*45*
S Africa NCOP	*0*	*3*	*9*	*3*	*6*	*10*	*0*	*2*	*7*	*2*	*7*	*0*	*49*
S Africa NW PL	*0*	*3*	*3*	*5*	*1*	*2*	*0*	*4*	*5*	*0*	*2*	*4*	*29*
S Africa Western Cape Prov Parl	0	3	9	0	0	3	0	4	3	2	4	5	33
Sri Lanka													*68*
Swaziland	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*8*	*96*
T&T HR	*4*	*2*	*4*	*2*	*4*	*3*	*4*	*0*	*4*	*7*	*2*	*2*	*38*
T&T Sen	*2*	*4*	*3*	*5*	*4*	*4*	*4*	*0*	*3*	*4*	*4*	*3*	*40*
Turks & Caic LC	*2*	*0*	*0*	*0*	*4*	*1*	*0*	*2*	*2*	*1*	*0*	*1*	*13*
Uganda													
UK Commons	14	14	21	6	14	18	11	1	9	14	17	11	150
UK Lords	14	12	20	7	15	17	13	1	8	18	18	13	156
Wales													*65*
W Samoa	*0*	*0*	*4*	*0*	*1*	*13*	*14*	*0*	*0*	*1*	*15*	*2*	*50*
Zambia	*9*	*16*	*15*	*0*	*0*	*0*	*12*	*8*	*7*	*18*	*16*	*0*	*101*

UNPARLIAMENTARY EXPRESSIONS

AUSTRALIA

House of Representatives

I imagine his strategy would simply be to rename Cyclone Yasi—to change it to "Cyclone Yusuf" and blame it on the Muslims.	22 February
... what the grubs opposite are prepared to do when it comes to migration.	22 February
... members opposite say that I should be embarrassed ...	23 February
… the Leader of the Opposition is a political con man ...	1 March
We know that the member for Tangney is quite supportive of the One Nation policies ...	1 March
[the Australian people] are confident people who are rejecting your race baiting ...	3 March
... the independents indicate[d] to us that they would support an amendment moved by the opposition that dealt with this issue ...	24 March
The motion was part of the agreement they made with the independents in order to buy their support with this grubby deal that the government has made with the crossbenchers.	24 March
they should be honest ...	23 May
... it is about time the Leader of the Opposition showed that he was not able to be bought by big tobacco and stood up for those who are fighting cancer.	26 May
Thank you, Stanley.	14 June
What a coward!	22 June
Tricky Nicky!	4 July
... from such a barbaric person as he is.	5 July
... slagging and bagging of members ...	6 July
The charlatan, the spiv or the climbing on the back of workers ...	7 July
Jenny, your people wanted an apology ...	16 August
Good riddance!	17 August
That's where he made his money.	24 August
It is not surprising though that there is a deficit of trust because this government is based on a deliberate and duplicitous statement made by the Prime Minister prior to the last election on the issue of a carbon tax.	25 August
I know the Leader of the House has rigged a few elections internally in the Labor Party over the years and has rigged a few outcomes ...	13 September
What a fraud—what an absolute hoax.	15 September
… you treating with contempt the Charter of Budget Honesty.	20 September
… in the interests of their grubby attempt to fundraise, we are unable to proceed with other votes because they want to get out of the House, again demonstrating that if they cannot run the country they will wreck the parliament and that if we cannot govern in the national interest we have to put their interests first.	22 September
This Prime Minister deliberately broke that promise.	11 October
... a calculated action designed to create the impression ...	11 October

... given the amount of workers in his electorate that he has left high and dry and fails to look after ...	13 October
… his short-minded sectarian view ...	13 October
… got the answer factually wrong …	22 November
New South Wales Legislative Assembly	
The member is a racist	21 June
I concede that a North Coast National Party member of Parliament is an expert witness when it comes to speaking on corruption	24 August
This shows a complete lack of honesty and integrity from the Premier, and it shows that he is a politician that cannot be trusted	8 September
Bush tucker man	17 October
I know the member for Maroubra has been at Tuscany ...	25 November
New South Wales Legislative Council	
… the mouthpiece of the egg corporation	2 June
Fraud and hypocrite	2 June
[Suggestion that a member was] squawking	2 June
[Referring to a member] mumbling into her beard	10 August
A piece of work	12 August
Lying prick	15 September
Queensland Legislative Assembly	
I also find the remarks offensive in their stupidity and I ask that they be withdrawn.	23 March
You are such a witty man—a halfwit, anyway.	6 April
On the federal level, the Leader of the Opposition … has described climate change as crap.	6 April
700 pages of legislation would scare the living crap out of anyone	11 May
You are an absolute clown.	12 May
Was it rum o'clock for the member for …	12 May
I take the interjection from the Leader of the Opposition—or, as Kenny Rogers would call him, the "coward of the county"	24 May
… you don't damn well care.	15 June
This lazy, arrogant government … I have had a gutful …	15 June
He knew he was in for a pizzling—sorry.	15 June
Sit down, you imbecile.	16 June
She said terrible things about me, Mr Deputy Speaker. I don't want to listen to this crap.	17 June
… bizarre buffoon from Townsville	23 August
… cowardly attack …	23 August
The member for … was laughing like a jackass.	24 August
I recognise, unlike the Neanderthals over there on the other side …	6 September
… the troglodytes over there in the LNP	6 September
You are spivs and scumbags.	6 September
…the next state election will be one hell of a hit and he will sit there wondering what the hell happened.	25 October
… Queenslanders have had a gutful of the politicians on both sides of the House	25 October

… look those toadies in the eye … dismiss the grubs who are running the LNP	25 October
How stupid does he have to be to not understand that? How dumb is the member for …	25 October
Even though you may many times get knocked in the guts, that is okay	26 October
The LNP did not even have the guts to vote against the act …	29 November
This foundation is nothing more than a sham set up by this government to raise capital to protect its own butt …	30 November
South Australia House of Assembly	
Gibbons at the zoo	8 February
Galah [an Australian bird]	23 June
Victoria Legislative Assembly	
I find it extremely interesting that certain members on the other side of this house give such diatribes about Easter Sunday when they do not believe. There were 23 members out of the 43 who got sworn in who took an affirmation—they do not believe. What diatribes!	2 March
Would I be allowed to do anything other than submit to this gross, base political attack so amply facilitated by the chair?	3 March
You petty little thing	6 April
2-kilowatt dimwit	7 December
Victoria Legislative Council	
There is no need for them, you dill! He is a total dill. Have you read the bill?	22 March
Spectacularly failing	7 April
Mr Right-Said-Ted I'm-Too-Sexy-for-My-Shirt Baillieu	4 May
The other mob	5 May
His influence—indeed some would argue improper influence—over VicUrban	5 May
And have you stopped beating your wife?	31 August
Displaying his lack of moral compass, decency and honesty	31 August
Assorted other leftie nutbags	13 September
You really are thick	13 September
Bleating	10 November
CANADA	
House of Commons	
Both of those parties… are more concerned about furthering criminal operations as opposed to actually stopping criminals from gaining access to our country.	21 June
The fight continues [on members' clothing in the chamber]	23 June
On the take	27 September
Bully	14 December
British Columbia Legislative Assembly	
Nefarious plan	6 October
Yapping over there like some kind of a little dog	27 October
Manitoba Legislative Assembly	
We have Darth Debater on the opposition benches right now and the Imperial Stormtroopers who ...	13 April
Before he got CSI Selinger on the case	21 October

Prince Edward Island Legislative Assembly	
Cons ... conned	26 April
Mouse of Souris	28 April
Puppet	28 April
The so-called minister or wannabe	28 April
Chickenshit change	8 November
Québec National Assembly	
Make-up	31 March
Hide	21 April
Smearing	3 May
Accomplice	24 May
Succeed in shortchanging us	4 October
Gross inability	20 October
Influence peddling	25 October
To be an accomplice of the Liberal child care racket	25 October
Hide [something to]	27 October
Corrupt	8 November
Talking out of both sides of one's mouth	8 November
Puppet	10 November
Disgraceful attempt	15 November
Hide his incompetence	15 November
You have knowingly stolen from us	15 November
Caquistes' cuckold	17 November
Requests for access to information screened by the political power	29 November
Liberal patronage	30 November
If he still has any form of ethical sense	2 December
Political patronage	7 December
Vile and abhorrent behaviour	7 December
Tamper with	8 December
Saskatchewan Legislative Assembly	
Fraudulent behaviour	22 March
Yukon Legislative Assembly	
Shell game	21 February
Odour of mendacity	22 February
Slap in the face	2 March
Bullying	16 March
Sewage	23 March
Abdicating her responsibility	28 March
Fearmongering	13 December

INDIA

Gujarat Legislative Assembly	
Unethical settlement	3 March
Shocked and awakened [by a minister's statement]	7 March
Far from the truth	7 March
Milking a cow and then feeding the dog [meaning exploiting the virtuous to support the undeserving]	8 March

Blackmarketeers, scamsters and corrupt people	15 March
Plotting a new conspiracy to exploit the minority section … to use them to gain their self-interest and political interest	22 March
Fictitious story	23 March
A weak Government	24 March
Playing politics	24 March
The central Government is encroaching upon the rights of the state Government	24 March
Nagaland Legislative Assembly	
Nepotism, favouritism	24 March
Bogus voters	24 March
Rajasthan Legislative Assembly	
Hello, you just crush it.	17 February
Talking nonsense	17 February
You should be ashamed	17 February
If today you get a chance to visit the dispensary	17 February
Just have a look at the dispensary situated in Assembly, where even a single rupee medicine is not available. When the house is running they stack it, otherwise on normal days nothing is available.	17 February
Government of thieves	18 February
Whole Government is engrossed in this den of corruption	18 February
You will be completely ruined	19 February
No whereabouts of his father	19 February
Government is shielding the suppliers of these inferior-quality transformers	23 February
It was Gadkari's marriage, don't know how many cards worth crores were distributed and hon. Members were given gifts worth lakhs	23 February
Wagging your tail	10 March
Shamelessness ... useless	10 March
Rats	10 March
Donkeys	10 March
Corrupts ... have shame you corrupts	10 March
Joker	11 March
Rs. 8 billion, as bribe for you	14 March
Have you bought a wax doll	14 March
Don't give a lecture	14 March
Sleazy acts	15 March
Don of hooligans	15 March
Digambar Singh is habitual of taking commission	15 March
Like an accused	15 March
They have committed murder	17 March
O' Horn, Horn, now just keep quiet	17 March
How much you will lie on this lie with this sleazy man	18 March
Sycophants	18 March
Selling your moral ... speaking lie	18 March
This murderer, sitting and watching	18 March
Shameless ... of shameless	18 March
Cheater	18 March

He is sitting ... one who is murderer, that murderer ...	
Sitting quiet .... this minister is useless	18 March
Gang	22 March
Small Sirens	22 March
Misdeeds	23 August
They have gone mad	26 August
Tout	29 August
Come to senses ... behave yourself	29 August
Rough man	29 August

NEW ZEALAND HOUSE OF REPRESENTATIVES

Shut up! You're gone.	15 February
He has been using xenophobia	16 February
Nothing short of a traitorous act	6 April
Does not have the courage of his personal convictions	13 April
He does not have the guts	18 May
It does not have the moral courage of its convictions	18 May
You're a moron	19 May
They are losers, haters, wreckers and muppets	20 May
Lacks the courage	8 June
Used by the Government to give money to its mates	9 June
The member opposite is a fraud	21 June
Not even game enough	16 August

SOUTH AFRICA

Western Cape Provincial Parliament

Member would look better with a condom over his head	8 March
Chihuahuas [referring to members as]	15 March
Shut up	27 October

UNITED KINGDOM

House of Commons

Rank hypocrisy	18 January

BOOKS ON PARLIAMENT IN 2011

AUSTRALIA

Mr Big of Bankstown: The Scandalous Fitzpatrick and Browne Affair, by Andrew Moore, UWA Publishing, ISBN 9781742582788

Shortlisted in the New South Wales Community and Regional History Prize for non-fiction, this book recounts the story of Bankstown businessman Ray Fitzpatrick and journalist Frank Browne and their place in Australia's political and legal history—the only Australian citizens to be convicted and gaoled for a breach of parliamentary privilege. Their 1955 article in the Bankstown Observer, implicating Charles Morgan MP in an immigration racket, resulted in them being called to appear before the Bar in the House of Representatives on 10 June 1955 to answer the charges brought against them. The House, on a motion from Prime Minister Robert Menzies, voted that Browne and Fitzpatrick be committed to 90 days in gaol. Subsequent appeals to the High Court of Australia and the Privy Council were unsuccessful. Not only does Moore give an insight into the people, politics and personalities involved in this unprecedented event but he also discusses the implications of this case on parliamentary privilege, civil liberties and the freedom of the press.

43rd Parliament—Parliamentary Handbook of the Commonwealth of Australia 2011, Parliamentary Library, Department of Parliamentary Services.

This volume is a comprehensive reference work on the 43rd Commonwealth Parliament. It presents the parliamentary service and political careers of senators and members of the 43rd Commonwealth Parliament, as well as details of parliamentary committees and elections up to and including that of April 2010. All biographical details are correct as of 1 August 2011.

Papers on Parliament No. 55: Lectures in the Senate Occasional Lecture Series, and Other Papers, Department of the Senate, Australia, ISSN 1031976X

Contains transcripts of lectures on parliamentary issues, and other papers, including: *Parliament, Political Ethics and National Integrity Systems* by Charles Sampford; *Elections, Money and Free Speech in the United States* by Diana Dwyre; *The Pryor Perspective: Sharply to the Point* by Kathleen M. Burns; *The Disillusionment of Sir John Downer* by John Bannon; *Square Peg in a Square Hole; Australia's Parliament House* by Andrew Hutson; *Minority Government: is the House of Representatives Finally Catching Up With the*

Senate? by Scott Brenton; *Strengthening the British House of Commons: the Unexpected Reforms of 2010* by Meg Russell; and *The Senate Committee System: Historical Perspectives* by Rosemary Laing.

Papers on Parliament No. 56: Lectures in the Senate Occasional Lecture Series, and Other Papers, by Department of the Senate, Australia, ISSN 1031976X.
Contains transcripts of lectures on parliamentary issues, and other papers, including: *How Not to Do It: Reflections on the 2010 UK Elections* by David Burchell; *Devotion, Daring and Sense of Destiny: Surveyors of the Early Commonwealth* by David Headon; *How Healthy is Australian Federalism?* By Geoff Gallop; *After the Party, the Hangover?: An Analysis of 'Post-Celtic Tiger Ireland' in the Light of the February 2011 Election* by John Barry; *Multiculturalism, Assimilation and the Politics of Terrorism* by Waleed Aly; *Learning to Be a Minister* by Patrick Weller; and *Budgets and Finance: Sunlight and the Dark Arts* by Andrew Murray.

The Australian Voter: 50 Years of Change, by Ian McAllister, University of New South Wales Press, ISBN 9781921410116.

The fog on the hill: how NSW Labor lost its way, by Frank Sartor, Melbourne University Press, ISBN 9780522861068.

CANADA

Politicians above the Law: A Case for the Abolition of Parliamentary Inviolability, by JP Joseph Maingot with David Dehler, Baico Publishing Inc, 2010, $28, ISBN 9781926596846.

Question Period in the Canadian Parliament and Other Legislatures, by Michel Bédard, Library of Parliament.

NEW ZEALAND

What's the Hurry? Urgency in the NZ Legislative Process 1987–2010, by Claudia Geiringer, Polly Higbee and Elizabeth McLeay, Victoria University Press, NZ$60, ISBN 9780864737724.
This book is the result of the first in-depth study of the use of urgency in New Zealand. Material from the study was submitted to the Standing Orders Committee during its review of standing orders, and was discussed by the committee in the context of its recommendation for new procedures for the House to extend its sitting hours.

UNITED KINGDOM

Erskine May—Parliamentary Practice, 24th edition, by Sir Malcolm Jack (ed.), Butterworth, ISBN 9781405751063.

House Full: Time to Get a Grip on Lords Appointments, by Meg Russell, the Constitution Unit, ISBN 9781903903605.

House of Lords Reform Since 1911: Must the Lords Go?, by Peter Dorey, Palgrave Macmillan, £57, ISBN 9780230271661.

House of Lords Reform: A History: The Origins to 1937—Proposals Deferred, by Peter K Raina, Peter Lang, £119, ISBN 9783034307499.

Peter Raina offers a detailed examination of the Lords' constitutional position and the predicament they faced as the Commons increasingly championed popular rule. The author provides a history of the Lords' responses to the new democracy and the stream of arguments, proposals and bills for reform of their House. Raina draws on speeches, letters, reports and memoranda of the times. The two books in volume one cover the period from the medieval origins of the House of Lords and proceed, through many tumultuous events, to the outbreak of the Second World War.

From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging, by James Lee, Hart, £44, ISBN 9781849460811.

Dishonourable insults: a cantankerous collection of political invective, by Greg Knight, Robson, ISBN 9781849541619.

Selective Influence: The Policy Impact of House of Commons Select Committees, by Meg Russell and Meghan Benton, Constitution Unit (University College London), ISBN 9781903903612.

CONSOLIDATED INDEX TO VOLUMES 76 (2008) – 80 (2012)

This index is in three parts: a geographical index; an index of subjects; and finally lists, of members of the Society specially noted, of privilege cases, of the topics of the annual questionnaire and of books reviewed.
The following regular features are not indexed: books (unless substantially reviewed), sitting days and unparliamentary expressions. Miscellaneous notes and amendments to standing orders are not indexed in detail.

ABBREVIATIONS

ACT	Australian Capital Territory	NSW	New South Wales
Austr.	Australia	N.Terr.	Northern Territory
BC	British Columbia	NZ	New Zealand
Can.	Canada	Reps	House of Representatives
HA	House of Assembly	RS	Rajya Sabha
HC	House of Commons	SA	South Africa
HL	House of Lords	Sask.	Saskatchewan
LA	Legislative Assembly	Sen.	Senate
LC	Legislative Council	T & C	Turks and Caicos
LS	Lok Sabha	T & T	Trinidad and Tobago
NA	National Assembly	Vict.	Victoria
NI	Northern Ireland	WA	Western Australia.

GEOGRAPHICAL INDEX

For replies to the annual questionnaire, privilege cases and reviews see the separate lists.

SUBJECT INDEX

Sources and authors of articles are given in brackets.

LISTS

Members of the Society

Abbreviations: R *retirement,* O *obituary.*

Privilege Cases

* *Marks cases when the House in question took substantive action.*

Questionnaires

Reviews