# The Table

THE JOURNAL OF
THE SOCIETY OF CLERKS-AT-THE-TABLE
IN
COMMONWEALTH PARLIAMENTS

EDITED BY
NICOLAS BESLY

**VOLUME 78**
**2010**

THE SOCIETY OF CLERKS-AT-THE-TABLE
IN COMMONWEALTH PARLIAMENTS
HOUSE OF LORDS
LONDON SW1A 0PW

ISBN 978-0-904979-35-0
ISSN 0264-7133

# CONTENTS

**THE TABLE**
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# EDITORIAL

This year's edition of *The Table* contains plenty of variety: a reflection perhaps of the issues encountered by clerks across the Commonwealth. It features articles by two distinguished former editors of the journal: Christopher Johnson, editor from 2003 to 2008, and Brendan Keith, editor from 1984 to 1990.

Christopher Johnson, Clerk of the Journals in the House of Lords, covers the "cash for amendments" allegations in the Lords and their aftermath. At a time of heightened public and media attention on the ethics and remuneration of parliamentarians a major newspaper enticed members of the House into suggesting they would be willing to seek to amend a bill before the House as part of a financial relationship. Four peers were investigated by the relevant Lords committee; two were found culpable and, following debate about whether the House had the power to do so, suspended for the remainder of the session. Following that a new Code of Conduct was drawn up, and a new Commissioner for Standards in the House of Lords created. All are fully covered in the opening article.

Brendan Keith is the Registrar of Lords' Interests in the House of Lords. Particularly now the new Code of Conduct is in place, that is quite a job in itself. Prior to 2009, though, he combined being Registrar with being Clerk of the Judicial Office in the Lords: running the office that supported the Lords in its capacity as the highest court in the land. The years since 2003 were also filled with preparations for the new United Kingdom Supreme Court. That officially opened in October 2009, bringing to an end the Lords' appellate jurisdiction. Brendan's article looks back on the judicial role of the Lords and recalls the process of creating the new Supreme Court.

Charles Robert, Principal Clerk of Chamber Operations and Procedure in the Senate of Canada, has written authoritatively in this journal in recent years about privilege (please see, in particular, volumes 74 (2006), pages 7–21, and 75 (2007), pages 17–38). He latest offering is an alternative look at privilege in the Canadian context. This study is in two parts: the first, in this edition, covers the Constitution Act 1867. The thrust of the article is that even though the privileges of the Canadian Parliament are based on those of the

Westminster House of Commons, the basis of those privileges differ—there is not the same historical need to secure the independence of Parliament from the Crown—and therefore privilege is anchored in the constitution and the law, rather than on the principle of necessity. This makes it distinct from, and perhaps more constrained than, the privileges of the Westminster House of Commons. The second part of this alternative look at privilege in Canada will feature in next year's edition and will cover the Constitution Act 1982.

This edition also features a diverse trio of articles from clerks in Australia. Richard Pye, Clerk Assistant (Procedure) of the Senate, writes on the control of delegated legislation—a subject much covered in previous editions and growing in importance. His article covers a dilemma faced by parliaments in considering the merits of an item of delegated legislation, viz. that usually a legislature has a stark choice of accepting the instrument in full or rejecting it in full. The article explores recent developments in the Australian Senate that have sought ways around that.

Robyn Smith, Parliamentary Officer at the Legislative Assembly of the Northern Territory, recalls noteworthy political developments there, in which a motion of no confidence in the government swung on a single independent member.

Neil Laurie, Clerk of the Parliament of the Queensland Legislative Assembly, brings us back to the field of ethics, but not in relation to particular allegations of misbehaviour. Rather, his article summarises his submission to a review of integrity and accountability in Queensland and provides some useful guidance on the theories underlying ethical rules which apply in parliaments.

At last year's meeting of the Society of Clerks-at-the-Table in Arusha, Tanzania, the outgoing Clerk of the Australian House of Representatives, Ian Harris, presented a paper on the role of the Clerk of the House. The matter attracted such interest that it became the subject of this year's annual comparative study. As always, the results make for interesting reading.

Any ideas for future areas of inquiry would be gratefully received. In the mean time I thank most warmly all those who have contributed to this year's edition and hope it makes for interesting reading.

## MEMBERS OF THE SOCIETY

### *Australia House of Representatives*

**Bernard Wright** was promoted to the position of Clerk of the House, following the expiration of **Ian Harris**' 10 year period of appointment prescribed under the Parliamentary Service Act 1999 (section 58(3)).

**David Elder** was promoted to the position of Deputy Clerk.

**Robyn Webber** retired from the position of Clerk Assistant (Committees).

**Joanne Towner** was promoted to the position of Clerk Assistant (Committees) in March 2010.

**Claressa Surtees** was promoted to the position of Serjeant-at-Arms in March 2010.

### *Australia Senate*

Former Clerk of the Senate, **Harry Evans**, retired on 4 December 2009 after serving nearly 22 years in that role and 40 years with the Senate. In valedictory statements on 19 November 2009, the President of the Senate and senators paid tribute to his exemplary service and championship of the institution of parliament. Dr **Rosemary Laing** was appointed to the position on 5 December 2009, having served as Deputy Clerk since 2005 and Clerk Assistant since 1993.

Former Deputy Clerk of the Senate, **Anne Lynch**, who retired in 2005, died on 24 April 2009 after a long battle with cancer. She was well-known throughout the parliamentary world for her expertise in parliamentary privilege and her work in support of the Senate Committee of Privileges. She was made a Member of the Order of Australia (AM) in 2006.

Former Usher of the Black Rod, **Andrea Griffiths**, departed on long leave pending retirement in December 2008. Her replacement, **Brien Hallett**, was appointed in January 2009.

### *Queensland Legislative Assembly*

**Stephen Finnimore** was appointed Manager of the Committee Office in September 2009. Stephen also continues in his role as a Committee Research Director.

### *Canada House of Commons*

**Marie-Andrée Lajoie**, Clerk Assistant, retired on 3 December 2009 after more than 29 years in the service of the House of Commons.

### *Saskatchewan Legislative Assembly*

In 2009, the Clerk Assistant position was eliminated and **Iris Lang** was promoted to Principal Clerk from her previous position of Clerk Assistant (Committees). The Clerks-at-the-Table include **Greg Putz**, Clerk, **Ken Ring**, Law Clerk and Parliamentary Counsel and Iris Lang, Principal Clerk.

### *United Kingdom House of Commons*

**Sir Charles Gordon**, Clerk of the House from 1979 to 1983, died on 1 March 2009 aged 90. He entered the Clerk's Department as an Assistant Clerk in 1946 and later became, *inter alia*, Fourth Clerk at the Table, Clerk of the Overseas Office, Principal Clerk of the Table Office and Clerk Assistant. He edited the 20th edition of *Erskine May* and co-edited *The Table* for a decade. Sir Charles was appointed CB in 1970 and KCB in 1981.

**Douglas Millar CB** retired as Clerk Assistant and Director-General of Chamber and Committee Services.

**Robert Rogers** moved from Clerk of Legislation to Clerk Assistant and Director-General of Chamber and Committee Services.

**David Natzler** moved from Clerk of Committees to Clerk of Legislation.

**Jacqy Sharpe** was promoted from Principal Clerk, Table Office to Clerk of Committees.

**Andrew Kennon** moved from Clerk of the Journals to Principal Clerk, Table Office.

**Liam Laurence Smyth** was promoted from Clerk of Bills to Clerk of the Journals.

### *United Kingdom House of Lords*

**Lieutenant-General Sir Michael Willcocks KCB, CVO** retired as Gentleman Usher of the Black Rod and Serjeant-at-Arms in April 2009. He was replaced by **Lieutenant-General Sir Frederick Viggers KCB, CMG, MBE**.

**Brigadier Hedley Duncan MBE, OBE** retired as Yeoman Usher of the Black Rod and Deputy Serjeant-at-Arms in August 2009. He was replaced by **Lieutenant-Colonel Edward Lloyd-Jukes**.

# CONDUCT OF MEMBERS: RECENT DEVELOPMENTS IN THE HOUSE OF LORDS

CHRISTOPHER JOHNSON
*Clerk of the Journals, House of Lords*

## Introduction

The 2009 *Table* described the events leading to the House's agreement, in December 2008, to a new procedure for receiving and investigating complaints against members of the House.[1] That note concluded with the reappointment, on 19 January 2009, of the body charged with conducting investigations, the Sub-Committee on Lords' Interests (a sub-committee of the Committee for Privileges). Just six days later, on 25 January 2009, the *Sunday Times* newspaper published an article alleging that four members of the House were "prepared to accept fees of up to £120,000 a year to amend legislation in the House of Lords on behalf of business clients."

The story was based on essentially the same "sting" as the *Sunday Times*' celebrated "cash for questions" story of July 1994, which led to the suspension of two MPs. On this occasion journalists posed as lobbyists acting on behalf of a Hong Kong-based client, who was seeking to establish a chain of retail outlets in the United Kingdom. Their stated objective was to establish a financial relationship with a member of the House, who could act on behalf of their client, in particular by helping to amend the Business Rates Supplements Bill, which was then going through the House of Commons. The newspaper claimed to have approached 10 members, most of whom refused to help the supposed lobbyists. However, it alleged that the four members, Lords Moonie, Snape, Taylor of Blackburn and Truscott, all belonging to the governing Labour party, were willing to take money in return for providing these services. However, unlike the 1994 case, no money changed hands. Nor were contracts signed—the "sting" was cut short, for reasons which remain unclear, when the story was published on 25 January.

The *Sunday Times* story was, for the House of Lords, without precedent. The potential for lasting damage to the House's reputation was immediately apparent. The day after the story broke, the Leader of the House, Baroness

[1] See "Procedure for investigating complaints", pp 90–92. The procedure was set out in the Committee for Privileges, 4th Report, 2007–08 (HL Paper 205) (the "4th report").

Royall of Blaisdon, said that she had already "referred these allegations to the Sub-Committee on Lords' Interests" for investigation. She also announced that she had separately asked the Chairman of Committees, who also chairs the Committee for Privileges, "to consider any issues relating to the rules of the House that arise, especially in connection with consultancy arrangements, and in connection with sanctions in the event that a complaint against a Member is upheld".

Thus three strands of activity were identified almost immediately: an investigation into the specific allegations; a review of the sanctions available to the House in the event of a serious complaint being upheld; and a review of the House's rules, in particular the Code of Conduct. The first and second of these strands predominated from January until late May; the final strand followed in the summer and autumn of 2009. The remainder of this article describes each strand in turn.

## The investigation

### *Interpreting the Code of Conduct*

The newly-appointed, five-strong Sub-Committee on Lords' Interests faced a huge and wholly unexpected challenge: not only to conduct a thorough and fair investigation, under intense pressure from the media and from lawyers representing the four peers, but to get to grips with the meaning of a Code of Conduct which, since its adoption in 2001, had never been properly analysed or explained. There was next to no case law to build on—the handful of complaints received since 2001 had not resulted in any significant investigations.

In the event, the Sub-Committee held 18 meetings in the course of the three-month investigation; most lasted half a day or a whole day. 11 of these meetings were by way of preparation for oral hearings with each of the four peers in turn. In the course of these preliminary meetings the Sub-Committee sought to construe the Code of Conduct itself, in order to establish which provisions, if any, might have been breached. In addition it spent many hours listening to tape recordings and videotapes acquired by the *Sunday Times* in the course of the "sting". The *Sunday Times* also provided transcripts of these tapes, but subsequently, doubt having been cast on the accuracy of the transcripts, the Sub-Committee commissioned their own transcripts, which were prepared under conditions of strict confidentiality by Hansard reporters.

A key issue for the Sub-Committee was to decide whether the actions of the four peers, if proved, constituted a breach of the Code of Conduct. The key

provision was paragraph 4 of the Code, which the Sub-Committee described as "dominant in the Code":[2]

"4. Members of the House:
(a) must comply with the Code of Conduct;
(b) should act always on their personal honour;
(c) must never accept any financial inducement as an incentive or reward for exercising parliamentary influence;
(d) must not vote on any bill or motion, or ask any question in the House or a committee, or promote any matter, in return for payment or any other material benefit (the "no paid advocacy" rule)."

At first sight it might have appeared that the four peers had breached the "no paid advocacy" rule set out in paragraph 4(d) of the Code. However, as already noted, no money changed hands; no contracts were signed; no action was taken (or alleged to have been taken) by any of the four peers. All that was alleged against them was that they had been "prepared to accept" fees in return for such services. It was therefore clear that no breach of paragraph 4(d) of the Code had occurred.

The Sub-Committee then considered paragraph 4 as a whole. The Sub-Committee noted that the House had "long accepted that [members] should not promote in Parliament the interests of an outside body in return for a financial inducement. To do so would be to engage in paid advocacy." It therefore concluded that paragraphs 4(c) and 4(d) were intimately linked: "Paragraph 4(d) gives examples of the kind of activities falling under the no-paid-advocacy rule, which is more generally described by paragraph 4(c)."

The Sub-Committee further argued that "any *agreement* to promote an amendment in return for a fee" (my emphasis) would constitute a breach of paragraph 4(c), whether or not money changed hands. Moreover, "in negotiating or attempting to negotiate such an agreement the Lord in question would in our view also have failed to act on his personal honour in breach of paragraph 4(b) of the Code."

This interpretation of the Code had far-reaching implications. Of particular importance was the emphasis on the archaic-sounding concept of "personal honour", which was further refined by the parent Committee, the Committee for Privileges, as follows: "The term 'personal honour' has been used within the House for centuries to describe the guiding principles that govern the conduct of Members; its meaning has never been defined, and has not needed

[2] Committee for Privileges, 2nd Report, 2008–09 (HL Paper 88-I), p 29.

definition, because it is inherent in the culture and conventions of the House. These change over time, and thus any definition of 'personal honour', while it might achieve temporary 'legal certainty', would quickly become out-moded … the term 'personal honour' is ultimately an expression of the sense of the House as a whole as to the standards of conduct expected of individual Members."This interpretation played an important part in the preparation of the House's new Code of Conduct later in 2009 (discussed below).

### *Procedural difficulties*

At an early stage of the investigation the Sub-Committee sought written evidence from the four members. All provided such evidence. Subsequently, in response to invitations from the Sub-Committee, three of the members, Lords Moonie, Snape and Truscott, accepted invitations to appear before the Sub-Committee; transcripts of their evidence were published in the final report.

The fourth member, Lord Taylor of Blackburn, ultimately refused to appear in person. The exchanges between the Sub-Committee and Lord Taylor or (more often) his legal representative, reprinted in full in the final report, illustrate the procedural and quasi-legal difficulties facing the Sub-Committee. These may be outlined under four headings: procedural fairness; representation by counsel; the burden of proof; the applicability of human rights legislation.

Lord Taylor's lawyer, in raising procedural objections to the conduct of the investigation, was assisted by a provision in the Code, deriving ultimately from a recommendation of the Joint Committee on Parliamentary Privilege in 1999.[3] This stated that "in the investigation and adjudication of complaints against them, members of the House have the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies".

This provision was interpreted as a guarantee that the procedure adopted in the investigation should provide the "defendant" with the same rights as those enjoyed by defendants in the criminal justice system. For instance, there were challenges to the legitimacy of the investigation on the basis that there had been no formal "complaint", merely a request from the Leader of the House for the investigation to be initiated. Lord Taylor's lawyer also sought permission to call, and to cross-examine, other witnesses, including the *Sunday Times* journalists. The Sub-Committee was unable to accede to these requests. While it sought to conduct the investigation in accordance with the principles of natural justice and fairness (encompassing, for instance, full

[3] Report of the Joint Committee on Parliamentary Privilege, session 1998–99 (HC 214/HL 43), paragraph 281.

disclosure of evidence), the Sub-Committee insisted that it was entitled, as a committee of the House, to determine its own procedures rather than complying with judicial standards.

As for legal representation, the Sub-Committee insisted that it would take oral evidence only from the members concerned, and would not hear counsel. This insistence was reinforced by Standing Order 67 (now 66): "A Select Committee shall call such evidence as it may require, but shall not hear parties by Counsel unless so authorised by Order of the House." However, it will be clear from preceding paragraphs that the Sub-Committee did engage in extensive correspondence with legal representatives, and treated such correspondence as evidence for the purposes of the investigation.

On the burden of proof, the Sub-Committee, in accordance with the procedure described in the 4th Report of the Committee for Privileges, adopted the civil standard (the "balance of probabilities"), while Lord Taylor's lawyer argued, on the basis of cases heard in the courts, that the criminal standard ("beyond a reasonable doubt") should apply. The Committee for Privileges, in hearing appeals, ultimately endorsed the Sub-Committee's approach: "while taking the civil standard of proof, the balance of probabilities, as the appropriate standard, we have, in the light of the seriousness of the allegations, taken the view that particularly strong evidence should be required before we may be satisfied that the allegations are proved."

Finally, it was argued that in investigating the allegations against the four peers the Sub-Committee was subject to obligations as a "public authority" under the Human Rights Act 1998, and that it was therefore under a duty to comply with Article 6 of the European Convention on Human Rights.[4] The Sub-Committee did not formally reach a view on this point; indeed, ultimately the matter could only be determined by the European Court of Human Rights. The Court has previously held that proceedings against a non-member for contempt were subject to Article 6; however, the judgment in that case explicitly differentiated between contempt proceedings against non-members and internal disciplinary proceedings which "relate to the internal regulation and orderly functioning of the House". [5]

In summary, the Sub-Committee were under enormous pressure to turn their investigation into something closely resembling a full-blown trial. They refused to bow to this pressure, or to take oral evidence from any but the

[4] Article 6 states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[5] *Demicoli v Malta* (1991) 14 EHRR 47, para 33.

members concerned. This led ultimately to Lord Taylor's refusal to give evidence in person, with the result that his case was judged solely on the basis of written evidence.

### *The Sub-Committee's conclusions*

Eventually, in late April, the Sub-Committee concluded their investigation. They found that three of the four members, Lords Snape, Taylor of Blackburn and Truscott, had breached paragraph 4(b) of the Code, in that they had failed to act on their personal honour. The fourth member, Lord Moonie, was exonerated of any breach of the Code. The Sub-Committee made no recommendation as to the appropriate sanction in each case.

On 23 April the relevant sections of the Sub-Committee's report were sent to the members concerned. At the same time each was notified of his right, in accordance with paragraph 19(e) of the Code, to appeal against the Sub-Committee's findings to the Committee for Privileges.

### *Appeal heard by the Committee for Privileges*

The three members found to have breached the Code all decided to appeal to the Committee for Privileges, in each case providing written appeals, either personally or through their legal advisers. One, Lord Snape, also appeared in person before the Committee for Privileges on 11 May 2009. Lord Taylor of Blackburn, whose lawyer submitted a 172-paragraph written appeal on his client's behalf, again declined to appear in person, as did Lord Truscott.

Those members of the Committee for Privileges who had taken part in the Sub-Committee investigation (three in number), together with the Leader of the House (as the complainant), disqualified themselves from hearing the appeal. This reduced the Committee's numbers from 16 to 12.

The Committee for Privileges upheld the appeal of Lord Snape, on the grounds that the Sub-Committee had not given sufficient weight to the fact that he simply had no time, between his one tape-recorded conversation with the journalists, and the publication of the *Sunday Times* story, to consult colleagues or staff, check the rules, and so on. Lord Snape insisted that he would have taken no steps without first consulting the Registrar, but the premature termination of the "sting" meant that he had barely 24 hours in which he could have done so. The Committee, on the balance of probability, accepted Lord Snape's account, and accordingly upheld his appeal.

The Committee dismissed the appeals of Lord Truscott and Lord Taylor of Blackburn, and therefore upheld the Sub-Committee's findings that both had breached paragraph 4(b) of the Code of Conduct, in failing to act on their per-

sonal honour. The Committee's report, to which the Sub-Committee's report was annexed, was published on 14 May 2009, in two volumes—a report volume of around 100 pages, and an evidence volume of around 500 pages.

The next section addresses the question of sanctions.

## The powers of the House Lords

### *Received wisdom*

The working group which drew up the procedure for investigating complaints, set out in the 4th Report of the Committee for Privileges of 2007–08, stated that:

> "It is generally accepted that the House has no power to suspend or expel a Member. Nor does the House possess an effective power to fine its Members, who are unpaid. If a complaint is upheld, therefore, the only sanction currently available to the Committee for Privileges is to bring the conduct of the Member concerned to the attention of the House."[6]

In coming to this conclusion, the working group reflected an orthodox view of the powers of the House, which had since at least the 19th century been generally, if not universally, accepted. The most thorough examination of the issue was the report in 1956 of the Select Committee on the Powers of the House in relation to the Attendance of its Members ("the 1956 Committee"). This Committee was established at a time when the House was almost wholly made up of hereditary peers.[7] Its aim was to find ways to improve the attendance of the "backwoodsmen"—hereditary peers who, though members of the House, seldom or never attended.

The 1956 Committee noted that the letters patent by which new peers were created signified the monarch's intention that the peer (and his successors) should "have hold and possess a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom amongst the Barons." Peers therefore have a constitutional right to membership (unless that right is subsequently modified or withdrawn by legislation). More specifically, they have a constitutional right to receive a "writ of summons", the formal royal summons which, at the commencement of each new Parliament, instructs them to attend the House and given counsel

[6] *Op. cit.*, Appendix, paragraph 10.

[7] The Committee predated the Life Peerages Act 1958, which allowed the creation of large numbers of life peers. Before 1958, the only "life peerages" were those created for senior judges under the Appellate Jurisdiction Act 1876.

on affairs of state. The right of every peer, not otherwise disqualified by statute, to receive a writ of summons, is enshrined in the Earl of Bristol's case of 1626, where the House resolved that even the Sovereign could not withhold the writ of summons from a peer otherwise entitled to receive it.

It was therefore clear that the House could not, by resolution, reverse the effect of the letters patent; it followed also that it could not remove a peer's entitlement, at the start of each Parliament, to receive a writ of summons. The conclusion of the 1956 Committee, endorsed by subsequent editions of *Erskine May*, was therefore that "a resolution by the Lords as a legislative body could not exclude a member of that House permanently".[8]

However, the 1956 Committee's conclusion left two key questions unanswered. First, while permanent exclusion was impossible, what about temporary exclusion? Secondly, the 1956 Committee was concerned only with non-attendance and so excluded possible misconduct by members. For example, the then Attorney General, Sir Reginald Manningham-Buller, stated in written evidence that "we can find no precedent which would form a satisfactory basis for preventing a peer who has not been guilty of any positive misconduct from exercising his rights as a member of the House of Lords". He said nothing of what might be the powers of the House in respect of a peer who *had* been guilty of such misconduct.

The Joint Committee on Parliamentary Privilege, in 1999, revived these uncertainties, concluding that "whether a peer can otherwise be suspended within the life of a single Parliament is not clear." The Committee recommended accordingly that "the power of the House of Lords to suspend its members should be clarified and confirmed. The House of Commons has power to suspend its members, and it would be anomalous and undesirable if this were not the position in the House of Lords" (paragraph 279). The events of January 2009 suddenly made this long-standing anomaly a matter of crucial and urgent importance.

### *Legal advice*

After the allegations appeared, the Committee for Privileges immediately sought the advice of the Attorney General, Baroness Scotland of Asthal, on the range of sanctions available to the House in the event of a serious complaint against a Member being upheld. The Attorney General's response was cautious. She acknowledged that it was "possible to construct a respectable argument that the power of the House to regulate its own procedures includes a power to suspend a member for a period within a Parliament on the grounds

[8] *Erskine May*, 23rd edition (2004), p 50.

of misconduct." However, she considered, on balance, that the House had no such power:

> "the key factor ... is that a suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament (albeit to a lesser degree than permanent exclusion). This is a fundamental constitutional right and any interference with that right cannot be characterised as the mere regulation of the House's own procedures."[9]

The Attorney General also drew attention to the Resolution agreed by both Houses in 1705, that "neither House of Parliament hath power, by any Vote or Declaration, to create to themselves any new Privilege, that is not warranted by the known Laws and Customs of Parliament". She advised that a decision to suspend or expel a Member would constitute the creation of a "new privilege", contravening the 1705 resolution.

The Committee for Privileges considered the Attorney General's advice on 12 February 2009—just over a fortnight after the *Sunday Times* allegations appeared—and decided that a second opinion should be sought. In case it appears unusual that the Committee should not immediately accept the advice of the senior Law Officer, it is worth recalling the Committee's unique history and character. The Committee for Privileges first emerged in the early 17th century, when it was, in effect, a committee of the whole House, constituted to determine key points of privilege—and, in particular, of peerage law. From the beginning the Committee was in effect a judicial forum, something reflected in later years by the requirement that, when hearing peerage claims, the Committee should sit with not fewer than three "Lords of Appeal" (that is to say, present or former holders of high judicial office).

While the Crown, through the Attorney General, has always been available to assist the Committee, the Committee has never been bound to accept the Attorney General's advice. Indeed, as recently as 1984 the Committee considered a reference from the House on the effect of mental health legislation on the privilege of freedom from arrest and on the privilege of peerage, and in its judgment dissented from the advice of the then Attorney General. In so doing, the Committee concurred with the opinions of two serving and two retired Lords of Appeal.[10]

[9] Committee for Privileges, *The Powers of the House in respect of its Members*, 1st Report, 2008–09 (HL Paper 87), paragraph 4.

[10] Lords Journal, 217 (1983–84), p 727; HL Deb., vol. 455, c. 13.

In early 2009 the imminent disqualification of serving judges from participating in the House's work[11], as a result of the establishment of the United Kingdom Supreme Court, made it difficult to call upon their assistance in determining the House's disciplinary powers. However, the Committee for Privileges itself possessed significant judicial expertise, notably in the person of Lord Mackay of Clashfern, a former Lord of Appeal in Ordinary and, from 1987 to 1997, Lord Chancellor. Lord Mackay accordingly agreed to provide a second opinion.

Lord Mackay's advice to the Committee differed from that provided by the Attorney General. He accepted that members had a constitutional entitlement to receive a writ of summons at the commencement of each new Parliament, and thus that the House had no power to expel a member permanently. However, he also drew attention to the House's extensive powers of self-regulation, for instance its power to adopt standing orders to preserve "order and decency". This power of self-regulation was not in itself a "privilege", but a power "comparable to that enjoyed by many other organisations by virtue of the ordinary law." The "privilege" (or "exceptional right of advantage") enjoyed by the House lay not in its power of self-regulation, but in the fact that this power was not subject to judicial oversight.

Lord Mackay therefore advised that the writ of summons came with certain "implied conditions" attached, in particular a requirement that Members respect the rules of the House: "the way in which the duty imposed by the writ of summons ... is performed is necessarily subject to modification by the House, in accordance with its own rules of procedure". The House had no power to withhold the writ; but its power to modify the effect of the writ, once issued, was extensive. It followed therefore that "if a Member of the House were to be guilty of a clear and flagrant breach of the rules of the House, gravely transgressing the conditions implied in the writ of summons, it would be open to the House to prevent him, by resolution, from attending for such definite period as the House deemed appropriate."

Lord Mackay then, more briefly, addressed the question of the 1705 resolution, and the historical basis for the House's penal powers. Arguing in part by analogy with the development of similar powers in the House of Commons, he concluded that the House of Lords "had in 1705 an inherent power, deriving from its status as a constituent part of the High Court of Parliament, to discipline its Members." This was borne out by precedents from the early and mid-17th century, such as the suspension of the Earl of

[11] By virtue of section 137 of the Constitutional Reform Act 2005, which came into force on 1 October 2009.

Middlesex on 19 May 1642. These precedents had been, in later periods, largely dismissed as untrustworthy, but their existence certainly weakened the argument that a decision to suspend a Member would constitute the creation of a "new privilege".

### *Conclusions of the Committee for Privileges*

The Committee for Privileges formally considered the advice of the Attorney General and Lord Mackay of Clashfern on the same day, 11 May 2009, as it considered the appeals of Lord Snape, Lord Taylor of Blackburn and Lord Truscott. Before considering the appeals, the Committee unanimously endorsed the advice of Lord Mackay of Clashfern, and agreed the following conclusions, subject to the final decision of the House:

> "The House has no power, by resolution, to require that the writ of summons be withheld from a Member otherwise entitled to receive it; as a result, it is not within the power of the House by resolution to expel a Member permanently.
>
> "The House does possess the power to suspend its Members for a defined period not longer than the remainder of the current Parliament."

The Committee then turned to the appeals. As previously stated, the Committee upheld Lord Snape's appeal, but rejected the appeals of Lord Taylor of Blackburn and Lord Truscott. In light of its previous decision on the powers of the House, the Committee agreed to recommend that the two latter peers, having been found to have failed to act on their personal honour, be suspended from the service of the House until the end of the 2008–09 session of Parliament (in effect, around six months).

### *Decision of the House*

The Committee's recommendations on the powers of the House were debated on 20 May 2009. In the course of a 90-minute debate there was broad support for the Committee's actions. The Attorney General spoke in the debate, and urged caution, without going so far as to seek to persuade the House to reject the Committee's report. The report was then agreed unanimously.

The House then, without further debate, agreed the report on the four peers. The House finally agreed two separate motions formally suspending the Lords Taylor of Blackburn and Truscott for the remainder of the 2008–09 session of Parliament. The motions took effect immediately.

## The Leader's Group on the Code of Conduct

Although the Leader of the House, in her answer on 26 January, had referred to the need to consider any "issues relating to the rules of the House that arise, especially in connection with consultancy arrangements", in the event it was felt that no such consideration should take place until after the investigation was over and the outcome decided. Then, the day after the suspensions, on 21 May, the Leader made a statement in the House announcing that she had "set up a Leader's Group with the terms of reference as follows: to consider the code of conduct and the rules relating to Members' interests and to make recommendations".[12]

A "Leader's Group" is, as the name implies, a group of members appointed by the Leader of the House to examine a particular issue or range of issues and report back to the Leader. The strength of such groups lies in their informality and freedom from procedural constraints. They have the opportunity to make innovative, even radical, recommendations, in the knowledge that these recommendations are of no force unless and until they are put to the House by more formal means. Although appointed by the Leader of the House, Leader's groups are only possible where there is cross-party agreement on terms of reference and membership. Indeed, the Leader's power to establish such groups and receive their reports epitomises the dual role of the Leader of the House of Lords, who, as well as being a government minister, "advises the House on procedure and order" and also, on certain occasions, is required to express "the sense of the House".[13]

On this occasion the Leader's Group was six-strong, and chaired by a Crossbench (independent) member, the former Archbishop of Armagh, Lord Eames. The Group also comprised two members from the governing Labour Party, two Conservative members and one Liberal Democrat. The Group met first on 9 June, and held 13 meetings in total, including meetings with the Lord Speaker, the Chairman of Committees, the Leaders of the main parties, senior officials, the Chairman of the House of Commons Standards and Privileges Committee, and with representatives of the Committee on Standards in Public Life and the House of Lords Appointments Commission.

The advantages of the Group's informal status were apparent in the course of these meetings. They were held in private, and, although informal notes were taken for the Group's own use, no transcript was taken and no record published—in effect, the Group was able to apply the "Chatham House rule",

[12] HL Deb., 21 May 2009, col. 1434.

[13] *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2010), p 60.

so encouraging frank and detailed discussion of the difficult issues around members' conduct. The Group also sent a series of questions to all members of the House, and 34 written responses were received, again in confidence. A striking feature of the Group's work was the harmony among its members. Whereas the last Leader's Group to consider standards of conduct, in 2001, was politically riven[14], by 2009 there appeared to be a consensus on all sides of the House on the way forward.

The reasons for this unity of purpose were not hard to find. As well as the case of the four peers, from May 2009 onwards a series of stories appeared in the media alleging misuse of expenses by members of both Houses. Although most of the stories related to MPs, there were also allegations against several members of the House of Lords. These exposed a huge lacuna in the 2001 Code of Conduct, which focused narrowly on registration and declaration of interests, and "paid advocacy", but made no reference to the use of members' expenses or the facilities of the House. The result was that even the most flagrant misuse of the expenses system would not, *prima facie*, constitute a breach of the Code of Conduct. A complaint relating to expenses would not be subject to investigation by the Sub-Committee on Lords' Conduct—instead it would be investigated by the Clerk of the Parliaments, as Accounting Officer for the House of Lords. Only in "exceptional circumstances" could he request the Sub-Committee to assist him in investigating a "complex or serious" complaint.[15] This procedure did not stand up well to the intense media scrutiny that affected both Houses from May 2009 onwards.

The Group were thus able to agree and publish their report, on schedule, in late October.[16] The key recommendations made by the Group were as follows:

- That instead of a single Code of Conduct, incorporating rules on the registration of interest, there should be two documents: a high-level Code of Conduct, agreed by resolution of the House, and setting out key principles of conduct; and an accompanying Guide, providing detailed explanation and interpretation of these principles, and focusing in particular on the rules

[14] See HL Deb., 2 July 2001, cols 630–87, when the House agreed the Code of Conduct previously proposed by the Leader's Group appointed to consider the recommendations of the Committee on Standards of Conduct in Public Life on standards of conduct in the House of Lords. On this occasion an amendment to the Code, proposed by two opposition members of the Leader's Group, was defeated by 152 to 149.

[15] Committee for Privileges, 4th Report, 2007–08 (HL Paper 205), paragraph 11.

[16] *Report of the Leader's Group on the Code of Conduct*, HL Paper 171 (see http://www.publications.parliament.uk/pa/ld/ldlead.htm).

for the registration and declaration of interests. The Group provided texts for both the proposed new Code and the Guide.

- That the Code and the Guide should emphasise, in positive terms, the role of the House and the contribution that members of the House were expected to make to its work. In particular, the Group noted that members did not receive a regular salary, and that membership of the House did not constitute full-time employment. The Group's proposed Code stated in terms that in discharging their parliamentary duties members were "expected to draw substantially on experience and expertise gained outside Parliament."
- That members of the House should sign a formal undertaking, immediately after taking the oath on introduction or at the start of a new Parliament, to abide by the Code of Conduct. Signing the undertaking did not make the Code more binding—as a set of rules agreed by resolution of the House it was binding in any case—but it did underline members' personal commitment to upholding the standards embodied in the Code.
- That "parliamentary consultancies" should be banned. In other words, there would be a ban on members accepting payment in return for providing either parliamentary services (tabling questions, arranging meetings, lobbying ministers or officials, and so on) or parliamentary advice (advising paying clients on how they can influence the parliamentary process).
- That the categories of registrable interest should be simple and clearly defined, with specific thresholds for the registration of financial interests.
- That members should be required to disclose any relevant registrable interests when tabling written notices, including all questions and motions. As a result of this recommendation, specific interests relevant to written notices are now identified in the online *House of Lords Business*.[17]
- That the Code should require members to observe any rules agreed by the House in respect of financial support and expenses, and the use of facilities (such as the Refreshment Department). The rules themselves were not to be included in the Code, but in reports by domestic committees which would be put before the House as required. The Code should simply enshrine the general principle that members must observe such rules.
- That investigations should be conducted by an independent investigator, the "House of Lords Commissioner for Standards". Up until this point investigations had been conducted by members serving on a sub-committee of the Committee for Privileges, the Sub-Committee on Lords' Interests. In

[17] See http://www.parliament.uk/business/publications/business-papers/lords/lords-business/.

the changed climate, this extreme form of self-regulation was no longer easy to defend. The new Commissioner would be appointed by resolution of the House, and could only be dismissed following a further resolution. He would enjoy full operational independence, and would be tasked with establishing the facts of any complaint and to present his conclusions regarding possible breaches of the Code to the Sub-Committee. In the event that he upheld a complaint, the Sub-Committee's job would then be to recommend the appropriate sanction. The member concerned would have a right of appeal to the Committee for Privileges against both the Commissioner's findings and the recommended sanction.

The Group also addressed some of the general principles that had been brought into question during the investigation into the four peers. First, there was a perceived failure in the 2001 Code, in that it failed to emphasise the public interest. The Committee for Standards in Public Life, in evidence to the Group, argued that the Code should make explicit that members "should be expected to act not only on their personal honour but also to reflect the wider public good and should follow the spirit as well as the letter of the Code."

However, the Group only partially accepted this argument. The Group did include a stronger reference to the public interest in its proposed Code, requiring that members "base their actions on consideration of the public interest". But the Group also took the view that the ancient principle of "personal honour", which has underpinned conduct in the House of Lords for centuries, required members "not only to observe the letter of the Code and the accompanying Guide, but to act in the spirit of the Code in all their parliamentary activities."[18] "Personal honour" thus survives as a cornerstone of the House's updated Code of Conduct.

The Group also addressed the issue of procedural fairness. The 2001 Code, as indicated above, promised members "the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies". The Group noted that in the case of the four peers this requirement placed "an almost impossible burden upon the Sub-Committee"—amounting to what the Hansard Society had described as a "lawyers' charter".[19] The Group therefore proposed a less exacting requirement, enshrined in the new Code, that investigations be conducted "in accordance with the principles of natural justice and fairness".

[18] Leader's Group report, p 15.

[19] Hansard Society, Briefing Paper 1: *Restoring Trust in the House of Lords* (July 2008), p 8.

### *Decisions of the House*

Following publication of the Group's report, the Leader of the House engaged in intensive consultation with members, ahead of a full debate in the House on 30 November 2009. There was much discussion as to the terms of the motions that would be put before the House. There were three distinct objectives, all of which had to be met ahead of the impending dissolution of Parliament in spring 2010. The first was to allow a general debate on the report of the Leader's Group; the second to secure the House's agreement to the new Code of Conduct; and the third to remit the proposed Guide, which the Group had intended to be provisional in parts, to the Sub-Committee on Lords' Interests for final revision.

In the event, two motions were tabled in the Leader's name and debated together. The first stated "that this House takes note of the Report of the Leader's Group on the Code of Conduct (HL Paper 171, Session 2008–09); and that Part 3 of the Report be remitted to the Committee for Privileges, with an instruction that it reports a Guide to the Rules on the Conduct of Members of the House of Lords to the House". No time-limit was specified, though it was informally accepted that the Committee, through its Sub-Committee, should complete its work in enough time to allow the House to agree the final text ahead of the dissolution. The second motion was a motion for resolution, seeking the adoption of the new Code of Conduct, to replace the existing Code with effect from 1 April 2010.

The debate on 30 November revealed broad, but far from unanimous, support for the Group's proposals. Two amendments were tabled to the text of the Code: the first would have removed the requirement that members sign an undertaking to abide by the Code; the second would have removed any reference to a House of Lords Commissioner for Standards. In the event, these amendments gained little support in the debate, and were not moved. The two motions were then agreed without division.

### *Finalising the Guide to the Code of Conduct*

The Sub-Committee on Lords' Interests, while following the outline of the Guide prepared by the Leader's Group's, engaged in a thorough review of the detail, not only focusing on the definition of the various categories of interest, but also involving other committees of the House in considering what rules should apply to the use of facilities such as committee rooms, IT equipment and stationery. The Sub-Committee also recommended a change in its own name, with a view to improving transparency, from "Sub-Committee on Lords' Interests" to "Sub-Committee on Lords' Conduct". This change was

agreed and indeed extended by the Committee for Privileges, which recommended a change in its own name, to "Committee for Privileges and Conduct".

The report of the Committee for Privileges, embodying the Sub-Committee's recommendations, and publishing for the first time a final text of the Guide, was agreed on 8 March 2010.[20] The report was debated on 16 March and agreed after a relatively short debate.[21] In light of the imminent dissolution of Parliament, the House agreed an amendment to the resolution of 30 November 2009, to the effect that the Code and Guide would come into force not on 1 April 2010, but at the start of the new Parliament.

The new Parliament began on 18 May. Members then had one month, in accordance with the new Code, to register all interests falling within the revised categories for relevant interests. The new Register of Lords' Interests was therefore published on 18 June 2010. The appointment of the new Commissioner for Standards, Mr Paul Kernaghan CBE QPM (a former Chief Constable of police), had already been formally approved by the House, on 2 June 2010.

It remains to be seen whether the number and complexity of complaints against members will fall; much will depend on whether the media onslaught against Parliament, which was so intense in 2009, abates in the new Parliament. But it does seem that, with a new and wider Code, more detailed and clearer guidance for members, and an experienced and independent Commissioner for Standards to conduct investigations, the House in 2010 is in better shape to regulate the conduct of members and to defend its reputation than seemed possible in January 2009.

[20] Committee for Privileges, *Guide to the Code of Conduct*, 2nd Report, 2009–10 (HL Paper 81).

[21] HL Deb., 16 March 2010, cols 567–88.

# CONTROL OF DELEGATED LEGISLATION IN THE AUSTRALIAN SENATE

RICHARD PYE
*Clerk Assistant (Procedure), Australian Senate*

The archetypal regulatory scheme in Australia has the policy framework set out by parliament in an Act and details of administration and implementation in executive-made legislative instruments. Classical legislative theory imagines the executive putting in place the legislature's intentions at every turn. In practice, however, parliament must secure its legislative intentions by devising systems to oversee and control these delegated legislative powers. As the volume, scope and complexity of regulatory schemes increase, so do the challenges to parliament's ability to exercise effective oversight. This article briefly surveys existing arrangements surrounding the control of delegated legislation before turning to some of the considerations raised in recent Senate debates.

## Background

Pearce and Argument have this to say about parliamentary control of delegated legislation in Australian jurisdictions:

> "There are various ways that a parliament can exercise control over the form of delegated legislation. They include:
>
> requiring that the legislation be laid before the parliament and not come into operation unless the parliament approves of it;
> allowing the legislation to come into force immediately but providing that its continuance in operation is dependent upon a resolution of the parliament permitting that continuance;
> providing for the legislation to be tabled in the parliament and for it to come into force after a specified number of days, unless the parliament resolves that it not come into operation;
> allowing the legislation to commence immediately it is made but requiring that it be tabled and providing the parliament with the right to disallow the legislation, by resolution, at any time or within a specified time.

> … The method of disallowance utilised in Australia is almost uniformly that stated in the fourth point above – the negative resolution procedure operating on legislation that is already in force."[1]

That is certainly the case in the federal sphere. What might be called the usual process of scrutiny of delegated legislation involves:

- the making and registration of instruments which typically take effect upon registration;
- parliamentary processes of scrutiny (through tabling) and control (through disallowance);
- executive review (through "sunsetting" provisions).

These processes are now generally set out in the Legislative Instruments Act 2003 (LIA) and apply to most legislative instruments by force of that Act.[2]

## Legislative scrutiny committees

The Senate's ongoing interest in scrutiny and disallowance of delegated legislation is reflected in the work of its two legislative scrutiny committees, which each play a role as guardian of the processes of making and controlling delegated legislation. Each committee operates on a non-partisan basis and engages in what is known as "technical legislative scrutiny". This scrutiny does not typically extend to the policy merits of legislation, focusing instead on principles relating to personal rights and parliamentary propriety. This enables them to undertake a quality-control function, ensuring proper processes are followed in making delegated legislation and proper considerations applied in determining the relationship between Acts and instruments: for example, whether material contained in legislative instruments is more appropriate for parliamentary enactment, or whether inappropriately broad powers of delegation are sought.[3]

The non-partisan nature of the committees allows them to consider questions of process quite apart from the heat of politics and contested policy,

[1] D. Pearce and S. Argument, *Delegated Legislation in Australia*, 3rd edition, LexisNexis Butterworths, Australia, 2005, p. 17

[2] See Chapter 15, *Odgers' Australian Senate Practice*, 12th ed., for an account of the development of delegated legislation and disallowance in the Commonwealth jurisdiction.

[3] See Senate standing orders 23 (Regulations and Ordinances Committee) and 24 (Scrutiny of Bills Committee); for more about the origins and operations of these committees, see R. Laing, *Annotated Standing Orders of the Australian Senate*, pp. 109–18.

facilitating debate about the principles underlying the making, use and control of delegated legislation.

One of the terms of reference for an inquiry into the future direction and role of one of the Scrutiny of Bills Committee addresses "whether parliamentary mechanisms for the scrutiny and control of delegated legislation are optimal". That inquiry was continuing at the time of writing.

## Disallowance in the Senate

The Senate's concern with delegated legislation is also apparent in debates in the chamber about disallowance, which is the principal control the Senate can exercise over delegated legislation.

Where LIA provisions apply a senator may, within 15 sitting days after tabling of a legislative instrument, give notice of a motion to disallow it. If the motion is agreed to, the instrument is disallowed. If a notice of motion to disallow has not been resolved or withdrawn within 15 sitting days after having been given, the instrument is *deemed* to have been disallowed. If an instrument is disallowed, it ceases to have effect, and the government is prevented from making an instrument "the same in substance" for six months.

From the Senate's perspective, the proper measure of the controls surrounding delegated legislation is the extent to which they enable the Senate's legislative intentions to be realised. How does disallowance measure up in this regard?

Disallowance is typically referred to as a "blunt instrument". In a procedural sense this is true: instruments stand or fall on the vote; there is no opportunity to amend. This can make it difficult for the Senate to express a nuanced position.

A recent refinement to the disallowance process reduces its bluntness. Under the LIA, a notice of a motion may be given to disallow "a provision" of an instrument. This measure was inserted in response to long-standing concerns that the requirement that disallowance apply to the whole of an instrument was an unnecessary limitation on the Senate's control over delegated legislation.[4]

In a broader sense, however, characterising disallowance as a blunt instrument disguises its use as a negotiating tool. Senators proposing disallowance may be satisfied if the outcome is something else, such as an undertaking to revise the instrument in question, to limit its applications or to clarify the manner in which it is intended to operate. This aspect is perhaps most apparent

[4] See *Odgers'*, 12th ed., p. 322.

in the work of the Senate Regulations and Ordinance Committee. That committee often issues what are known as "protective" disallowance notices while entering into correspondence with ministers about the content or quality of disallowable instruments. Such notices secure negotiating time, and the possibility of disallowance adds force to negotiations. A ministerial undertaking to revisit or revise an instrument will generally see the proposed disallowance withdrawn.

## The cataract surgery case

The most serious dispute over delegated legislation in 2009 occurred in relation to a government budget decision to halve the Medicare rebate paid to patients undergoing certain types of cataract surgery. Although non-government senators considered this to be a significant policy change, the government chose to implement it through delegated legislation. The rebates are prescribed in tables of medical services contained in regulations made under the Health Insurance Act 1973. The government's announced policy was implemented by including a reduced rebate amount in the relevant items in the 2009 regulations.

The Opposition determined that it would resist the measure and proposed its disallowance.[5] This exposed one of the limitations of the disallowance process: what would stand in place of the disallowed items?

## The revival rule

In 1979 the Regulations and Ordinances Committee had recommended the general adoption of a revival rule: if an instrument which repeals an earlier instrument is disallowed, that should have the effect of reviving the earlier instrument. That recommendation was readily accepted by the government, the then Attorney-General Senator Durack telling the Senate:

> "In the absence of a revival rule, disallowance can create a legislative void. As the Committee has pointed out, absence of a revival rule also means that a House of the Parliament is effectively unable to prevent the repeal of an instrument which that House may not wish to have repealed."[6]

Changes to remove this uncertainty were introduced by the government in 1982 and are now contained in the LIA.

[5] The motions for disallowance and for the associated legislative steps taken were jointly proposed on behalf of the Opposition, a minor party and an independent senator; all non-government senators supported each measure.

[6] Senate Debates, 26 May 1981, p. 2087.

## A legislative void

Generally speaking, where the LIA provisions apply, the revival rule operates to maintain the status quo. In the cataract surgery case, however, this rule was in effect set aside. The mechanism for prescribing the table is unusual: a new table is prescribed annually, in a set of regulations which repeals its predecessor. As a backstop the Act contains a sunset provision: that each set of regulations "cease to be in force" 12 months and 15 sitting days after its gazettal.

Disallowing particular items in the table would not attract the revival rule because the repealing provision in the regulations would not be affected: the rebate for the particular service would be removed entirely. Disallowing the whole set of regulations would revive the earlier set (because the repeal provision in the regulations is also disallowed), but only until the "sunset" took effect. When this matter was first before the Senate the new measures were yet to commence, but there was no way the Senate could use disallowance to maintain the status quo.

## The resolution

The non-government senators proposed a strategy with two components:

- disallowing the four relevant Medicare table items; and
- amending the Health Insurance Act to insert a revival provision—that, should any item be disallowed, the corresponding item from the previous table would be revived.

The government resisted these measures at each step.

The revival provision was first proposed in a private senators' bill, which passed the Senate on 28 October but was not considered by the House of Representatives. A second attempt to insert the revival provision by way of amendments to a government bill was also rejected by the government.

In the meantime the Senate had disallowed (on 28 October) the four disputed table items, leaving no rebate in place. The Minister made a fresh determination, effectively substituting new, but still much reduced, rebate amounts in the table. The Senate disallowed that measure as well, on 25 November. A further replacement determination was made after the end of the 2009 sittings, and all indications were that non-government senators would again propose its disallowance.

In January 2010, the Minister announced a compromise arrangement, which appeared to have the support of the industry, and the Opposition

indicated its acceptance of the new arrangements, put in place by a further determination on 29 January 2010.

It appears the Senate's persistence kept the matter alive long enough to ensure an acceptable political compromise, but it has to be doubted that the "legislative void" created by the exercise of the disallowance power in this case was desirable. It can readily be seen that the position of a Senate seeking to have its intentions respected in the exercise of delegated legislation is improved if the consequence of disallowance is that the status quo is retained.

## The safety net case

Another recent debate of significance arose, again, in relation to health system payments, this time involving "Medicare safety net" payments. The issue here surrounded the adequacy of provisions in primary legislation proposing a new delegation of power.

The government had announced that it intended to introduce legislation enabling the Minister to determine a cap on the benefit payable in relation to a number of specific areas of medical services. These included obstetric services, Assisted Reproductive Technology services and a number of others. When the amending bill emerged it contained a simple provision enabling the minister to make a determination imposing a cap on payments, but made no reference to particular services. Instead the bill appeared to give the minister the power to make such determinations in relation to *any* medical service.

The government produced to the Senate committee examining the bill a copy of draft regulations and made much of the fact that the determinations would be subject to the usual scrutiny process. The committee's report identified a number of areas, however, in which non-government senators were not satisfied with the proposed changes.[7]

The concerns raised in the committee's report affected the passage of the bill in a number of ways.

## Knowledge of the content of instruments

First, the Senate insisted on having more information about the proposed determinations before proceeding to consider the detail of the bill. Lack of knowledge of the content of legislative instruments at the time primary legislation is considered by the Senate and its committees is a key difficulty. Many

[7] Community Affairs Legislation Committee, Report, Health Insurance Amendment (Extended Medicare Safety Net) Bill 2009, August 2009.

of the Senate's legislation committees have had difficulty forming a concluded view on the operation of proposed legislative schemes because the detail is contained in delegated legislation which is not available.

For instance, in noting shortcomings in industry consultation in relation to another bill, the Community Affairs Legislation Committee noted in August 2009:

> "1.67 As is becoming common in recent times the Committee has once again been asked to inquire into a Bill which provides for much of the detail on its operation and administration to be outlined in yet to be drafted legislative instruments. This Bill does not commence until 1 July 2010 specifically to enable time for the associated regulations to be drafted. The Department has indicated that certain regulations and guidelines will be released in draft format and that industry will be involved prior to their finalisation."[8]

Often this situation remains even as the bill is considered in committee of the whole. It is now not unusual for procedural motions to be moved to defer consideration of a bill until regulations have been presented in draft form. In the safety net case, although draft determinations had been made available to the committee, the Senate majority delayed consideration of the bill in committee of the whole pending the production by the government of a more considered "final draft".

## Level of detail in primary legislation

From second reading speeches made on the safety net bill, commentary in the committee report referred to above and amendments circulated, it was clear that a number of senators wanted to impose additional controls around the content of the determinations provided for by the bill.

Senators frequently seek undertakings from ministers about the intended scope and operation of delegated legislation before finally agreeing to the passage of the legislation which authorises it. Although such undertakings are generally given and received in good faith, they are not enforceable. In addition, while this might be appropriate for the first set of regulations produced under an Act, the passage of time and the revision of such regulations can remove the imperative to follow such undertakings.

Another common approach is to propose amendments designed to direct or constrain the form of delegated legislation—inserting provisions such as:

[8] Community Affairs Legislation Committee, Report, Therapeutic Goods Amendment (2009 Measures No. 2) Bill 2009 [Provisions], August 2009, p 17.

"The regulations must provide …"
"Regulations made for the purposes of this section may not deal with …"
"The Minister must not give a direction on the following matters …"

Such amendments are often desirable when the scope of delegated legislation is particularly broad. The Scrutiny of Bills Committee routinely comments on the practice of determining important matters in delegated legislation, often lamenting that this approach appears to reflect current drafting practice.[9] The need to make amendments of this kind is amplified when the detail of instruments is not available when bills are being considered, as noted above.

In the safety net case, a number of proposals were canvassed which would limit the subject of determinations, preventing their application in particular areas. These were not, in the end, pursued. Senators instead determined that the best way to provide oversight was to put in place a different commencement arrangement for the ministerial determinations.

## Constraints upon the commencement of instruments

When considering legislation which delegates legislative power, it is open to the Parliament to insert provisions for the control of delegated legislation which differ from the LIA provisions. On this matter, *Odgers'* states:

> "There are some forms of subordinate legislation with different approval or disallowance procedures. Some instruments require affirmative resolutions of both Houses to bring them into effect, while others do not take effect until the period for disallowance has passed. The Senate has amended bills to insert such provisions where it was thought that particular instruments merited special control procedures … One such amendment provided that a statute was not to operate until the regulations made under it were approved."[10]

In this case, the government accepted an amendment requiring the determinations not to commence until approved by a resolution of each House of the Parliament. This was seen as appropriate both because of the breadth of the power to make determinations, and the uncertainty that would have been caused by allowing contested determinations to commence, only later to be disallowed.

[9] See, for example, Scrutiny of Bills Committee, Alert Digest 6/09, p 19.
[10] *Odgers'*, 12th ed., p. 333.

## Conclusion

The legislative power of the Commonwealth is vested, by section 1 of the Australian Constitution, in the federal parliament. Although the parliament delegates legislative power, it may not (in the words of Barwick CJ) "abdicate it".[11] The disallowance process and other controls on the use of delegated legislation are the mechanisms by which the parliament's responsibility for this exercise of legislative power is secured. Debates in the Senate demonstrate the utility of the standard disallowance process.

As has been noted, disallowance is, procedurally, a blunt instrument. Considered properly, however, the disallowance process allows for a great deal of flexibility in negotiations. Much work has been done in developing the procedures now contained in the LIA to ensure that the usual disallowance process protects parliamentary proprieties and the Senate's legislative scrutiny committees monitor the use of those processes to good effect.

Departures from the LIA provisions can impair the ability of the Senate to maintain an appropriate degree of control. The cataract surgery dispute represents one such case, and also demonstrated that calm examination of the principles surrounding control of delegated legislation are unlikely to be advanced in the heat of particular policy battles. There are many provisions in authorising Acts which exempt legislative instruments from aspects of the oversight and control regime. While these may be warranted when introduced, it would perhaps be prudent for the legislature to consider from time to time whether such variations remain appropriate. The legislature must be vigilant to ensure that the provisions of primary legislation enable ongoing control of delegated legislation. The safety net case demonstrates some considerations in this area.

One final word about the sufficiency of oversight. It is generally estimated that more than half of the law of the Commonwealth of Australia by volume consists of delegated legislation rather than Acts.

In her submission to an inquiry into the direction and work of the Scrutiny of Bills Committee in 2010, the Clerk of the Senate noted that "there is no ordinary process by which the large volume of delegated legislation produced each year is tested to see whether policy considerations exist which might appropriately become the subject of committee investigation. When policy defects are identified in particular documents they may become the subject of inquiry … but this is an ad hoc process at best. It is possible that many instru-

[11] *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373, quoted in Pearce and Argument, p. 16.

ments of delegated legislation which raise policy questions are slipping under the radar." Ensuring that the tools are available to exercise control is only part of the battle. Raising awareness of the policy content of delegated legislation provides its own significant challenge.

# PARLIAMENTARY PRIVILEGE IN THE CANADIAN CONTEXT: AN ALTERNATIVE PERSPECTIVE

## PART I: THE CONSTITUTION ACT, 1867

CHARLES ROBERT
*Principal Clerk of Chamber Operations and Procedure, Senate of Canada*[1]

Parliamentary privilege is an important feature of all the legislatures across Canada, at the federal, provincial and territorial levels. Its purpose and justification is to provide the authority and protection necessary for these deliberative and legislative bodies to carry out their functions effectively. While necessity is accepted to be the basis of all claims to privilege, this necessity is invariably conditioned by historical, constitutional and political considerations. This reality is not always fully appreciated, yet it explains much about certain aspects of parliamentary privilege in Canada. At the outset, in 1867, Canada's Parliament was provided with the power to legislate in the area of privilege, based on the Westminster model and fixed at that time. In addition, certain features normally managed through privilege were incorporated into the constitution and placed beyond the control of either the Senate or the House of Commons acting alone. More than 140 years later, after obtaining full sovereignty and a patriated constitution, these constitutional limitations on Canadian privilege remain fundamentally unchanged.

The historical roots of parliamentary privilege are thoroughly English. Growing from its origins as a council of royal advisers centuries earlier, the English Parliament, more specifically the House of Commons, in the 17th century claimed important inherent privileges to assert its right to exercise power independent of the Crown's control. The long and bitter struggle between the pretentions of an absolutist Crown and its courts on the one hand, and an elected, representative Commons on the other hand, led to a civil war and, ultimately, the execution of a king. This was then followed by a short-lived protectorate before the restoration of a diminished monarchy. The Glorious Revolution of 1688 and the accession of William and Mary as constitutional sovereigns selected by Parliament clearly demonstrated its undisputed supremacy. The passage of the Bill of Rights the following year, 1689, further confirmed it. Parliamentary privilege was an element of these struggles. The

[1] The opinions expressed in this article are those of the author.

ultimate triumph of Parliament vindicated these privileges and established the central role of the Commons in government. From this position, Parliament continued to grow in power and, through the course of the 18th and early 19th centuries, it asserted ever more control over the Crown's executive agents, its ministers, through the development of the convention of responsible government. This process of accountability gave Parliament the right to control who was entitled to advise the Crown. More than three centuries after Parliament established its supremacy over the Crown, parliamentary privilege still remains an important feature of its identity.

Parliamentary privilege in Canada has a significantly different history. The attempts made by the colonial legislatures from the early decades of the 19th century to fix their role as representative bodies were not focused exclusively or primarily on privilege, but rather on establishing responsible government as an operative principle and convention. This was achieved with relative speed and without the same degree of struggle that had occurred in England. The rebellions of 1837 and 1838 did not lead to any breach with the imperial authority of London. Rather the bonds between England and the Canadian colonies were strengthened through the concessions that were made, giving legislatures the role they claimed. By 1848, some years after the Union Act establishing the United Province of Canada in 1840, London acknowledged that its appointed governors had to secure and maintain the support of the legislative assemblies with respect to their executive councils. London agreed to further concessions following the Charlottetown and Quebec Conferences to bind the British North American colonies into a new federal arrangement. It was through this constitutional act that the Imperial Parliament conceded to the Canadian federal Parliament the authority to legislate parliamentary privileges.

The constitutional settlement of 1867 was the third major attempt by England to fashion a parliamentary government for Canada. The first had been in the Constitutional Act of 1791; it was replaced by the Union Act of 1840. Both proved unsatisfactory for various reasons: the first because the Assembly did not have any control over the revenues of the province; and the second because it did not fully accept the principle of responsible government in practice. In addition the Union Act of 1840, implementing the recommendations of the Durham Report, created tensions based on language and a policy of assimilation. The constitutional proposals of 1867 were designed to address and correct these issues. As it had done previously, England was prepared to take the measures necessary to provide stable parliamentary government in Canada.

With the enactment of the British North America Act (now the

Constitution Act 1867), passed by the Imperial Parliament in March 1867, the newly created federal Parliament was granted by section 18 the authority to create through statute the privileges, immunities and powers then held and exercised by the House of Commons and its members at Westminster. This was an unprecedented gesture by the Imperial Parliament. It was the first time that Westminster had conferred on another parliamentary body through such a legal instrument the authority to claim by legislation a range of privileges that appeared to be nearly the same as its own. Section 18 would resolve for the new federal Parliament the sometimes vexing issue of justification of privilege by colonial legislatures based on necessity. For example, in 1842 the courts had denied the Newfoundland Legislative Assembly's claim to punish for contempt.[2] Through the authority granted in section 18, the federal Parliament could rely on a constitutional head of power that was conclusive; it need not depend on the elusive concept of necessity to prove any valid privilege.

The statute implementing this authorisation was assented to in 1868. This law, Chapter 23 of the Statutes of Canada for that year, was one of several laws that received royal assent on 22 May dealing with the privileges, powers, independence and management of Parliament.[3] In language similar to section 18 itself of the Constitution Act, section 1 of Chapter 23 stated that "The Senate and the House of Commons respectively, and the Members thereof respectively, shall hold, enjoy and exercise the like privileges, immunities and powers as, at the time of the passing of the British North America Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament … and by the Members thereof, so far as the same are consistent with and not repugnant to the said Act." The law went further and also provided protection to persons involved in parliamentary publications. This latter provision was based on the British Parliamentary Papers Act 1840 enacted following the court decisions in *Stockdale v Hansard*.[4]

The language of section 18 of the Constitution Act and section 1 of Chapter 23 do not clearly identify the privileges, immunities and powers being allowed or claimed. The British Parliament had never codified them and the new Canadian Parliament adopted the same approach. What is more often overlooked, however, is that these provisions also acknowledged certain limitations or restrictions with respect to the exercise of these privileges in Canada. These were of two kinds: the grant under section 18 was strictly limited to those priv-

[2] *Kielly v. Carson* (1842), 13 E.R. 225 (P.C.).

[3] *An Act to Define the privileges, immunities and powers of the Senate and House of Commons …*, S.C. 1868, c. 23.

[4] (1839), 9 Ad. & E. 1, 112 E.R. 1112.

ileges that existed in the Westminster Commons as of 1867; and section 1 of Chapter 23 stated that these privileges had to be consistent with and not repugnant to the Constitution.

A benefit in authorising the Houses of the Canadian Parliament to claim these privileges, immunities, and powers while not stated in the Constitution Act 1867 itself was expressed in section 2 of Chapter 23:

> "Such privileges, immunities and powers shall be deemed to be and shall be part of the General and Public Law of Canada, and it shall not be necessary to plead the same, but the same shall in all Courts in Canada and by and before all Judges be taken notice of judicially."

Acknowledging that Parliament's privilege was part of the law freed it from disputes based on necessity, though it did not obviate the need to establish before the courts in an authoritative manner the existence in England as of 1867of any contested privilege.

The actual boundaries of the authority provided through section 18 were unclear and Ottawa soon tested them. On the same day that Chapter 23 of the Statutes of Canada was enacted, establishing the "privileges, immunities and powers … held, enjoyed and exercised by the Commons House of Parliament," royal assent was also given to an additional law, which provided for the power to hear witnesses under oath.[5] This law had witnesses appearing under oath either at the bar of the Senate, following the practice in the House of Lords, or at select committees of either House when dealing with a private bill, a useful power in hearing petitions for divorce.[6] This law more or less copied the situation that prevailed at Westminster and claimed the same powers exercised there to aid it in carrying out this function.

Several years later, the Canadian Parliament sought to broaden still further the power to administer oaths to witnesses. In 1873 while investigating matters relating to the construction of the Canadian Pacific Railway, the committee charged with this task reported to the House of Commons in April that it would be desirable to hear witnesses under oath and that it would be advisable to bring in legislation to provide for this.[7] Shortly after, a bill was introduced for this purpose.[8] In the meantime, an instruction was given to the committee

[5] *An Act to provide for Oaths to Witnesses being administered in certain cases for the purpose of either House of Parliament*, S.C. 1868, c. 24.

[6] At this time and for the next 100 years, Parliament was involved in the business of providing relief for failed marriages through private bills granting divorce.

[7] Canada, House of Commons, *Journals*, 2nd Parl., 1st sess. (17 April 1873) at 166.

[8] *An Act to provide for the examination of witnesses on Oath by Committees of the Senate and House of Commons, in certain cases*, S.C. 1873, c. 1.

to proceed with hearing witnesses on oath.[9] According to Bourinot, doubts were raised as to its constitutionality during debate on the bill, but such doubts did not prevent its passage in early May 1873.[10] Ottawa chose to push the boundaries of section 18 based on pressing political need. This is more or less stated to be the case in a memorandum written by the Governor General, Lord Dufferin, when the bill received assent.[11] This memorandum to the British Colonial Secretary, Lord Kimberely, was accompanied by two separate opinions: one by Sir John A. Macdonald, written in his capacity as Minister of Justice, doubted the constitutionality of the Act; the other, by Alpheus Todd, suggested that it was valid.[12] Todd's justification for the enactment was that, despite the possible conflict with section 18, it was within the proper exercise of the section 91 power granted to Parliament to ensure "peace, order and good government". Given the nature of the political scandal with respect to the Canadian Pacific Railway, this was thought to be a sufficient justification for the statutory expansion of the power to hear witnesses under oath and make them liable to the penalty of perjury, a criminal offence with a maximum punishment far exceeding that permitted under the power to punish for contempt of Parliament.

The opinion of Macdonald was confirmed when the law was subsequently disallowed by London on the advice of the law officers of the Crown. Applying the authority provided under section 56 of the Constitution Act 1867, they determined that the law of 1873 was *ultra vires* as it was contrary to the express terms of section 18. Ottawa did not have the right to ignore the language of that section. Since there was no general power to hear witnesses under oath at Westminster as of 1867, Ottawa could not pretend to have it or seek to claim it on its own authority. Moreover, it was determined that the provisions of the 1868 Act giving the Senate the power to hear witnesses under oath at the bar, a power possessed in 1867 only by the House of Lords and not the House of Commons, was also beyond the authority of the Canadian Parliament to claim and therefore of no force or effect.[13]

The actions taken by London to disallow these Acts demonstrated the limitations of section 18 and also the binding nature of the Constitution on the Canadian Parliament. Amendments to the British North America Act could

[9] Canada, House of Commons, *Journals*, 2nd Parl., 1st sess. (3 May 1873) at 267.

[10] Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 3d ed. (Toronto: Canada Law Book Company, 1903) at pp 562–63.

[11] Canada, House of Commons, *Journals*, 2nd Parl., 2nd sess. (23 October 1873) at pp 5–8.

[12] *Ibid.* at pp 8–10.

[13] *Ibid.* at pp 10–11.

only be made through the Imperial Parliament. Canada did not yet have sole control over its basic law. Section 56 of the Constitution permitted London through the Colonial Secretary to annul and disallow any Act passed by the Canadian Parliament within two years of its transmission to London. Further, section 57 also provided a mechanism to reserve any bill adopted by Parliament for up to two years. This approach was consistent with the Colonial Laws Validity Act[14] adopted in 1865 which, while seeking to allow colonial Parliaments sufficient power to legislate, still enforced the ultimate authority of the Imperial Parliament to override any colonial law which conflicted with any law adopted by the Imperial Parliament that extended to the colony. The steps taken by London to disallow the Act were therefore intended to maintain the integrity of the constitutional arrangement, substantively put in place at Canada's request.

To overcome the inconvenient limitation imposed by section 18, it was necessary to amend it. In the event, this was done with the full co-operation of Westminster. After all, in 1871 it too had decided that it needed to extend the power to apply oaths to witnesses appearing before any of its select committees. Moreover, despite its status as the Imperial Parliament, Westminster was not generally opposed to providing the required assistance to promote good government in Canada.

In July 1875, the Imperial Parliament adopted "An Act to remove certain doubts with respect to the powers of the Parliament of Canada under section eighteen of the British North America Act, 1867".[15] This Act amended the language of section 18 to provide flexibility to the federal Parliament so that it in future it could legislate privileges, powers or immunities so long as they conformed to those possessed at Westminster at the time the Act was adopted. In addition, the 1875 statute declared that the disallowed portion of the 1868 Act dealing with oaths sworn at the bar of the Senate was now deemed to have been valid as from the date of its original royal assent. Early the following year, the Canadian Parliament passed an Act providing for hearing witnesses before either House or its committees under oath.[16]

The language of section 18 has remained unchanged since 1875, with the consequence that Westminster remains the reference point for parliamentary privilege in Canada. Initially limited to those privileges possessed by Westminster in 1867, after 1875 the Parliament of Canada could legislate to

[14] Colonial Laws Validity Act 1865 (UK), c. 63.

[15] Parliament of Canada Act 1875 (UK), c. 38.

[16] *An Act to provide for the examination of witnesses on oath by Committees of the Senate and House of Commons, in certain cases*, S.C. 1876, c. 7.

define and confer privileges equivalent to those at Westminster, however they might change over time. The 1875 amendment preserved a relationship between Ottawa and Westminster which has endured even as steps were taken to establish the full sovereignty and independence of Canada and its Parliament.

No effort was made to amend section 18 following the Statute of Westminster 1931 or after the amendment of 1949 granting certain authority to the federal Parliament to make amendments to the Constitution Act 1867 on its own authority without requiring the support or involvement of Westminster. After the federal Parliament was no longer in any substantive way in a subordinate relationship to Westminster, still it was felt unnecessary to consider changes to section 18, even when the Constitution was patriated in 1982.

This reality, together with a basic inertia, reflects what has been true from the time even prior to Confederation: privilege has never had the same importance in Canada as it has had in England. The desire for responsible government, not privilege, was the major force driving events in Canada's constitutional history prior to Confederation. Aside from a brief study in 1977, neither House of the federal Parliament has engaged in any sustained study of parliamentary privilege.[17] It has been taken for granted.

Because of the language of section 18, conferring the authority to claim without apparent qualification the existing privileges of the Westminster Commons for the Canadian Parliament, it is easy to assume that the Canadian Parliament possesses the same privileges, immunities and powers. Evidence for this assumption is clear from the frequent verbatim repetition of the definition of privilege found in *Erskine May*, the British bible of parliamentary practice, by the Canadian parliamentary authorities and manuals. This definition identifies privilege as "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by the Members of each House individually without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law."[18] It is based on the formulation first used in the 1946 edition of *Erskine May*. This definition is often recited

[17] Canada, House of Commons, "First Report of the Special Committee on Rights and Immunities of Members" (29 April 1977).

[18] Sir William McKay, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed. (London: LexisNexis, 2004) at p 75. Audrey O'Brien & Marc Bosc, eds, *House of Commons Procedure and Practice* (Ottawa: House of Commons, 2009) at p 60.

by federal as well as provincial and territorial members when seeking to raise a question of privilege and also by speakers as they rule on them.

Nonetheless, not all the privileges exercised in Canada either at the federal or provincial levels have the same scope as the privileges of Westminster. Some are framed by other provisions in the Constitution Act 1867. This was acknowledged in section 1 of Chapter 23 of 1868 which stated that "the Senate and the House of Commons … shall, hold, enjoy and exercise such and the like privileges, immunities and powers … [of] the Commons House of Parliament … *so far as the same are consistent with and not repugnant to the said [Constitution] Act*" [emphasis added]. This qualification remains part of what is now the Parliament of Canada Act though the language has been adjusted by deleting the reference to "repugnant", as an unnecessary reminder of an attitude that disappeared when the Colonial Laws Validity Act became inoperative.[19] Nonetheless, despite the authority provided under section 18, other provisions of the Constitution Act 1867 clearly constrain or limit elements or features of some of these privileges.

Among the privileges and powers claimed through section 18 by Ottawa is the power of each House to control its own proceedings. This privilege allows each House to conduct its deliberations as it sees fit without the risk of interference from any outside body. Control over proceedings is one of the significant corporate or collective privileges. It is the complement to the privilege of freedom of speech enjoyed by every individual member. Free speech would be almost meaningless without control over the choice of topics debated. Historically, both privileges are anchored in Article IX of the Bill of Rights 1689 adopted by the triumphant English Parliament after it had established its supremacy over the Crown and the courts. Article IX guarantees that "the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Without a doubt, Article IX remains one of the shared features of all parliaments and legislatures within the British parliamentary tradition.

The privilege of control over proceedings in Westminster by either the House of Commons or the House of Lords is regarded as absolute. The doctrine of exclusive cognizance is a clear expression of this power and the control that each House possesses in the exercise of this privilege. There are no constraints that would lead to any questions about its use outside of Parliament itself. No British court or other outside body would be able to review any deviation from a conventional practice that was approved by either House. For

[19] Parliament of Canada Act, R.S.C. 1985, c. P-1, section 4. "[C]onsistent with and not repugnant to" has been replaced with "in so far as is consistent with".

example, if the House of Commons reformed its rules so as to allow for a process of only two readings of a bill, or even just one, enabling the Commons to process more legislation within a session, such an innovation would not be susceptible to challenge or review by a court. Equally, either House could institute a practice requiring super-majorities for the passage of specific legislation affecting the devolved regions of the Kingdom so that a majority of Scottish members, for example, would have to approve any bills affecting Scotland adopted at Westminster. Any such changes instituted by the House of Commons or the House of Lords would fall within the proper scope of the privilege of control over proceedings.

In Canada, the situation is not entirely the same. Though there is clearly a wide range of activities which would properly fall within the privilege of control over proceedings, it remains true that this range is not as broad as it is at Westminster. This is because the Constitution Act 1867 imposes some explicit requirements on the Senate and the House of Commons. These requirements were incorporated into the Constitution as a result of the experience of the pre-Confederation Parliament of the United Province of Canada and the earlier regime established after the Constitution Act 1791. These activities are thus outside the control of either House alone exercising its privilege of control over proceedings. There are at least three specific activities covered: quorum, voting, and the language of the official records.

## Quorum

Quorum is the minimum number of members required to be present in the House properly to conduct business. At Westminster, in the House of Lords it is three, though 30 are required for divisions on bills and on any motion to approve or disapprove subordinate legislation. In the House of Commons, the quorum has been set at 40 since the mid-17th century. An attempt was made to increase quorum to 60 by resolution of the House of Commons in 1801, the first Parliament of the United Kingdom, following the incorporation of Ireland, but the resolution was rejected.[20]

The early experience with representative assemblies in Canada following the Constitution Act 1791 was discouraging. It was difficult to retain members during the course of the session and, in consequence, the quorum had to be adjusted so as to allow the assemblies to function. The solution was to impose

[20] Sir Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 11th ed. by T. Lonsdale Webster and William Edward Grey (London: William Clowes and Sons, 1906) at 228 n. 5.

a fixed quorum and this was done in the Union Act 1840.[21] The Legislative Council of 20 members had a quorum of ten and the Legislative Assembly that originally had 84 members had a quorum of 20. This solution was retained when drafting the new constitution in 1867.

Section 35 of the Constitution Act 1867 stipulates that the Senate quorum is 15, including the Speaker. Section 48 states that at least 20 members of the House of Commons, including the Speaker, must be present. These numbers were set when both Houses were much smaller than they are now. The original Senate totalled some 72 members, 24 for each of the three regions or divisions, while the House of Commons in 1867 had 181 members representing the four original provinces.

The Senate now has 105 members and the House of Commons is substantially larger with 308 members, representing ten provinces and three territories, and this is expected to increase following an adjustment based on the next census. Despite this increase in size, the quorum has not changed and, from the adoption of the 1949 amendment and under the current constitutional amending formula adopted in 1982, it remains the case that neither House is able to alter its quorum without the approval of the other House and assented to, as expressed in an Act of Parliament.

In fact, prior to the adoption of the 1949 amending authority, and indeed from 1867, section 35 did indicate that the Senate quorum could be adjusted by a decision of the Parliament of Canada, meaning that the quorum could be changed without a formal amendment approved by Westminster. The language of section 48 did not allow for a similar approach for the House of Commons. It provided no reference as to how the quorum could be changed. The clear implication is that quorum could only be adjusted through a process that involved Westminster. This was admitted by the special committee of the House formed to review the rules in 1925. When the committee proposed that the quorum of the Commons be increased to 30, it acknowledged that "In order to make this change, it will be necessary to present an address to the Parliament of Great Britain requesting that section 48 … be amended …"[22] Nothing came of this recommendation. The situation changed in 1949 when Westminster authorised the federal Parliament to amend the Constitution in matters falling within its exclusive jurisdiction, a power which the provincial legislatures had had from 1867. For some years thereafter, Stanley Knowles

[21] Gary O'Brien, *Pre-Confederation Parliamentary Procedure: The Evolution of Legislative Practice in the Lower Houses of Central Canada, 1792–1866* (1988) [unpublished Ph. D. thesis, archived at Carleton University] at pp 234–35.

[22] Canada, House of Commons, *Journals*, 14th Parliament, 4th sess. (29 May 1925) at p 348.

regularly brought in a bill seeking to increase the quorum of the Commons to 27. His efforts never succeeded.[23]

The constitutional autonomy of Canada established through the patriation of the Constitution in 1982 has not altered the reality that the matter of quorum remains beyond the authority of either House to alter on its own. Even after 1982, quorum in each House does not fall under the privilege of control over proceedings. If either House should ever seek to change its quorum, it will still require an Act of Parliament.

## Voting

Just as with the quorum, the requirements for voting in both Houses are provided by the Constitution Act 1867. Section 36 requires that "Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative."[24] Section 49 is similar in stating that decisions in the House of Commons shall be decided by the majority. However, it goes on to explain that the Commons Speaker, unlike his counterpart in the Senate, will only vote in cases of a tie: "and when the voices are equal, but not otherwise, the Speaker shall have a vote." One feature which is significant, unlike the provisions with respect to Senate quorum, is that neither section authorises any possible deviation from this majority principle by an Act of Parliament. Consequently, it was originally beyond even the authority of the federal Parliament to adopt any practices which allowed for decisions to be decided by any vote other than by majority. Any such change would have needed the approval of the Imperial Parliament.

The majority principle has been an accepted standard in British parliamentary practice for centuries. However, circumstances in Canada led to deviations from this principle that provoked dissatisfaction and serious political tensions. During the period of the Union Act, when equal representation was provided to Canada East and Canada West despite the disparity in populations, a theory developed that decisions should be made by a majority from both parts of the province, a double majority. Adherence to this approach was never formally acknowledged and it was in any event unworkable, but it did

[23] Between 1952 and 1980, Stanley Knowles attempted to do this 20 times. See, for example, Bill 81, *An Act to amend the British North America Acts, 1867 to 1952, with respect to the Quorum of the House of Commons*, 22nd Parl., 1st Sess., 1953 and Canada, House of Commons, *Debates*, 22nd Parl., 1st Sess. (25 May 1954) at pp 5074–75.

[24] The Constitution Act 1791 (UK), c. 31, section 28 and The Union Act 1840 (UK), c. 35, section 10; both provided that the Speaker have a casting vote.

create animosities.[25] There was, in addition, an original provision in the Union Act 1840 that required any increase in the membership of the Legislative Assembly to be approved by a vote of two-thirds of the members of both the Legislative Council and the Legislative Assembly, making an increase almost impossible to achieve.[26] This section of the Act was repealed by the Imperial Parliament in 1854.[27] This history was not forgotten in the negotiations that led to the Constitution Act 1867.

The House of Commons has never sought to change this practice and has always adhered to the majority principle in voting and deciding questions. The Senate has not been so scrupulous. In 1915 the Senate adopted rules which allowed for other than a majority vote in cases where the Senate was seeking to rescind a decision in the same session. Where a vote was to be formally rescinded, the new rule imposed a five-day notice period and two-thirds support of the senators then present in the chamber in order to carry. The Debates of the time suggest that no consideration was given by senators to the conflict with the Constitution or to the inconsistency of this innovation with another Senate rule which repeated the language of section 36.[28] A review of the Journals suggests that this rule has never been applied and on the occasions when there was a vote to rescind, it occurred with leave, usually waiving the five-day notice, and without a recorded vote.[29]

Since the amending formulas of 1949 and 1982 were put in place, it became possible to change sections 36 and 49. Indeed, an attempt was made in the Charlottetown Accord of 1992, as part of the Senate reform package, to institute a double-majority requirement under certain circumstances. In cases where francophone culture and language were at stake, the Accord required a majority of the senators present plus a majority of the francophone senators present to vote in favour of the proposition in order for the measure to pass. This innovation together with the entire package of the Charlottetown Accord

[25] Margaret Elizabeth Nish, *Double Majority: Concept, Practice and Negotiations, 1840–1848* (1966) [unpublished M.A. thesis archived at McGill University].

[26] The Union Act 1840 (UK), c. 35, s. 26.

[27] *An Act to empower the Legislature of Canada to alter the constitution of the Legislative Council for that Province, and for other purposes* (UK), 1854, c. 118, section 5.

[28] Canada, Senate, *Debates*, 12th Parliament, 5th Sess., (15 March 1915) at pp 127–28, (23 March 1915) at pp 145–52, and (31 March 1915) at pp 274–75. The Senate Rule in question repeats section 36 and is now rule 65(5) of the Rules of the Senate of Canada (March 2010).

[29] See *e.g.* Canada, Senate, *Journals* (28 June 1920) at p 412, (23 March 1948) at p 223, and (18 August 1988) at p 3284. In 1991, the original rule was divided into two parts. Rule 63(2) still requires five days' notice to rescind a formal decision of the Senate, while Rule 58(2) provides a notice of one day "to correct irregularities or mistakes …"

was defeated in a national referendum held in the fall of 1992. What is not disputable, despite what happened in the Senate in 1915, is that it remains constitutionally beyond the power of either House individually properly to change the provisions requiring majority vote and the voting rights of the Senate and Commons Speakers through the power of control over proceedings.

## Parliamentary records and journals

The language of parliamentary documents would not normally be considered in a discussion of privilege. In England it is not. The situation in Canada is substantially different. Recognition of the historical reality of the bicultural and bilingual nature of the country was a fundamental precondition to the establishment of Confederation. The use of French in the Legislature of the United Province of Canada had been a matter of considerable controversy. The Union Act of 1840 declared English to be the only language of the Legislature.[30] This provision was repealed by the Imperial Parliament in 1848.[31] The importance of the two languages is fully admitted in section 133 of the Constitution Act 1867, which allows the use of French and English as languages of debate in both Houses of the federal Parliament and also requires the publication of the records and Journals of the Senate and the House of Commons in both languages. As a result, both English and French have been spoken in Parliament since 1867 and the Journals have likewise been published in both languages since that time. However, this has not been the case with the Debates (Hansard), the verbatim record of the deliberations of the Senate and the House of Commons. While the first Debates for the House of Commons were not published until 1875, the bound volumes of the English and French versions appeared at the same time. The Senate Debates in English were first published a few years earlier in 1871, but French Debates were not available before 1896.

In more recent years, having put themselves under the Official Languages Act, both Houses have instituted similar rules and practices requiring that the distribution of all documents supporting the proceedings of either the Houses or any of its committees can only take place when they are available in both languages.

[30] The Union Act 1840 (UK), c. 35, section 41.

[31] *An Act to repeal so much of an Act of the third and fourth Years of Her present Majesty, to re-unite the Provinces of Upper and Lower Canada, and for the government of Canada, as it relates to the use of the English Language in instruments relating to the Legislative Council and Legislative Assembly of the Province of Canada* (UK), 1848, c. 56.

Again, like the matter of quorum and majority votes, the power to alter provisions respecting the use of English and French in Parliament is beyond the authority of either House acting alone to change. Indeed, it has never been competent even for Parliament to amend section 133. Provisions relating to the use of English and French were explicitly excluded from the 1949 amendment, and since 1982 this falls under the matters requiring unanimity for amendments. This is not to say that either House is prevented from going beyond the requirements of section 133. Since 2008, the Senate has been working on a pilot project intended to permit the use of aboriginal languages on the floor of the Senate and eventually in some committees.

The constitutional limitations on the scope of certain privileges apply to some provinces as well. Section 133 also states that the records and Journals of the Québec Legislature shall be in both languages. A similar obligation was also applied to Manitoba when it was created in 1870, and more recently to New Brunswick in 1982.

The scope and application of section 133 to the Québec National Assembly has been decided by the courts. A law purporting to declare French to be the exclusive language of the National Assembly was declared *ultra vires*. The Supreme Court of Canada held that "section 133 is not part of the Constitution of the Province . . . but is rather part of the Constitution of Canada and of Québec in an indivisible sense…"[32] Additionally, the Court explained that section 133 is an entrenched provision that cannot be amended by the unilateral action of Parliament or of the Québec National Assembly.[33] Similarly, in 1985 the federal government referred questions to the Supreme Court of Canada with respect to section 23 of the Manitoba Act 1870, which required, among other things, that "records and journals" of the legislature be kept in both English and French. The Court determined that the use of English and French in the records and journals of the legislatures was a mandatory obligation. In light of the provisions of the amending formula of 1982, both the agreement of the relevant provincial assembly and federal Houses would be required to change these provisions.

## Conclusion

The newly created Parliament of Canada established through the Constitution Act 1867 was given powers and authorities in keeping with the scale of its responsibilities. It was the successor to the Assemblies that had been

[32] *Attorney General of Québec v. Blaikie et al.*, [1979] 2 S.C.R. 1016 at 1025.
[33] *Ibid.* at 1026–27.

established in earlier attempts to provide parliamentary government in Canada. Unlike its predecessors, it had substantial control over revenues and it exercised authority over the executive through the accepted convention of responsible government. In addition, the new federal Parliament was deliberately provided in section 18 with the power to legislate for itself the privileges, immunities and powers of the Commons at Westminster. This authorisation was constitutional in its nature and not dependent on any doctrine of necessity. As stated in the statute that implemented this authorisation, these privileges were part of the law of the land. This was to be acknowledged by the courts which also retained the right to review any disputed privilege. While freed from the need to establish necessity, these privileges were nonetheless constrained by conditions set in the Constitution. This too was also acknowledged in the law. The first constraint was temporal in nature and the second derived from other constitutional provisions which imposed restrictions on certain privileges.

A consequence of the thoroughly constitutional character of privilege in Canada has been to displace much of the justification of privilege by necessity when there is a conflict with section 18. This became apparent when Parliament sought to enlarge the power to hear witnesses on oath by law in 1873. The political pressures exerted by the scandal involving the Canadian Pacific Railway was not sufficiently necessary to override considerations based on the actual language of section 18; nor was the fact that the Westminster Commons had also been provided this power by statute in 1871. Consequently, the law was disallowed. Even as corrective steps were subsequently taken to amend section 18 to address the immediate situation, the revised version of section 18 still imposed limitations on what might be asserted through legislation. The language of section 18 remains clear and unchanged; no law of privilege for the federal Parliament is to be adopted that exceeds at the time of passage, the privileges, powers and immunities held by the Commons at Westminster.

Other provisions of the Constitution Act 1867 imposed requirements which limit the scope of the basic privilege of control over proceedings, the complementary privilege to freedom of speech. These restrictions were the consequence of earlier experiences and failed attempts to establish parliamentary government with inadequate means and powers allowed to the legislatures. Fixing the quorum for the Senate and the House of Commons were the outcome of problems that arose following the implementation of constitutional measures in 1791. Similarly, the Constitution Act 1867 stipulated that all questions and decisions were to be reached by a simple majority and that

the debates and records of the Senate and the House of Commons were to be in English and French. Both of these requirements were put in place specifically to address difficulties that had arisen from the dissatisfaction with the Union Act 1840. While the original mechanism to amend these provisions has been modified to recognise Canada's full sovereignty and autonomy, it remains true that, in comparison to the scope of privilege at Westminster, these provisions cannot be adjusted by a simple resolution of one House, but must be the subject of either a statute adopted by Parliament or possibly, since 1982, a constitutional amendment under section 41.

The constitutional character of parliamentary privilege in Canada makes it distinct and different from that of Westminster. Despite the common feature that both are not codified, the fact that privilege in Canada is a part of a written constitution fixes it within a framework that is less flexible and amendable. In reality, this has not proved to be an inconvenience as privilege, while it is invariably acknowledged to be important, has never had the same historic or legal profile that it had, and continues to have, in England.

In 1867, the Imperial Parliament of the day sought to provide the new Parliament of Canada with sufficient authority to manage the complex affairs of the federation. In just recognition of the importance and status of the Senate and the House of Commons, the Imperial Parliament also authorised the new Parliament to claim the privileges that the former had fought so long to obtain. In doing so, it thoroughly anchored those privileges, immunities and powers in the constitution and in the law, rather than necessity. After almost 150 years, the legal structure put in place in 1867 has survived and matured. Parliamentary privilege is an integral component of this constitutional history and like any other part of the constitution and the law, it remains liable to further development and growth like a living tree.

# THE CHANGING FACE OF PARLIAMENTARY OPPOSITION: INDEPENDENTS, PARTIES AND HOUSES: AN OVERVIEW OF RECENT NORTHERN TERRITORY EVENTS

ROBYN SMITH
*Parliamentary Officer, Legislative Assembly of the Northern Territory*

## Abstract

A mere 12 months (almost to the day) after the 2008 Northern Territory general election, there was something of a potential constitutional crisis in the 25-member Northern Territory Legislative Assembly.

Pursuant to the recently amended Northern Territory Electoral Act[1], a majority of members of the Assembly wrote to the Speaker seeking to convene the Assembly to allow the Leader of the Opposition to give notice of a motion of no confidence in the Government.

As events unfolded, it became clear that the fate of the Northern Territory parliament rested with the Independent Member for Nelson, Gerry Wood.

## 2008 general election

Chief Minister Paul Henderson put himself to the people of the Northern Territory in an early general election on 9 August 2008.

On election night, the result was not clear and indicated that the Assembly's sole Independent, Gerry Wood, could hold the balance of power.

When he called the election, Henderson's government held 19 seats in the 25-member Legislative Assembly. He lost eight of those and emerged with the barest majority. The result was 13 seats for the ALP, 11 for the Country Liberal Party (CLP) and one held by an Independent. Three ministers lost their seats in an election that came down to a handful of votes in the Darwin suburban seat of Fannie Bay, which had been comfortably held by retiring member and former Chief Minister Clare Martin. It was some days before the Electoral Commission declared Labor's Michael Gunner the winner by 78 votes.

[1] Other jurisdictions amend their constitutions; the Northern Territory does not have a constitution, hence the amendment to the Electoral Act.

When the ALP's marginally victorious position became apparent, there was media speculation about whether Independent Gerry Wood would assume the role of Speaker. His response was that he "wouldn't consider it"[2].

## Parliamentary demographics

The ALP was left with four members who were not in the Ministry. Jane Aagaard, the Member for Nightcliff, retained her position as Speaker of the Legislative Assembly. The three newly elected government members became office holders: Michael Gunner (Fannie Bay) was appointed Whip; Lynne Walker (Nhulunbuy) was appointed Deputy Speaker and Chairman of Committees; and Gerry McCarthy (Barkly) was appointed Chairman of the Public Accounts Committee. This arrangement gave rise to the situation of the government having no backbenchers to serve on Parliamentary Committees, although the three office holders named serve on the majority of Committees.

TABLE 1: *Summary of parliamentary demographics—August 2008*

| | ALP | CLP | Independent | Total |
|---|---|---|---|---|
| Members | 13 | 11 | 1 | 25 |
| New members | 3 | 8* | — | 11 |
| Women | 6 | 2 | — | 8 |
| Men | 7 | 9 | 1 | 17 |
| Indigenous | 4 | 1 | — | 5 |
| Bush seats† | 7 | 1 (rural Darwin) | 1 (rural Darwin) | 9 |
| Urban seats† | 6 | 10 | — | 16 |

* The former CLP Member for MacDonnell (1997–2005) in Central Australia was elected to the urban Darwin seat of Port Darwin; the former CLP member of the House of Representatives seat of Lingiari Dave Tollner (2001–07) was elected to the new industrial/urban Darwin seat of Fong Lim. Both are treated as new members for the purposes of these statistics.

† A "bush" seat is one that is in a remote region and does not include an urban or town area. "Urban" seats are those within a town boundary and in Darwin's rural area, which is substantially populated.

## Electoral reform

Chief Minister Henderson personally accepted responsibility for the ALP's poor performance in the election and immediately moved to redress issues

[2] *Northern Territory News*, 11 August 2008, p 4.

acknowledged as having a negative effect on the government. One criticism throughout the three-week campaign was that he had called the election nine months earlier than was necessary (and did so on the premise of Japanese petroleum company Inpex requiring "certainty" in government before making a decision to base its LNG operation in the Northern Territory or Western Australia).

Following the first Cabinet meeting on 19 August, the Chief Minister announced that his government would amend the Electoral Act to incorporate fixed four-year parliamentary terms in the Northern Territory and acknowledged that the "low voter turnout was due in part to the early election date".[3]

The Electoral Act was amended in the following terms:

"24 Extraordinary general election – motion of no confidence

(1) The Administrator may issue a writ for a general election before the end of the minimum term if:
  (a) a motion of no confidence in the Government is passed by the Legislative Assembly (being a motion of which not less than 3 clear days notice has been given in the Legislative Assembly); and
  (b) during the period of no confidence, the Legislative Assembly has not passed a motion of confidence in the Government.

(2) After the motion of no confidence is passed, the Legislative Assembly may not be prorogued before the end of the period of no confidence and may not be adjourned for a period extending beyond that period unless a motion of confidence has been passed.

(3) In this section:
***period of no confidence***, for a motion of no confidence in the Government, means the period starting on the day the motion is passed and ending 8 clear days after it is passed.

25 Extraordinary general election – non-passing of appropriation Bill

(1) The Administrator may issue a writ for a general election before the end of the minimum term if the Legislative Assembly:
  (a) rejects an appropriation Bill; or
  (b) fails to pass an appropriation Bill before the time the Administrator considers the appropriation is required.

(2) In this section:
***appropriation Bill*** means a Bill for an annual Appropriation Act for all Agencies.

[3] Media Release, *Fixed Four Year Terms to be Introduced*, Chief Minister Paul Henderson, 19 August 2008.

26 Criteria for deciding whether to issue writs

In deciding whether a writ for a general election should be issued under this Division, the Administrator must consider whether a viable alternative Government can be formed without a general election and, in so doing, must have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Chief Minister."

Parliamentary officers had begun to consider the possibilities and implications of these amendments as early as February this year, and sought advice from the Solicitor-General in respect of terms such as "clear days" and "fails to pass".

It was clear that sections 24 to 26 of the Northern Territory Electoral Act were based substantially on section 24B of the New South Wales Constitution Act. The NSW Act has two definition sections (3 and 16), neither of which address terms such as "fails to pass" or "three clear days". Similarly, neither the NSW Interpretation Act 1987 nor Interpretation Amendment Act 2006 defined the terms in question.

Correspondence between the Clerk and the Solicitor-General seeking clarification of these terms was the first of several during the course of events that unfolded.

## Parliamentary arrangements

Given the closeness of numbers in the Assembly, the government was forced to consider the mechanics of parliamentary sittings. At the first sitting following the election, Sessional Orders included a 45-minute dinner break. The Government also negotiated with the Opposition for a pairing arrangement. After some negotiation, which resulted in additional staff and facilities, the Opposition agreed.

By the first General Business Day on 29 October, it was clear that Opposition business would keep the House sitting until 3 or 4 am the following day, a highly ceremonial day on which the Assembly would be addressed by the President of Timor Leste, His Excellency Dr Jose Ramos Horta.

On 28 October, Chief Minister Henderson announced reforms to parliamentary arrangements which included:

- three extra sitting days per year;
- starting the parliamentary day at 9 am rather than 10 am;

- finishing the parliamentary day no later than 10 pm; and
- web casting, including video, all parliamentary proceedings.[4]

These reforms were not effective by General Business Day. However, the Assembly sat until 1.30 am when the Government used its numbers to shut down debate, moved that the Assembly do now adjourn and further moved that the motion be now put, which, inevitably, drew a predictable protest from the Opposition.

The media interpreted the Chief Minister's announcement as a response to allegations of late night drunkenness by some members, but it was more a matter of practicality for the efficient functioning of the Assembly, although the Government was clearly concerned about the tactics of the Opposition. The Chief Minister, when announcing the reforms, said:

> "Territorians will be able to witness what we say, witness how we say it and be able to see it [and] hear it. Any misbehaviour is likely to be captured by the video and audio stream and can be rebroadcast. I really hope that it does improve the standards of behaviour."[5]

In fact, video streaming will not commence until the next sitting of the Assembly next month, but the audio is webcast so people can listen to proceedings live.

## Political dynamics

On 10 February 2009, the Deputy Chief Minister and Minister for Education Marion Scrymgour suddenly resigned from Cabinet following a ministerial re-shuffle in which she lost Education but gained a heavy portfolio load. She cited a medical condition as her reason for going to the back bench.

On Tuesday 2 June, she expressed outrage over the Government's proposed Indigenous outstation and homeland policy, an area over which she presided whilst in Cabinet. Urgent caucus meetings were convened and the matter apparently resolved. On Friday 5 June, however, she resigned from the ALP and announced that she would sit as an independent.

The Government's already tenuous grip on power had worsened, and the composition of the Legislative Assembly was now ALP—12; CLP—11; Independent—2.

[4] Prior to this announcement, parliamentary proceedings were available on the internet by audio feed only and Question Time was broadcast on an FM radio network throughout the Territory.

[5] *Northern Territory News*, 29 October 2008.

TABLE 2: *Summary of parliamentary demographics—June 2009*

| | ALP | CLP | Independent | Total |
|---|---|---|---|---|
| Members | 12* | 11 | 2 | 25 |
| Women | 5 | 2 | 1 | 8 |
| Men | 7 | 9 | 1 | 17 |
| Indigenous | 3 | 1 | 1 | 5 |
| Bush seats | 6 | 1 | 2 | 9 |
| Urban seats | 6 | 10 | — | 16 |

* Speaker has an optional deliberative and a casting vote in the event of a tied vote.[6]

For her part, Scrymgour had given the government an undertaking that she would support the Appropriation Bill and would not support a motion of no confidence in the government—the two scenarios that could trigger an Extraordinary General Election under the amended Electoral Act.

Seizing their newfound potential as an alternative government—with the support of the two Independents—on the first sitting day following Scrymgour's move to the cross-bench[7], the Opposition attempted to censure the Chief Minister for "lying to Aboriginal people and failing to deliver on promises to consult them on the government's outstation policy."

During the course of that debate, Scrymgour was extremely critical of former CLP governments in the matter under debate and informed the Opposition that under no circumstances would they have her support. Having been dealt a full and frank account of the newly Independent member's mind, when the motion was put, the Opposition did not seek to divide.

On Tuesday 4 August 2009, another Government minister resigned and went to the cross-bench. This time, Alison Anderson was the minister concerned, and she said her resignation was in protest to the expense of and lack of progress with the *Closing the Gap* housing initiative[8] in remote Indigenous communities. The Henderson Labor government was both vulnerable and in crisis—and the Assembly was scheduled to sit the following week.

[6] Section 27 of the Northern Territory (Self-Government) Act (Cth).
[7] 9 June 2009.
[8] Also known as the Strategic Housing and Infrastructure Program or SIHIP.

TABLE 3: *Summary of parliamentary demographics—4 August 2009*

| | ALP | CLP | Independent | Total |
|---|---|---|---|---|
| Members | 11 | 11 | 3 | 25 |
| Women | 4 | 2 | 2 | 8 |
| Men | 7 | 9 | 1 | 17 |
| Indigenous | 2 | 1 | 2 | 5 |
| Bush seats | 5 | 1 | 3 | 9 |
| Urban seats | 6 | 10 | — | 16 |

Now the balance of power rested with the Independents, two of whom were former ministers in the Labor Government.

The Opposition had anticipated this scenario and was well prepared to move a motion of no confidence in the Government pursuant to section 24 of the Electoral Act, the success of which would result in either a change of Government or an extraordinary general election.

The situation changed quickly, with the Government securing the return of Marion Scrymgour, the minister who resigned in June, on the same day that Anderson declared her independence.

TABLE 4: *Summary of parliamentary demographics—later, 4 August 2009*

| | ALP | CLP | Independent | Total |
|---|---|---|---|---|
| Members | 12 | 11 | 2 | 25 |
| Women | 5 | 2 | 1 | 8 |
| Men | 7 | 9 | 1 | 17 |
| Indigenous | 3 | 1 | 1 | 5 |
| Bush seats | 6 | 1 | 2 | 9 |
| Urban seats | 6 | 10 | — | 16 |

The Opposition, with the support of the two Independents (Wood and Anderson), which represented a majority of members of the Assembly, wrote to the Speaker seeking to convene the Assembly a day earlier than scheduled, on Monday 10 August, in order to give notice of a motion of no confidence. This was done, after which the Assembly was adjourned for the requisite three clear days, to reconvene on Friday 14 August when the motion was moved, debated and ultimately negatived owing to the support of the Independent

Member for Nelson, Gerry Wood, who secured a raft of undertakings from the Government in exchange for his support.

Wood, like Henderson during the August 2008 election, cited "certainty" as one of his reasons for supporting the Government.

As an aside, parliamentary officers spent the intervening days trying to anticipate the range of possible outcomes in respect of the motion of no confidence, and working through the procedural mechanics of each of these. The result was a collection of complex and impressive flow charts.

Wood entered into a "Parliamentary Agreement"[9] with the Chief Minister. That agreement included Wood's support for the Government on appropriation bills and motions of no confidence as long as Paul Henderson remained Chief Minister in return for a grab-bag of benefits for Wood's electorate of Nelson and some "parliamentary reforms", one of which was the establishment of a "Council of Territory Co-operation".

The "Council of Territory Co-operation" would comprise two Government members, two Opposition members and at least one Independent (Wood). In addition, the Council would:

> "… be empowered to conduct inquiries and make recommendations on matters of public importance which are referred to it by the Legislative Assembly or self-referred.
>
> Current matters of public importance which the Government agrees to support being referred to the Council include: Strategic Indigenous Housing and Infrastructure Program (SIHIP); Local Government Reform; the Planning Scheme and establishment of Weddell; and A working Future (including Homelands Policy)."[10]

Whilst it had been Wood's intention that the Council would be a creature of legislation, potential issues of justiciability pointed to its establishment as a select committee to be known as "the Council of Territory Co-operation" by way of resolution of the Assembly. At the time of writing, however, that matter had not been resolved. The present situation is that advice has been sought in relation to an external, non-voting Chair of the Council, which raises questions of immunity, privilege and the like.

Chief Minister Paul Henderson remains in a tenuous position in which he has to rely on the support of Wood, whom Alison Anderson is urging to withdraw his support. The Opposition remains in a position to move against the

[9] It was in fact an agreement between two individuals with no parliamentary status at the time it was signed. It was tabled by Wood during debate on the motion of no confidence.

[10] "Political Agreement" between Wood and Henderson, Appendix A, page 1.

Government subject to the circumstances of the day. Under the fixed-term regime, the next general election in the Northern Territory will be held in August 2012. The fledgling Wood–Henderson agreement has a long time to endure, and "certainty" is one thing that is not guaranteed in the Northern Territory.

# THE LAW LORDS DEPART: CONSTITUTIONAL CHANGE AT WESTMINSTER

BRENDAN KEITH
*Registrar of Lords' Interests, House of Lords*[1]

## Setting the scene

It is a Monday morning, sometime within the past 50 years. It is a few minutes before 11 am. A small group of five gathers by the newspapers in the Library of the House of Lords. Some quickly scan the headlines. Others chat informally. At one minute to 11, they proceed in a crocodile to a staircase that leads to the Committee Corridor of the Palace of Westminster. Their destination is Committee Room 1.

When they reach the door to the room, a splendidly attired Doorkeeper calls for order among the assembled crowd, by crying out "Their Lordships". Each member of the crocodile bows in turn to the onlookers and then enters the room. They are about to discharge the judicial function of the House of Lords, to hear and determine appeals from the lower courts. They are the final court of appeal and their word is law. They are the Law Lords.

Almost any general statement made about the Law Lords needs to be qualified. In relation to the description above, it must be made clear that the Law Lords assemble only during the law terms, which do not always coincide with parliamentary terms. So by special dispensation they are often at work when the two Houses are in recess. They have been gathering in the Library since 1948. Before then they assembled outside the chamber of the House of Lords itself and heard appeals in the chamber of the House. For reasons of history, their jurisdiction does not extend to criminal appeals from Scotland. The term "Law Lords" is shorthand: their correct title is "Lords of Appeal in Ordinary". Since 2004 their numbers have included one woman; and when she is one of the five proceeding to the committee room, the Doorkeeper's cry is "Their Lordships and her Ladyship". Walking at the end of the crocodile is a sixth person, the Head of the Judicial Office whose role at this point is that of shepherd. The crowd in the Committee Corridor are mostly barristers and solicitors and their clients, in attendance for the business of their appeal. There is a

[1] Brendan Keith was also the final Clerk of the Judicial Office from 2002 to 2009.

further point to amplify, the most important of all: the time-honoured scene described above no longer takes place, because the Law Lords' functions were abolished in 2009 and they have departed the Palace of Westminster.

What were they doing there, and why were they abolished? What follows is a short summary of a long story.

## Beginnings and endings

For many centuries the House of Lords discharged two distinct roles. It has had, and continues to have, a legislative role as part of the United Kingdom's Parliament. It used to have, but no longer has, a judicial role as the United Kingdom's final court of appeal. The two roles belonged in constitutional theory to the same persons, namely, all 700–800 members of the House. But in practice for about 150 years the judicial function was carried out only by highly qualified full-time professional judges entitled "Lords of Appeal in Ordinary", and commonly known as "Law Lords". Unlike other members, their peerages were not hereditary; they were the first peerages created for life. The number of Law Lords increased over the years since 1876 when they were first appointed; from two at the beginning to 12 at the end. Of these 12, two were usually appointed to represent the jurisdiction of Scotland and one to represent the jurisdiction of Northern Ireland. There have been 112 in all since 1876. "Ordinary" is a Victorian expression signifying that they were professional persons in receipt of a salary, unlike other members of the House. They were of course anything but ordinary: they were the sharpest legal brains of the day.

Although they were full members of the House with all the rights and privileges of the other members, the Law Lords in modern times seldom exercised their right to take part in the House's legislative or deliberative business. There had always been commentators who questioned the propriety of the most senior judges also being members of the legislature. But that had not inhibited some of the Law Lords from taking an active part in the "public" business of the House for a large part of the 20th century. The question whether the Law Lords should ever participate in the House's legislative business came to be asked more and more however, as greater attention was paid to the principle of judicial impartiality enshrined in article 6 of the European Convention on Human Rights. Prominent constitutional lawyers, including some senior judges, made their views felt on this issue. Greater weight was added to the argument for their exclusion from Parliament when the United Kingdom's Human Rights Act 1998 was enacted. The risk of a serious challenge on the

grounds of bias or conflict of interest could no longer be ruled out. Most Law Lords had chosen not to take part. Their formal announcement to that effect however was made as recently as 22 June 2000. 30 years before, the Law Lords would have been recognised by most members of the House; but no longer. Hence the question often whispered by "normal" members of the House as the Law Lords processed out of the Library each morning: who are those gentlemen?

The Constitutional Reform Act 2005 brought the House's judicial function to an end. The Act was controversial, and many were opposed to it, including some Law Lords. The Act created a new Supreme Court for the United Kingdom (UKSC). The last Law Lords then became the first Justices of the Supreme Court. They were given an old building in which to meet, separate from the Palace of Westminster but not far away, on the other side of Parliament Square. The building had to be renovated and so it took another four years for the provisions of the Act establishing the Supreme Court to be brought into force. Those four years were productive in terms of preparation for the new Court: half a dozen committees chaired by Law Lords set to work on every aspect of the new Court: the architects' proposals for refurbishment, the library, rules of procedure, security and public access and catering. As key stakeholders they engaged fully, and for the most part willingly, in their translation from Law Lords to Justices.

In the meantime they continued to sit in the Palace of Westminster as Lords of Appeal in Ordinary. Finally, in October 2009 the relationship between the most senior judiciary and the legislature changed. The highest court of appeal was no longer a committee of the upper House of the legislature; and the United Kingdom now has a formal separation of powers between legislature and judiciary.

## Committees, not courts

It may be useful to note briefly some features of the work of the Law Lords during their time in the Palace of Westminster. Memory fades and it may not be too long before people are unable to recall how things used to be. For that reason an extensive photographic archive was compiled during their last year, including unprecedented photographs of sittings of the Law Lords in Committee Room 1 and in the chamber of the House. This archive may be examined in the Parliamentary Archives; but a few words of description may also be helpful.

First, it should be noted that from 1948 the judicial function of the House

of Lords was in practice carried out by committees of the House. The court was a committee of the House like any other committee, except that it was composed exclusively of judges. There were two types of committees: Appellate Committees and Appeal Committees.

Appellate Committees consisted usually of five judges and dealt with full appeals. They sat in public and heard submissions from counsel. Given that the judicial function of the House can be traced back for at least 600 years, Appellate Committees were newcomers, having been first set up only in 1948. They were established for practical and not constitutional reasons. Up until then all appeals had been heard in the chamber of the House, during the day before the House met for public business in the late afternoon. In constitutional theory it was the full House that was sitting, although in reality it was the Law Lords only. After the Second World War, noise from building works to repair bomb damage made it difficult to continue to sit in the House itself (in fact the House had given up its chamber temporarily to the House of Commons and was sitting in the King's Robing Room). So they moved to the peace and quiet of Committee Room 1 upstairs, overlooking the River Thames. It was envisaged that the move would be temporary. But it proved so convenient that they remained there.

However, they could not sit there as the House, but only as a committee of the House. So in 1948 the UK final court of appeal became a committee of the upper House of the legislature—the Appellate Committee. The Appellate Committee sat on Mondays at 11 am and on Tuesdays to Thursdays at 10.30 am, with a one hour break at lunchtime. The Law Lords usually rose at 4 pm, but would often sit later to dispose of an appeal. Those hours however did not constitute their working day but only its core: some regularly arrived in the office by 7.30 am and most seldom left before 7 pm.

Judgments were in theory the decision of the whole House, and so could only be made by the House itself and given in the chamber of the House. The House did this by receiving and agreeing to a report from the Appellate Committee. Each week, usually on Wednesday mornings at 9.45 am, the House met for judgments, that is to say, the Law Lords sat in the chamber and gave their decisions (technically, "opinions") on the appeals they had heard in Committee Room 1. Because it was a sitting of the House, all the parliamentary procedures of the House applied. Prayers were read by a bishop; the clerk sat at the Table and called on the business; each Law Lord made a short speech in which he stated his verdict (until 1962 he read out his judgment in full); the question "That the report from the Appellate Committee be agreed to" was proposed from the Woolsack by the presiding Law Lord and each Law

Lord voted "Content" or "Not-content"; and the quorum was the same as for the House in its non-judicial role.

Very occasionally, as a reminder of the constitutional theory, the Law Lords sat to hear appeals in the chamber of the House; but this was so inconvenient to all concerned that it only reinforced the good sense of sitting in the committee room. However, for their last week in existence in July 2009, as a reminder of how things used to be done, the Law Lords sat in the chamber to hear appeals, as well as to deliver judgments. The public galleries were unusually crowded, as visitors came to see these curious proceedings for the last time.

Appeal Committees had a longer history. They dated from 1812 and were originally intended to act as a filter for interlocutory matters and to resolve disputes over the judicial standing orders. They usually consisted of three judges, and in recent times they usually worked in private, on the papers alone. Their modern purpose was to decide which appeals ought to be heard by the House, and they dealt with about 200 applications for permission to appeal each year. At one time the courts below used to give leave to appeal to the House fairly regularly; but in recent times such courts preferred to let the House consider almost all applications for leave to appeal, thus allowing the Law Lords themselves to decide their workload. In deciding whether to give permission to appeal, the Law Lords applied the criteria whether the case gave rise to an arguable point of law of general public importance that should be considered by them at that particular time, given that the matter had already been the subject of judicial decision and usually already reviewed on appeal. Appeal Committees gave leave to appeal in about one third of the applications they considered.

## Accommodation and costs

During their last decades in the Palace of Westminster the Law Lords and their staff were located on "the Law Lords' Corridor" on the top floor of the Palace of Westminster, looking out over Westminster Abbey. They were thus set slightly apart from the rest of those who occupied the building, and this symbolised in a small way the paradox of their situation: they were in and of the House but at arm's length from it too.

Each Law Lord had a room, equipped with an extensive set of legal authorities. There was also a small library of reference books adjacent to the Law Lords' Corridor. This avoided the need to go all the way down to the main Library, several floors below on the other side of the building. The small

library also served as a conference room where they could deliberate, although often they preferred to stay on in Committee Room 1 after the end of an appeal, and to deliberate there.

The House of Lords in its judicial capacity had low running costs compared with many of the world's supreme courts. This was because it did not need its own separate premises and facilities, and thus avoided the running costs associated with heating and lighting, security, catering, a library, information technology and maintenance of buildings. All of these were provided by Parliament at marginal cost to itself. The staff of the Judicial Office, which administered the judicial function, were members of the House of Lords administration. The identifiable costs of the judicial function were Law Lords' and staff salaries, about £2.5 million a year at the end (£700,000 of which was offset from income from fees on judicial business). In contrast the new UKSC has an annual budget of £13.8 million.

## The Lord Chancellor

The office of Lord Chancellor was unusual in that he was at one and the same time a cabinet minister, head of the judiciary, and Speaker of the House of Lords. At one time the Lord Chancellor was central to the judicial function of the House of Lords and not only sat regularly on appeals but "invited" the other Law Lords to sit on the Appellate Committees, that is to say, he nominated the committees. His participation was in fact declining throughout the latter part of the 20th century, mainly because there were so many other calls on his time. In recent years he played no part at all, having given up in 2003 his role as head of the judiciary and a judge (and in 2006 his role as Speaker of the House of Lords). His former judicial duties were given to the senior Law Lord (who became President of the UKSC) and to the Lord Chief Justice of England and Wales. The original plan for constitutional reform had envisaged that the office of Lord Chancellor should cease to exist altogether, but the House of Lords in its legislative role insisted that the office be retained. The office of Lord Chancellor was thus preserved, but not as part of the House of Lords. When Gordon Brown became prime minister in June 2007 he appointed a member of the House of Commons as Lord Chancellor, combining that post with the office of Secretary of State for Justice. This continues to be the position in the coalition government led by David Cameron.

## The Judicial Committee of the Privy Council

The work of the Law Lords was not confined to the United Kingdom. They also sat in the Judicial Committee of the Privy Council (JCPC). The JCPC is the final court of appeal for some Commonwealth countries and for Crown dependencies. Although any judge who is a Privy Counsellor is entitled to sit on the JCPC (and all judges on the Court of Appeal in England and Wales hold that rank), in practice the judges of the JCPC were mainly the Law Lords. So from 2009 the JCPC has consisted mainly of the Justices of the UKSC. This makes no difference to the work of the JCPC except that for practical convenience the JCPC and its courtroom and staff are now co-located with the UKSC in the refurbished building on Parliament Square.

Co-location meant the end of a small tradition. The JCPC used to be located at the end of Downing Street, a few doors away from the Prime Minister's residence at No 10. But the Law Lords were based in the Palace of Westminster. So from time immemorial the Law Lords sitting on the JCPC made the short journey between the Palace of Westminster and Downing Street four times a day: once in the morning, once before lunch and once after, and again at the end of the day's work. Formerly no doubt they travelled in horse-drawn carriages, but in modern times they travelled in a remarkable vintage Daimler limousine into which all five judges sitting on the JCPC could fit. Because there is no longer any need for them to make the journey to the Privy Council, there is now no need for the limousine, which has been retired from service.

## A last judgment?

The last judgments of the Law Lords were given on 30 July 2009. They came at the end of a week in which appeals were heard for the last time in the chamber of the House. The House had said goodbye to the Law Lords some days earlier (21 July), in a debate on the motion—

> "That, in view of the establishment of the United Kingdom Supreme Court on 1 October, this House thinks it right to record its appreciation of the contribution made to the work of this House by all those who have assisted the House or served in the House in a judicial capacity; and by the Lords of Appeal in Ordinary and other Law Lords since the passage of the Appellate Jurisdiction Act 1876."

In reply to speeches made by the Leader of the House and other party leaders,

Lord Hope of Craighead (who had been designated Deputy President of the new Court) said:

> "**Lord Hope of Craighead:** My Lords, as I have listened to these generous tributes, for which I and all my noble and learned friends past and present are truly grateful, it has struck me that what is really happening today is that the House is losing part of itself.
>
> **Noble Lords:** Hear, hear!
>
> **Lord Hope of Craighead:** After all, my Lords, the appellate function, which it has fulfilled with such diligence and attention to detail over many centuries, has been unique to this House. It was never part of the functions of the other place. It is unique, too, in the role that it has fulfilled as an appellate court. Its capacity to combine, within this Chamber, the legal traditions of the three separate jurisdictions within the United Kingdom—England and Wales, Scotland, and Northern Ireland—is something that the courts of none of those jurisdictions on its own could have achieved."[2]

Lord Hope went on to say:

> "The system has been unique, too, in what the Law Lords wear: no wigs, no robes, dressed simply as everyone else is in this House. The authority of the Law Lords is undoubted, but this is due to what they have said and written and what they have done, not to any kind of dressing up. The system has been unique in a respect that, in the end, was to be its undoing: the fact that the Law Lords were entitled to take part in the work of the House as a legislature and of its committees, just like everyone else."[3]

Nine judgments were delivered on 30 July 2009, late in the afternoon. The last judgment of all related to an appeal on the right to assisted suicide. The events of that last day are commemorated in a striking painting commissioned by the House of Lords Works of Art Committee. The artist is Sergei Pavlenko. Appropriately, the painting hangs in Committee Room 1 where it will be a reminder of the years when the Law Lords sat there to hear appeals and discharge the ancient judicial function of the House.

[2] HL Deb, 21 July 2009, col 1514.
[3] *Op cit.*

# INTEGRITY AND ACCOUNTABILITY REVIEW IN QUEENSLAND

NEIL LAURIE
*Clerk of the Parliament, Queensland Legislative Assembly*

In the last few years in Queensland a series of events and incidents touching upon integrity and accountability have arisen. They include the conviction of a former minister for accepting secret commissions from prominent business persons (with more charges pending); the revelation that a former Director-General supplied confidential information to a private sector company and later took up a contract with that company; an ongoing investigation into the role of a ministerial adviser in a government grant being awarded to a club with which he was associated and not for the purpose detailed in the grant; and large success fees given to lobbyists for the awarding of a large government contract.

In the wake of criticism from independently minded public figures about the integrity of public administration and the way business is conducted in Queensland, the Queensland Premier established an accountability and integrity review. The review's Green Paper, titled "Integrity and Accountability in Queensland", was tabled on 6 August 2009 for public discussion and consultation. My detailed submission to the review addressed a wide range of matters, including the lack of transparency in government decision-making and a growing culture that tolerates unethical conduct. My recommendations centred around improving the institution of Parliament by various means including the election of more members to the Legislative Assembly, the establishment of electorates with multiple members, and the overhaul of public service and judicial appointments. A condensed version of my submission is set out below. The full submission is published at: http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions/submissions-81-100/clerk-of-parliament.aspx.

## Perception and reality in politics

The great majority of public officers—including members of the Legislative Assembly—are hard working, honest and ethical servants of the people who have the public interest as their priority. However, the actions of a minority

harm the image of all public officers. In addition, continual and daily exposés in the media and allegations or insinuations of unethical behaviour by public officers, inappropriate relationships and conflicts of interest can very easily undermine public confidence in government and the institutions of government. The media can act as an important watchdog. However, it can also be reckless. The private interests of the media (that is, to publish stories that the public are interested in) do not always coincide with the public interest. This means that the media may publish a story that has the appearance of corruption and misconduct, but that in reality lacks substance, resulting in a lot of smoke without any fire. In the same way that the benchmark for unethical behaviour cannot be the criminal law, the benchmark for good reporting cannot be the laws of defamation.

Governments have a very strong propensity for dealing with matters in a political manner and disregarding proper procedure, which also creates the appearance of corruption and misconduct where none may exist. It is very difficult to build and maintain confidence in the integrity and ethics of government. It is much easier to destroy public confidence. The public are naturally cynical towards the institutions of government and it only takes a whiff of corruption or misconduct to destroy the public's confidence. Naturally, opposition parties are keen to exploit allegations of corruption because it aids their cause.

Within 20 years of the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, which also dealt with public administration in Queensland, corruption and misconduct in the police service, the public service and high political office has once again emerged in Queensland. It has not been found to be rampant—but it has emerged. If we are truly committed to reform that seeks to improve integrity and accountability in Queensland we need to study the past, learn the lessons it has to offer, and adopt reform that seeks to prevent a repetition of past mistakes. We need to accept that the reforms of the last 20 years have not gone far enough and that there are structural defects in Queensland—including a weakness in our institutions and resulting culture—that enable corruption and misconduct to emerge.

While there will always be aberrant behaviour in any jurisdiction and under any ethical regime, we must recognise that there is a recurring theme in Queensland of periodic corruption and misconduct, often at the very highest levels. This recognition is the first step to reforming our institutions and to ridding the state of a culture that fosters corruption and misconduct. We must all be aware of the dark side of our history—not to celebrate it, but to learn from it.

So why has corruption and misconduct been such a feature of Queensland's history and why has it arisen again within 20 years of the Fitzgerald report and its reforms? I believe that the root of the problem lies in weakness in our institutions. This in turn leads inevitably to a lack of transparency, an absence of fear of detection or enforcement, poor leadership in ethics and integrity and, most importantly, the growth of a culture that either accepts, ignores or is fearful of reporting unethical conduct.

Creating a lasting solution requires a complex set of actions. In my view there are ten pillars that must be the foundation for ethics and integrity in government. The interrelated pillars on which integrity and accountability rest are:

- ethical principles
- clear laws, rules and standards
- education
- advice
- protection of whistleblowers
- transparency
- enforcement
- strong institutions of government
- leadership
- culture.

### *Ethical principles*

The benchmark for appropriate behaviour in public office must be conduct that is within ethical principles. Every ethics regime should start with an expression of the principles on which it is based. These are aspirational, not enforceable, but they set the scene for enforceable laws, rules and standards. The principles found in section 4 of Queensland's Public Sector Ethics Act 1994 are:

- respect for the law and the system of government
- respect for persons
- integrity
- diligence
- economy and efficiency.

These, in my view, are very sound principles. I note, however, that one set of principles may not fit all the diverse roles within the public sphere. The role of a member of parliament, for example, whilst having some things in common with public servants, also has many different dimensions. Therefore, the

Statement of Fundamental Principles found in the Legislative Assembly's Code of Ethical Standards for Members is equally sound for members.

Given the importance and power of information in the information age, and the risks posed by an explosion of all types of information, I believe that the equal importance of transparency of decision-making, and the role of transparency to decision-makers, warrants the inclusion in the Public Sector Ethics Act 1994 of specific principle(s) that deal with (i) transparency, and (ii) the use of information.

### *Clear rules, laws and standards*

Every attempt at ensuring ethical behaviour will fail unless there are clearly enunciated rules, laws and standards. The rules, laws and standards in Queensland appear sound, and benchmark well nationally and internationally. However, there are newly emerging trends that must be considered, including the increasing prevalence of the professional lobbyist, the increasing number of political officers and the mobility of those officers between business and government, the reliance on those officers for advice at the expense of professional public service advice and post-public sector employment of public officers.

I recommend that new laws be established to regulate conflicts of interest arising between employment in the private sector and business, and post-public sector employment of senior public officers.

### *Education*

Principles, rules, laws and standards are in themselves inadequate without education. Education in relation to ethics and integrity cannot be voluntary. It must be compulsory and it must be regularly refreshed. Education should include the study of real life, past unethical conduct. This should not only reinforce ethical behaviour, but should provide identifiers as to unethical behaviour. Case studies that include scenarios in which the person was caught in the act should also have a deterrent effect.

I strongly recommend compulsory, certified ethical training in the public sector, requiring refreshment of certification every few years for every public officer. The more senior an officer is the more regular the requirement should be for refreshment of the education.

### *Advice*

Education alone is not enough. Easily accessible advice, from sources trusted by the advice seeker, is essential. A network of advisers throughout the public sector should be established and well advertised. Public officers who face con-

flicts, or who require advice, or who witness wrongdoing, need an independent network of peers to approach for guidance. Making an approach to appropriate peers or mentors can be much easier and far less daunting than first making a complaint to an organisation such as Queensland's Crime and Misconduct Commission.

### *Protection of whistleblowers*

Queensland's Whistleblowers Protection Act 1994, on the face of it, offers adequate protection to public officers who act appropriately and make disclosures relating to unlawful, negligent or improper conduct affecting the public sector, or posing danger to public health or safety and the environment. However, laws alone do not protect whistleblowers. Leadership is required to ensure that whistleblowers are actually protected. Many self-labelled whistleblowers are not, in fact, whistleblowers at all but opportunists, or people who are themselves the subject of allegations of misconduct or poor performance who attempt to use the status of whistleblower as protection.

There should be a thorough review of the adequacy of whistleblower protection. The network of ethics and advisers throughout the public sector referred to above may also assist in restoring confidence in whistleblower protection.

### *Transparency*

Secrecy is the companion of corruption. The light of transparency is one of the greatest weapons against corruption. When decision-makers act secretly, the risks of corruption in one form or another is increased dramatically. Disclosure of the private interests of decision-makers, disclosure of political donations (well before elections) and open and transparent tendering processes are all vital to prevent corruption.

There should be a thorough review of the adequacy of disclosure by public officers who make significant decisions in the public sector. The public disclosure of such interests should be considered as part of the government's integrity and accountability review.

### *Enforcement*

Investigation, detection and enforcement of breaches of rules, laws and standards are vital to accountability and transparency in public administration. Without risk of detection, or fear of punishment, corruption will flourish—only being hampered by the inherently honest.

In Queensland, the establishment of the Crime and Misconduct

Commission (CMC) and its predecessor the Criminal Justice Commission (CJC) has largely been a success story in the fight against corruption. The commission has been quite successful in deterring, investigating and dealing with misconduct in the public service and the police service. However, the commission was never designed to be the watchdog of government action that does not amount to criminal conduct, but which is still wrong when measured against ethical principles. A commission such as the CMC can never be a substitute for a properly functioning parliament.

The 20 years in which the CJC/CMC has operated demonstrates that the commission has been misused by all sides of politics and all levels of government who have referred matters to the commission when it has obviously no jurisdiction regarding those matters. The commission's decisions to take no further action have been lauded as proof of no wrongdoing by one side, and as evidence of a cover-up or inadequate investigation by the other. The referral of a matter effectively, and wrongly, often kills a matter.

The CJC/CMC itself has made many mistakes when dealing with complaints that have a political context. The CJC, in its early days, acted in breach of natural justice on a number of occasions. The CJC/CMC has acted inconsistently on allegations that were similar. In some instances the commission has investigated and reported on a matter even when no criminal conduct was uncovered. In other cases, it has investigated and recommended criminal proceedings in a matter, but then not reported on the matter, when criminal proceedings were not commenced by prosecuting authorities, resulting in inadequate public examination of the conduct in question. It has dismissed some matters expeditiously "on the papers", whilst its investigations in other instances have been interminably lengthy with no wrongdoing actually proven. In some cases there have been public hearings, in others cases there have been closed hearings.

### *Strong institutions of government*

The success of any system of government is predicated on the requisite strength of its institutions. Queensland suffers from weaknesses in key institutions, including the judiciary. Queensland is fortunate to have an independent, vibrant and well-respected judiciary.

However, I recommend that the judiciary should be further strengthened by improvements to the processes for judicial appointments. This would remove constant allegations regarding the selection of new appointments, and would further strengthen public confidence in this very important branch of government. It is vital that any discussion or review about the processes of

judicial appointments should include the judiciary and the legal community as well as the wider community.

One long-term strength of Queensland has been the professionalism and independence of its public officers, even when promotion was (wrongly) on the basis of seniority rather than merit. Merit and proven ability are now (correctly) the widespread criteria for appointment to the majority of the public sector. Merit rather than seniority should always be the basis for public office. This strengthens the institution of the public sector. However, there have been increasing concerns about the politicisation of the senior ranks of the public service over many decades and under different governments, and increasing interference with the operation of the public sector by political officers, with party/political rather than public interests in mind. The risk, if not the actuality, is that the public service no longer gives full and frank advice or that such advice is filtered. It is understandable that ministers will want to work with directors-general that they know and trust. However, the perception is that, as the years progress, the number of officers with political allegiances/connections increases.

There are some offices in which bipartisan confidence is so important that they should be appointed only after a selection process conducted by a parliamentary committee, and recommended by a bipartisan majority of that committee. The committee should make the selection, rather than being consulted by the executive about the appointment. Such consultation is already in place in some legislation but it is often illusory and provides no real safeguard. The offices that should be appointed in the way outlined above are those offices set out in section 68 of the Parliament of Queensland Act 2001.

The Queensland Parliament is less representative than many of its peers. There are also serious structural and cultural impediments that prevent the Queensland Parliament from keeping government accountable. A key to improving, and ensuring ethics and integrity in, Queensland is improving the institution of parliament. Many of the improvements implemented post-Fitzgerald inquiry and report have proven to be faux improvements and must now be revisited.

### *Leadership*

Leadership lies at the very heart of ethics and integrity. Without strong leadership, any ethics regime will fail. Leaders must sometimes choose between political solutions and correct ethical decisions. When proper processes are cut short or circumvented for a quick political solution, the whole ethics regime suffers.

The recall of the Queensland Parliament on 9 December 2005 to deal with a matter arising from a CMC investigation and report—instead of following proper parliamentary procedures—is an example of how dealing with an issue can easily become hopelessly partisan if proper procedures are not followed. The matter in this case was already before the parliament's privileges and ethics committee and that committee had established a long history of dealing with difficult matters in an appropriate and bipartisan fashion. In its history to that date, there had only ever been one dissenting committee report.

### *Culture*

The Fitzgerald report stressed how vital culture is to the way public officers act in relation to ethics and integrity. The report noted the linkage between culture and misconduct. We need to accept that the Queensland public sector, at all levels and in various areas, has periodically lapsed into unethical behaviour or misconduct. The greatest mistake we can make is to minimise identifiable misconduct by labelling it with catchwords or descriptions such as "isolated". It is also a mistake to claim that detecting and punishing corruption is a positive sign—particularly when that corruption may have been stumbled upon by authorities.

The political culture that has grown in Queensland is, in many respects, worse than the weaknesses in institutions referred to above. The growth of the modern political party, whilst greatly improving the stability of government, has negatively affected the ability of parliaments around the world to make governments accountable. Strict party discipline has weakened responsible government in Australia. It has made the problem more acute in Queensland where the lack of a representative upper house has affected the scrutiny function of the Queensland Parliament—and its role and function as the "Grand Inquest"—by hampering the creation of a committee system that is truly able to scrutinise government action.

The poor political culture in Queensland stems from the time of the abolition of the Legislative Council. It does not necessarily relate to the abolition of the council per se, but rather the manner in which its abolition was effected and the nature of unicameralism that followed. One cannot but think that the culture evident in the abolition of the Legislative Council re-emerges from time to time in Queensland. It is a numbers game, winner taking all, no need for compromise, no conviction that people other than those in government can positively contribute, for example, in reviewing or amending legislation. My observations of other jurisdictions with bicameral parliaments suggest that there is, by virtue of necessity, more of a culture of compromise elsewhere than

exists in Queensland, and more tolerance of other views, no matter who sits on the Treasury benches.

## Reform

### *Parliament*

One of the conventions of responsible government is ministerial responsibility. It appears that this most basic concept is now perceived far differently to how it would have been only a few short decades ago. Indeed, we are forced to wonder if individual ministerial responsibility is perceived by governments to exist at all.

I recommend that a new provision be inserted into the Constitution of Queensland Act 2001 to recognise the individual responsibility of ministers to the parliament for their personal decisions and actions.

The growing number of offices of profit in parliament, especially since 1996, has dramatically worsened the situation by increasing government control of the parliament. Every year the backbench shrinks, so too does scrutiny and accountability. Effectively, the balance required between an active backbench and the executive is distorted.

The most significant structural change to the Queensland Parliament in recent years has been the introduction and growth of parliamentary secretaries and government whips. There should be a constitutional restriction on the number of offices of profit or executive positions in the parliament. I recommend that these should not exceed 20 per cent of the total number of members of the Legislative Assembly.

Parliamentary committees are the jewel in the crown of parliamentary democracy. Unicameral parliaments should have committee systems that encompass and scrutinise the array of functions/portfolios of government. Recent reforms in Queensland, sponsored by the government, have ensured that parliamentary committees are focusing on policy rather than the scrutiny of government action. Indeed, such committees are effectively hampered in scrutiny activities by their terms of reference. In short, unicameralism has, to date, denied Queensland a committee system on a par with many other Westminster-style parliaments.

### *Electoral system*

There are structural flaws in our electoral system, including the very size of our parliament. One result of unicameralism (coupled with single-member constituencies in its only House) is that the Queensland Parliament is less

representative than other Australian parliaments. This has been compounded by the absence of any growth in the number of members, despite the growth in the population of the state, the complexity of regulation by government and the increasing size of the public service.

The electoral system is at the very heart of any parliamentary democracy. However, the Queensland Parliament is not representative of the voting intentions people of Queensland—the electoral system does not result in a parliament that reflects the popular vote.

One clear advantage of an upper house is the likelihood of wider representation, brought about by proportional representation or multi-member electorates or both. Of course, unicameral parliaments need not be unrepresentative. Reform of the electoral system, with a view to ensuring that the parliament more accurately reflects votes cast, should be undertaken. Multi-member seats or a mixed proportional representation system are models that should be carefully considered for Queensland.

There has been no change in the number of members in the Legislative Assembly since 1986, despite the approximate 30 per cent increase in population in the same period. The ostensible reason given as to why the number of members has remained relatively static, whilst population has grown and in some jurisdictions exploded, is that increasing the number of members is seen as unpopular with the electorate. The real reason is that increasing the number of members does not suit governments and major political parties. No government wants to have an overly large backbench, which can often be more troublesome than an opposition, because dissent or even adverse comment or disquiet from members of the government's backbench inevitably receives more media attention than adverse comment from the opposition.

I am of the very strong opinion that extra staff and other resources are no substitute for increasing the number of members—the real irony being that the cost of extra staff and other resources is probably much more than increasing the number of members.

I recommend that the number of seats in the Legislative Assembly should be increased by ten seats before the next redistribution.

### *Political funding*

Modern politics requires substantial funding. I am not convinced that we will ever be able to return to the days when "chook raffles" will supply sufficient funding for political parties' election campaigns. I tend to support increased public funding, but I am not convinced that it is in the public interest to ban or limit private funding rather than simply increase the frequency and extent

of disclosure on private funding. In the debate about campaign funding, the significant advantage that incumbency brings (whether governments or individual seats) cannot be understated. Most members run continuous three-year campaigns, from one election to the next, in a variety of ways. Incumbency brings incidental exposure and resources to assist in this regard. Limits on private campaign funding may have the effect of entrenching incumbents.

### *Lobbyists*

Modern government is so complex that business and interest groups need to employ lobbyists to assist with contacting government. Lobbying cannot be banned, but there is an obvious need for some regulation. The recently established Queensland lobbyist register is a positive move. Professional organisation codes, and codes of conduct for lobbyists, would be another. It appears to me that the real issue is the movement of people between the public sector and the private sector, whereby decision-makers later become employed by those affected by their previous decisions, or where they are employed by those about whom they later have to make decisions. Codes of conduct may not be sufficient in a legal sense to deal with all these scenarios and legislative provisions may be required.

## Conclusion

Despite my critique of aspects of our system of government, I maintain that Queensland is still lucky to have a vibrant democracy. The Queensland Parliament provides a stable government, legislation of a high standard and a forum for debate and grievance. There have been many positive gains made during the last two decades in improving the parliament. But parliament as a scrutiny mechanism over government is lacking. We should not settle for anything less than the best possible parliamentary institution, and there are many reforms that are possible and which I advocate.

# MISCELLANEOUS NOTES

## AUSTRALIA

### House of Representatives

#### *Publication of details of members' interests on the Parliament House website*

In November 2009 the Committee of Privileges and Members' Interests presented a report to outline to members the Committee's views on the desirability of publishing the details of members' interests on the Parliament House website and to advise members of a specific proposal for implementation.

While the Register of Members' interests currently is made public in hard copy, it is not published on the Parliament House website. However, as the result of an approach to the Committee early in this Parliament by an organisation, Open Australia, which wished to make the declarations of members' interests available on its website, the initial declarations of interests by all members in this Parliament currently are available from the Open Australia website.

The Committee's considerations had regard to the existing framework provided in the House's resolution on members' interests, and it does not propose any change to that framework.

The Committee also is considering a range of security features which will make it more difficult to download the statements, change them, and then present them as original documents. The Committee is also considering the issue of the visibility of members' signatures on the statements.

The Committee believes that the approach it proposes to the electronic publication of the Register of Members' interests will allow implementation in a way which will achieve a reasonable balance between the considerations of the integrity of the data, the ease of access to those using the system and administrative efficiency. The Committee has sought the views of members and other interested people on the proposal which would be implemented in the next Parliament.

#### *Procedures of the Committee of Privileges and Members' Interests and the House of Representatives in relation to consideration of privilege matters and procedural fairness*

In September 2009 the House Committee of Privileges and Members' Interests presented to the House a report recommending that the House adopt

procedures for the Committee and the House in relation to consideration of privilege matters to provide natural justice and procedural fairness.

The report followed a review by the Committee of procedures that had been adopted by the Committee. The review was undertaken by two leading academics in the field of parliamentary privilege—Professor Geoffrey Lindell and Professor Gerard Carney.

The procedures for the Committee cover matters such as:

- giving a person subject to a proposed investigation advice of allegations, or the charge, against them;
- giving a person charged all opportunity to respond;
- permitting a person charged to be accompanied by counsel;
- hearing evidence in public, wherever possible;
- giving the Committee the option to appoint counsel and have counsel examine witnesses; and
- giving a person the opportunity to respond to any findings or recommendations for penalties.

The procedures for the House cover matters such as:

- giving seven days notice for any finding of, or sanction for, contempt;
- giving the opportunity for a person for whom a penalty is proposed for contempt to address the House;
- providing that the House cannot impose a penalty greater than that recommended by the Committee; and
- providing that the House cannot make a finding of contempt where the Committee has made no such finding.

The House resolved to adopt the proposed procedures on 25 November 2009. The procedures can be found at:
http://www.aph.gov.au/house/ committee/pmi/reports.htm

### *Review of parliamentary entitlements*

In September 2009, the Special Minister of State announced that there would be a comprehensive review of the entitlements of Commonwealth parliamentarians.

The review followed a report by the Australian National Audit Office on the administration of a range of parliamentary entitlements that, in particular, was critical of the use of the printing entitlement. In addition to the review, the Government announced a reduction in the printing entitlement and a tightening of its administration.

The review is, among other matters, examining:

- a single principles-based legislative basis for entitlements;
- framework changes to remove overlap and duplication;
- defining the role of entitlements use;
- improving transparency and accountability; and
- improvements to protocols for handling misuse.

The full terms of reference can be found at: http://www.finance.gov.au/parliamentary-services/parliamentarians-entitlements.html

The review panel is chaired by a former senior officer from the Department of Prime Minister and Cabinet, Ms Barbara Belcher. The review will report by the end of March 2010.

### *Electronic petitioning recommended*

The Petitions Committee presented its report on electronic petitioning in November 2009. The report recommends that a system for hosting and receiving electronic petitions be established by the House and managed by the Petitions Committee. In implementing such a system the report recommends that arrangements be made to utilise the software supporting the Queensland Parliament's electronic petitioning system, including initially the signature verification methods that the Queensland system currently employs. If implemented, an electronic petitioning system would operate alongside the traditional paper petitioning practice.

The Petitions Committee has also resolved to conduct an inquiry into the current arrangements for petitions. Terms of reference for the inquiry require the Committee to examine its role and operations, and the effectiveness of the standing and sessional orders which relate to petitions, some of which were put in place to underwrite the new arrangements. Among other things, the Committee may consider whether current sessional orders on petitions should be made into standing orders, and in what form.

## Senate

### *Double dissolution triggers*

A package of legislation comprising 11 bills designed to implement an emissions trading scheme was a major component of the 2009 legislative programme. Although the Government was desirous of having the package enacted before the United Nations Conference on Climate Change in Copenhagen in December 2009, this was not to be and the Senate defeated

the package twice with an interval of three months between rejections, thereby enabling the bills to qualify as double dissolution triggers under section 57 of the Australian Constitution. Had the Government so wished, it could have advised the Governor-General to dissolve both Houses simultaneously with the prospect of reintroducing the bills after the election. A third defeat of the bills would then enable a joint sitting of both Houses to be convened for the purpose of considering the disputed bills. Under the Constitution, a double dissolution can occur at any time up to 11 August 2010 (six months before the expiration of the present House of Representatives). Further "triggers" were established early in 2010 on the second defeat of three bills dealing with private health insurance incentives. In April 2010, the government indicated that it would be deferring legislation on emissions trading.

### *Legislative responses to the global financial crisis of 2008–09*

Legislative responses to the global financial crisis included the appropriation of significant sums to fund stimulus measures, including a programme of building projects in schools and the subsidisation of ceiling insulation in existing homes. Early in 2009 the programme of sitting days for the Senate was rearranged to enable the package of stimulus bills to be referred to a Senate committee for a brief inquiry before being dealt with expeditiously by the Senate. Despite making concessions to the cross-bench, the Government failed to secure the support of a majority of senators and the bills were initially defeated on an equally divided vote. The bills were immediately reintroduced into the House of Representatives in an amended form and passed overnight, but only after further undertakings were given did they pass the Senate. Although the Australian economy was one of the few not to experience recession at this time, the rushed response led to problems of implementation and in early 2010 various Senate committees were engaged in inquiries into failures of safety standards in the home insulation programme which had been linked to the deaths of workers and numerous house fires, and allegations of greatly inflated building quotations in the school building renovation programme.

### *Legislative responses to High Court decisions*

The Senate Foreign Affairs, Defence and Trade Committee, in its report on reform of the military justice system, had recommended that a new military court be established as a fully fledged court under the Constitution. The former government at the time rejected this recommendation and established a quasi-court, which the High Court, in a judgment on 26 August 2009 (*Lane*

*v Morrison*), found to be unconstitutional. Two bills were speedily passed in September 2009 to fill the resulting gap with a temporary arrangement.

### *Orders for production of documents*

Numerous refusals by governments to comply with orders for production of documents on insufficiently articulated grounds led to several significant developments during 2009. One development was the agreement of the Senate on 13 May 2009 to an order setting out the process to be followed by witnesses before Senate committees who believe that they have grounds for withholding information. The order requires that witnesses state recognised public interest grounds for withholding information and, at the request of the committee or any senator, refer the matter to the responsible minister, who is also required to state recognised public interest grounds through the claim to withhold information. The order does not change the existing procedures of the Senate, but consolidates the formerly established, but not always followed, process, with the guidance of public sector witnesses in the future. The experience of committees and senators at the subsequent estimates hearings showed that the new order will take some time to become established practice. Its implementation is being monitored by the Procedure Committee.

In another significant development, the government's refusal to provide information about its proposed national broadband network led the Senate to agree an order to postpone consideration of any government legislation on the network for so long as the government refuses to provide the documents. The order remains in place at the time of writing and legislation on this subject has not been considered by the Senate.

The difficulties encountered by the Senate and its committees with an executive culture that is instinctively anti-parliament are well illustrated by the fate of an order for production of documents moved on behalf of the Select Committee on Fuel and Energy for the Treasury modelling used for the Government's emissions trading scheme legislation. A Government statement that the information could not be released because it was "commercial-in-confidence" was not accompanied by the statement of the commercial harm that would ensue from disclosure, required by an earlier order of general effect. A further statement from the Government indicated that the information required was of commercial value to the Treasury's consultants and its disclosure would undermine its value. A proposed order for the information to be released to the select committee and its consultant on a confidential basis was rejected by the Senate. A revised version was subsequently agreed to when the committee produced letters from the universities which participated in the

modelling indicating that they had no objection to the release of the information. Despite this, the Government again refused to provide the documents and a further resolution declared it contemptuous for failing to do so. A further order directed to the Productivity Commission for the production of documents in its possession relating to the emissions trading scheme was accompanied by a request to the commission for a report on aspects of the scheme. This order was complied with but the Government's continued failure to produce the modelling was said to have contributed to the first rejection of the emissions trading legislation.

### *Senate committee system*

In May 2009 the Senate agreed to restructure its committee system to return to the structure in place from 1994 to 2006 when it had been changed following the government's unexpected achievement of a majority of seats in the Senate, effective from 1 July 2005. The Senate once again abandoned the system of unitary committees in eight subject areas, with government majorities and chairs, and returned to a system of paired committees in each subject area. The legislation committees, with government majorities and chairs, examine bills referred to them, estimates of expenditure, and the annual reports and performance of government departments and agencies within their areas of responsibility. The references committees, with non-government majorities and chairs, inquire into matters referred by the Senate in their areas of responsibility.

The resurgence in the number of select committees (ad hoc committees established for a particular purpose), evident after the 2007 election, continued in 2009 but subject to an informal agreement to limit the number of such committees in operation at any one time.

## New South Wales: joint entry on behalf of the Legislative Assembly and Legislative Council

### *The scope of parliamentary privilege—Stewart v Ronalds*[1]

On 11 November 2008 the Lieutenant-Governor, on the advice of the then Premier of New South Wales, the Hon Nathan Rees MP, removed from office and withdrew the ministerial commission of the Hon Tony Stewart MP following allegations of misconduct by the minister and a subsequent inquiry and report by Ms Chris Ronalds SC. Mr Stewart subsequently challenged the

[1] [2009] NSWCA 277.

Premier's decision in the NSW Supreme Court, alleging, amongst other things, that he was denied procedural fairness in the process that led to his dismissal. The matter was subsequently removed to the Court of Appeal.

The decision of the New South Wales Court of Appeal in *Stewart v Ronalds*, handed down on 4 September 2009, included some useful comments on the privilege attaching to documents tabled in the House.

Article 9 of the Bill of Rights 1689 applies in New South Wales under the Imperial Acts Application Act 1969. In *Stewart v Ronalds* one of the issues considered by the Court of Appeal was whether the report of Ms Ronalds, which was prepared at the request of the Premier, but later tabled in the Legislative Assembly, constituted "proceedings in Parliament" for the purpose of Article 9, and was therefore immune from questioning in the court proceedings.

It is accepted that the House and its committees have the power to prepare and publish documents, such as committee reports, which may be tabled in the House. On tabling, the publication and content of such documents, prepared for the purposes of "proceedings in Parliament", attract absolute privilege.

By contrast, it is reasonably clear that the content of a document prepared independently of "proceedings of Parliament" but subsequently tabled in the House, such as an annual report of a government agency, or correspondence exchanged between two or more parties, does not attract parliamentary privilege for the purpose of Article 9. It is the act of tabling itself that is privileged as part of the "proceedings in Parliament", not the content of the document. In *Szwarcbord v Gallop*,[2] Crispin J held that:

> "… privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the Parliament and their subsequent production would not reveal words used or acts done that might fairly be regarded as falling within the concept of 'proceedings in Parliament'. For example, a Member of Parliament sued for defamation in respect of the publication of a letter for purposes unrelated to Parliamentary business could not effectively prevent the maintenance of the proceedings against him by the simple expedient of tabling the only copy of the offending letter."[3]

In *Stewart v Ronalds*, the Court of Appeal did not need to reach a conclusive view on the status of the Ronalds report. However Hodgson JA, while expressing himself tentatively, did make some useful observations—

[2] (2002) 167 FLR 262.
[3] *Szwarcbord v Gallop* (2002) 167 FLR 262 at [23].

> "It is true that the business of Parliament includes holding the Executive to account, and the maintenance of the confidence of Parliament in relation to the composition of the Executive; but this does not necessarily mean that the tabling in Parliament of a report obtained by the Executive for its purposes makes that report, so obtained by the Executive, a proceeding in Parliament.
>
> … it seems arguable to me that this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts ..."[4]

### *A new protocol for the execution of search warrants on members' offices*

Over the past six years the Privileges Committee of the New South Wales Legislative Council has conducted a number of inquiries concerning issues relating to the execution of search warrants on members' offices. Those inquiries concerned the seizure of documents from the office of a member of the Council, the Hon Peter Breen, by the Independent Commission Against Corruption (2003), a claim of privilege arising from the seizure of such documents (2004), and the development of a draft protocol for the execution of search warrants by law enforcement and investigative agencies (2006).

In September 2009, the respective Houses of the New South Wales Parliament gave references to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council Privileges Committee in relation to the issue of search warrants within the parliamentary precincts. These references required the respective committees to develop a memorandum of understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption concerning the execution of search warrants by the Commission on the Parliament House offices of members. This followed the adoption by the Commission of its own Operations Manual concerning the obtaining and execution of search warrants which included procedures for the execution of search warrants on parliamentary offices.

In its report on the inquiry, dated 25 November 2009, the Legislative Council Privileges Committee found that the Commission's procedures incorporated the key measures recommended by the Committee in its draft protocol of 2006. Accordingly, it supported the adoption of those procedures in a new Memorandum of Understanding with the ICAC.

[4] *Stewart v Ronalds* [2009] NSWCA 277 at [121] and [124].

The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics reported on the matter on 26 November 2009. While agreeing with the Legislative Council Committee, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics recommended that a Memorandum of Agreement also be developed with the NSW Police and the Director of Public Prosecutions.

Based on these reports, in November 2009 the Presiding Officers and the Commissioner of the Independent Commission Against Corruption entered into a new Memorandum of Understanding on the execution of search warrants in the Parliament House office of members of the New South Wales Parliament.

### *Political donations and election funding*

In recent times there has been considerable attention in the media and elsewhere concerning possible links between the political donation process and Government decisions regarding property development.

In response, the Leader of the Opposition, the Hon Barry O'Farrell, introduced the Independent Commission Against Corruption Amendment (Political Donations) Bill on 13 November 2009. The object of the Bill is to confer additional powers on the Independent Commission Against Corruption to investigate and report on potential connections between contributions and political decisions.

In turn, on 25 November 2009 the then Premier, the Hon Nathan Rees, introduced the Funding and Disclosures Amendment (Property Developers Prohibition) Bill. The bill prohibits property developers from donating to political parties. The bill passed both Houses without amendment and was assented to on 14 December 2009. This is the first time any state in Australia has enacted such reforms to their electoral funding legislation.

The legislation also makes it unlawful for someone to make a donation on a developer's behalf and for a developer to solicit another person to make that donation, and for a person knowingly to accept that donation. Spouses and other close associates of property developers are also forbidden from making donations. The legislation excludes supermarkets and other retail businesses on the basis that they only lodge development applications sporadically. Penalties for breaches carry a maximum fine of $22,000 for political parties and $11,000 for individuals. The Election Funding Authority was given powers to recoup unlawful donations.

In addition to this legislation, in December 2009 the Premier referred the issue of election funding to the Joint Standing Committee on Electoral Matters

for consideration, personally delivering the terms of reference to the Committee at one of its meetings. The stated intention was for this inquiry to build on the work of the Legislative Council Select Committee on Electoral and Political Party Funding, which reported in June 2008.

## New South Wales Legislative Assembly

### *Bills introduced by the Speaker*

In July 2007 an amendment was made to the Constitution Act 1902 (NSW) to enable the Speaker to participate in debate and vote in the House when not presiding in the chamber. This amendment enables the Speaker to initiate legislation in the same way as any other private member. In 2009 the Speaker introduced two bills, both of which were assented to.

On 26 June 2009 the Speaker introduced the Parliamentary Remuneration Amendment (Salary Packaging) Bill following representations from a number of members from various political persuasions. The bill provides for members to access the same salary packaging arrangements as NSW public sector employees. The amendment to the Parliamentary Remuneration Act is in line with recommendations made by the Parliamentary Remuneration Tribunal and is similar to superannuation and salary packaging schemes for members of parliament in other jurisdictions. The bill passed through both Houses without amendment.

The second bill introduced and passed was the Food Amendment (Beef Labelling) Bill. The bill was introduced on 4 December 2008 as the Food Amendment (Meat Grading) Bill and remained on the Business Paper for 11 months to facilitate ongoing consultation. After 12 months the bill would have lapsed.

These consultations produced a number of substantial amendments to the bill, which raised an issue as to whether the bill could in fact be amended or whether the bill should be withdrawn and a new bill introduced. The long title was to remain the same but a number of new sections were to be introduced into the principal act.

In the end it was considered that the amendments to the bill did not alter in any substantial way the main purpose of the bill, which is to provide a system of reliable and consistent meat labelling.

When debate on the agreement in principle commenced in November 2009, the Speaker sought pre-audience under Standing Order 64(1) to speak on the bill a second time in order to outline his proposed amendments. The bill was amended during the consideration in detail stage and was passed

without division. Unusually the short title of the bill was amended twice from the Food Amendment (Meat Grading) to (Beef Grading) in the Legislative Assembly to (Beef Labelling) in the Legislative Council.

### *A "serial pest" disrupts Question Time*

A so-called "serial pest", Mr Peter Hore, jumped from the Speaker's Gallery onto the floor of the House immediately prior to the commencement of Question Time on Thursday 18 June 2009. Mr Hore landed at the rear of the chamber and declared that he was a member of the "Free Australia Party" before being promptly ejected.

This is the second occasion on which Mr Hore has disrupted the proceedings of an Australian Parliament, the first time being an intrusion onto the floor of the South Australian House of Assembly chamber on 28 March 2000.

## New South Wales Legislative Council

### *Suspension of the sitting of Legislative Council for 69 days over the winter recess*

In the early hours of 25 June 2009 the President left the chair of the Legislative Council and suspended the House until the ringing of a long bell. In the event the House did not sit again for over 69 days.

This occasion was extremely unusual. While it is commonplace for a House to be suspended for short periods over the lunch and dinner break, or more rarely over the course of several hours or overnight while behind-the-scenes negotiations on a bill are conducted, the suspension of the Legislative Council for 69 days over what is normally the winter long adjournment was unprecedented.

The suspension of the House took place under Standing Order 34, which requires that the House not meet unless a minister is present in the chamber. The House was suspended when the last remaining minister in the House in the early hours of 25 June 2009 chose to leave the chamber rather than to continue with the Government's legislative agenda, which was being frustrated in the House.

In the event, the House did not sit again until 1 September 2009 after what would have been the winter long adjournment. On that day at 2.30 pm, the bells were rung, the President took the chair and debate from 25 June 2009 resumed. The House subsequently adjourned at 3.16 pm, finally concluding the sitting day of 24 June 2009 which had continued for precisely 69 days, 4 hours and 16 minutes.

This precedent raised serious questions about the right of the House to control the conduct of its own sitting times and sitting patterns. It also raised questions about the rights of individual members, as elected representatives of the people, to participate in debate and to represent the views of their constituents.

### *Proposal to restrict questions to non-government members*

On 12 November 2009 a member of the cross-bench in the New South Wales Legislative Council, the Hon Roy Smith (Shooters' Party), moved that questions with and without notice may only be put by non-government members.

The proposal would have prevented government backbench members from asking both oral questions during Question Time and written questions on notice which are published in the Questions and Answers Paper. An amendment to the motion was moved unsuccessfully by Ms Rhiannon (the Greens) to restrict government backbench members only in relation to oral questions during Question Time.

The motion provoked considerable debate in the House. In speaking to the motion, Mr Smith indicated that the intention behind the sessional order was to improve the functioning of the House, especially by removing the possibility for "Dorothy Dixers" from government backbenchers. Mr Smith also highlighted that Question Time has moved very far from the original intent highlighted in *Erskine May* as a means of members of Parliament seeking and obtaining information from the Executive Government.

In his response on behalf of the Government, the Hon Tony Kelly, Leader of the House, indicated the Government's opposition to the motion, on the basis that government members, not being ministers, have as much right as any other duly elected member to seek information of the Executive Government. The essence of responsible government based on the Westminster system is that the members of the Executive Government sit in Parliament and are accountable to all the members of Parliament.

The Hon Don Harwin, Opposition Whip, indicated that the Opposition also opposed any move to restrict the right of any members of the House to ask questions of ministers.

The debate ranged over a number of issues, but in particular the need for a balance to be struck between providing all members of the House with the capacity to ask questions, to represent their constituents and to hold the Executive Government to account, while at the same time ensuring that Question Time is an effective mechanism for eliciting information from the Executive Government.

The motion was eventually negatived.

## Queensland Legislative Assembly

### *Dissolution of Parliament and election results*

The 52nd Parliament was dissolved on 23 February 2009. A state election was held on 21 March 2009, the first since the 2008 electoral redistribution. While the redistribution created more seats in south-east Queensland the overall number of electorates remained at 89.

When the election was called the Australian Labor Party (ALP) Government held 58 seats and the Liberal-National Party (LNP) Opposition 25. Independent members and minor parties made up the balance. The Labor Government was returned with a reduced majority. The make-up of the 53rd Parliament is now: ALP 51 seats, LNP 34 seats and Independent members four seats. 19 new members were elected. The official opening of the new Parliament was held on 21 April 2009.

### *Disputed election result*

The election result in one inner Brisbane electorate—the Chatsworth Electorate, which was won by the ALP by 74 votes—was challenged by the LNP. An application was filed in the Court of Disputed Returns in April 2009 to declare the LNP candidate the winner or order a new election. This application was dismissed by the court in June because a $400 deposit required under the Electoral Act 1992 was not paid when the application was lodged. This decision was subsequently appealed and overturned. The challenge then returned to the Court of Disputed Returns.

In a judgment on 17 September 2009, Her Honour found that the ALP candidate had defeated the rival LNP candidate by 11 more votes than was claimed after the March poll. Her Honour found that the margin was actually 85 votes and dismissed the LNP candidate's application.

### *Record of Proceedings and tabled papers database*

The Queensland Parliament's Record of Proceedings, which contains both a transcript of debates and a record of all proceedings in the House (including details of all tabled papers), was further enhanced in 2009 by the inclusion of links to tabled papers published on the parliament's tabled papers database. Each sitting and non-sitting day, tabled papers are progressively published on the database. The links in the Record of Proceedings is a further step towards engaging with the community by making the proceedings of the House more widely accessible.

### *Parliamentary committee restructure*

On 20 April 2009, just before the commencement of the new parliament, the Premier announced the most significant restructure of Queensland's parliamentary committee system in decades. The restructure was announced in a media release by the Premier who claimed the changes would make the committee system more effective.

Under the restructure, the total number of committees increased from eight to nine. The restructure established four new "super committees" (the Law, Justice and Safety Committee, the Economic Development Committee, the Environment and Resources Committee, and the Social Development Committee). The Premier stated that the new committee system would maintain the necessary oversight role that parliamentary committees provide. However, committees would be more focused on developing best practice policy and legislative solutions to broad issues within their areas of responsibility.

On 19 May 2009 the Parliament of Queensland Amendment Bill was passed in the House. The Bill amended the Parliament of Queensland Act 2001 to give partial effect to the restructure of the parliamentary committee system. The Bill established the Law, Justice and Safety Committee, replacing the Legal, Constitutional and Administrative Review Committee (the LCARC) as a statutory committee and merged the Public Accounts Committee and the Public Works Committee into a single committee (the Public Accounts and Public Works Committee).

The explanatory notes to the Bill stated that the new parliamentary committee system would align more closely with the current departmental arrangements and the priorities of government. (The explanatory notes were silent as to consultation that was carried out in relation to the Bill, notwithstanding part 4 of the Legislative Standards Act 1992.)

A resolution of parliament was required to add further parliamentary committee functions to the Law, Justice and Safety Committee (in addition to the functions previously held by the LCARC) and to establish and confer functions and powers to the other three new super-committees.

The restructure also abolished the Select Committee of Travelsafe and retained four committees in their current form (the Members' Ethics and Parliamentary Privileges Committee, the Parliamentary Crime and Misconduct Committee, the Scrutiny of Legislation Committee and the Standing Orders Committee).

### *Integrity, Ethics and Parliamentary Privileges Committee*

On 25 November 2009 the Legislative Assembly passed the Integrity Bill 2009. The Bill received Royal Assent on 3 December 2009. By proclamation dated 9 December 2009, the Act commenced on 1 January 2010. The Act, amongst other things, changed the name of the Members' Ethics and Parliamentary Privileges Committee to the Integrity, Ethics and Parliamentary Privileges Committee. In addition to its previous functions, the committee is now responsible for monitoring, reviewing and reporting on the performance of the Integrity Commissioner's functions.

## Tasmania House of Assembly

### *Integrity Commission*

During 2008 the Tasmanian Parliament established a Joint Select Committee on Ethical Conduct to review standards and integrity of elected parliamentary representatives and state servants and to report on whether an Ethics Commission should be established. The report of the Committee was brought up and tabled on 18 August 2009 (Paper No. 24 of 2009). As a result the Labor Government agreed to adopt the principal recommendations of the Joint Committee and following consultations a bill to establish an Integrity Commission was brought in to the House of Assembly on 29 October 2009. The bill was debated and amended on 3 November and transmitted to the Legislative Council where it was further amended on 12 November. Both Houses agreed to the bill on 17 November 2009 and it received the Royal Assent on 17 December 2009 (Act No. 67 of 2009). The main provisions of the Integrity Commission Act are—

(a) An Integrity Commission has been established consisting of an Integrity Commissioner, the Auditor-General, an Ombudsman, a State Service Commissioner and community representatives. A Chief Executive Officer conducts day to day business of the Commission.
(b) A Joint Standing Committee of the Tasmanian Parliament on Integrity will oversee, liaise and monitor the Commission.
(c) The functions of the Commission are wide ranging and include the improvement of standards of governance; levels of community trust in the democratic system; education of the public and officials; and investigation of allegations of corrupt or inappropriate conduct. Any findings are referred to the appropriate authority for further action.

The Act will be reviewed in five years time.

### *Restoration of House of Assembly chamber*

Following extensive planning and preparation work began on restoring the House of Assembly chamber in July 2008. While the chamber works were underway the House sat in Tasmanian regional cities: Launceston for two weeks in August 2008 and Burnie for one week in September. It returned to the Parliament House Reception Room as a temporary chamber for the remainder of the 2008 sittings. Major construction work finished in early December 2008, leaving only minor fit out items to be completed in 2009. The televising of Parliament project was undertaken concurrently with the chamber works (see below).

The new chamber was opened by the Speaker, Hon Michael Polley, at 2 pm on 26 February 2009. A plaque was unveiled outside the chamber entrance to commemorate the event and then a brief sitting was held where those involved in the project were congratulated. The normal sitting to resume Parliament in 2009 commenced at 2.30 pm that day. A number of visiting presiding officers and clerks were present at the opening and then a dinner at Parliament House that evening.

The newly restored chamber is an impressive space for the lower house of the Tasmanian Parliament, incorporating as it does the latest technology within a late 1930s art deco design. Some of the features which members have commented on favourably are the new individual swivel and tilt ergonomic seats; desk/work stations; and the ability to gain access via laptop computers to a full range of IT facilities. All this is a far cry from the previous rudimentary facilities. Disability access has been provided to all areas of the chamber. Seating in the Public Gallery and Speaker's Reserves has been replaced; acoustics improved through the use of insulating batts and removable wall panels; the ceiling and lighting replaced and a full glass screen installed in the Public Gallery. The original Speaker's desk and Table of the House have been restored and re-introduced. For the first time in the House of Assembly members may now make their contributions during debate from three lecterns attached to the Table of the House. Hitherto members could only speak from their places or at the Table if a minister was required to speak on a bill in the Committee of the whole House.

The new chamber came in virtually on budget and continues to give much satisfaction to all users.

### *Televising of Parliament*

At the same time as the House of Assembly chamber works equipment was installed to televise the proceedings of both Houses and committees. Each

House was consulted separately by the consultants Winning Post Productions and agreement reached on how to proceed. With television technology constantly changing Parliament was keen to ensure that cameras and production equipment were the latest available. Sydney company Techtel P/L, in partnership with Hobart firm K W McCulloch P/L, were awarded the installation contract at a cost of $1.9 million.

13 Sony BRCH700P high definition (HD) digital cameras have been obtained. There are five cameras in each chamber and Committee Room 2 has fitted cameras. All cameras have the capacity to be removed and used elsewhere (e.g. Committee Room 1, Reception Room and the Long Room during Estimates Committees week). Some areas have fixed cabled brackets to house the cameras, while others such as the historic Long Room have outlets from the skirting boards where plug-in cabling, tripods and cameras are the means of shooting footage. Fortunately an existing relatively unused room was found mid way between both Houses and this has been adapted for use as the television studio. There are four booths in the Television Broadcast Studio: A and B are for the House of Assembly and Legislative Council respectively, and C and D are for committees. The booths have built-in redundancy to allow continued operation in the case of technical problems. This situation occurred about two months following commencement of televising and the switch was made seamlessly. Booth C was used until the replacement part could be supplied from Europe.

There are five media kiosks located in the Media Conference Room at Parliament House where the processed television signal is directed. There is capacity for up to four signals to be selected at each of the media kiosks. This allows for the four annual Estimates Committees' individual signals. The signal is available with and without titles. The titles or captions show at regular intervals the name of the member speaking, the electorate and party or grouping. It is the responsibility of the media organisations to provide their own equipment to use the HD digital signal from the kiosks.

The system operates so that sound can be switched on separately from vision. This allows digital recording by Hansard of committees which are not televised.

The system commenced operation on the first sitting day for the House of Assembly, 26 February 2009. The Legislative Council followed a couple of weeks later. Winning Post Productions won an open tender process to operate the system for three years. All television staff are employees of the contractor. A maintenance contract and warranties are in place on equipment. Normally there is one operator per House sitting with a back up person. This means if

one House is sitting there will be two personnel present and if both Houses are sitting three people.

Estimates Committees week (22 to 25 June 2009) was the ultimate test for the whole system. All four studio booths were operational and fully staffed with a total of seven personnel. Each day one Estimates Committee from each House was telecast on the in-house MATV system, transmitting to each member's office and streamed on the net. The media kiosks received all four signals from the Estimates Committees for the whole week, allowing media organisations to select the portions they wished to use. All television signals are provided free of charge. The APAC (cable public affairs) television channel has televised Question Time regularly.

The budget for the project was $1.9 million, which was exceeded by about 15 per cent. The overrun was due to complications with some technical aspects and a couple of Parliament's requirements which had not been considered in the initial specification. It was fortunate that most of the capital equipment purchases occurred when the A$ was at high levels. Virtually all the equipment had to be procured from overseas. Overall Parliament, television stations and the operators are very pleased with the outcome of the project.

## Tasmania Legislative Council

Of significance during the early part of 2009 was the presentation of the report of the Joint Select Committee on the Working Arrangements of the Parliament (Paper No. 5 of 2009) which dealt with the attendance of ministers who are members of the Legislative Council at House of Assembly Question Time. This proposal was ground breaking in the Australian parliamentary context. The Select Committee resolved that the Clerks of both Houses be invited to obtain an opinion from Mr Bret Walker SC on the legal, constitutional and related issues associated with the proposal. The Government provided legal advice from the Solicitor-General of Tasmania which was made available to both Clerks.

As a result of the advice obtained the Clerks determined that the proposed attendance in the House of Assembly of ministers who are members of the Legislative Council may be enabled by joint order of both Houses without any need for legislative action.

A draft motion prepared by the joint Clerks was adopted by the Select Committee with minor amendment only. Both Houses agreed the resolution on 12 March 2009 and ministers from the Legislative Council attended in the

House of Assembly for Question Time for the first time in Tasmania's parliamentary history on 24 March 2009.

## Victoria Legislative Assembly

### *Dispute Resolution Committee*

The Dispute Resolution Committee (DRC) was established in April 2007 following amendments made in 2003 to the Constitution Act 1975. The 2003 amendments aimed to create a process whereby disputes on bills between the Houses could be resolved. The DRC comprises 12 members, seven from the Legislative Assembly and five from the Legislative Council. The members are appointed by their respective House, and when appointing members the political composition of that House must be taken into consideration.

The process was first used in 2009 and has been characterised by disputes over the interpretation of procedures set out in the Constitution Act 1975 and lengthy points of order in the House.

The first referral motion was considered in June 2009 in regard to the Primary Industries Legislation Amendment Bill 2008. The bill, after having passed the Legislative Assembly, was amended by the Legislative Council. The Council amendments had not been considered (or rejected) by the Assembly before the Leader of the House moved to refer the Bill to the DRC. A point of order was immediately taken by an Opposition member that the referral was premature and lacked a condition precedent as the House had not had an opportunity to consider the amendments. The motion was then adjourned, and on the next sitting day the Council amendments were considered by the Assembly. The amendments were disagreed to and a message was sent to the Legislative Council advising them accordingly. The Council did not insist on their amendments, and the Primary Industries Legislation Amendment Bill 2008 was passed. The motion to refer the Bill to the DRC was then withdrawn some weeks later.

In August 2009 the Planning Legislation Amendment Bill 2009 was the first bill to be actually referred to the DRC after being passed by the Legislative Assembly and defeated by the Legislative Council.

The motion to refer the Bill to the DRC was met with resistance from opposition members, who argued that it did not satisfy the definition of a "disputed bill" as defined in section 65A of the Constitution Act 1975. Opposition members argued that, as the Bill had been defeated by the Legislative Council, it no longer existed and could not, therefore, be referred to the DRC. The Speaker did not uphold the point of order, and the motion to refer the

Planning Legislation Amendment Bill 2009 to the DRC was passed on 11 August 2009.

The DRC met to consider the disputed Bill, and reached a resolution in accordance with the 30-day deadline set out in the Act.

The Dispute Resolution was tabled in both Houses on 15 September 2009, the first sitting day after the deadline. The decision agreed to by the Committee was to introduce a new bill—the Planning Legislation Amendment Bill 2009 (No. 2), which incorporated the majority of the text from the original bill, and included a number of amendments. The resolution required that the bill be passed, unamended, by both Houses within 30 days or 10 sitting days, whichever is the longer.

In order to comply with the strict deadline for passage of the Bill, after the document was tabled and a motion moved to take note of the resolution, the Government moved a suspension of standing orders to allow for the Bill to be immediately introduced and second read. This suspension avoided the issue of the same question rule, and allowed for debate on the Bill to begin immediately after it was introduced.

The Bill passed the Legislative Assembly on 16 September, and subsequently passed the Legislative Council on 10 November 2009.

A number of members in both Houses expressed their concern with the dispute resolution process, particularly in regard to the requirement under section 65B(9)(a) that the DRC meet in private, which effectively moves part of the legislative process behind closed doors. Some members also questioned the deadlines applied to consideration of a Dispute Resolution, and that a bill defeated by the Legislative Council can subsequently be referred to the DRC.

Despite the concerns raised, the course of the Planning Legislation Amendment Bill 2009 has set a precedent for the dispute resolution process, and will now inform the process for the Planning and Environment Amendment (Growth Areas Infrastructure Contribution) Bill 2009, which was referred to the DRC on 23 March 2010.

## Victoria Legislative Council

### *Joint sitting to appoint new member*

In 2003 a series of electoral reforms were passed by the Victorian Parliament that substantially altered, amongst other things, the system of electoral regions and voting methods for the Legislative Council. The reforms took effect at the 2006 election. The result was a move from numerous smaller electorates across the state returning two members each, elected on a preferential basis,

to a system more closely aligned with the Australian Senate, based on eight larger regions, each represented by five members elected using proportional representation.

With a new electoral system in place, a new mechanism for filling casual vacancies was also introduced in 2006. This was first utilised when Legislative Council member Evan Thornley announced he was resigning from his role as a member of the Legislative Council in late December 2008. In a departure from the by-election method of filling vacancies used previously, a joint sitting of Parliament is now required to select a new appointment.

On Tuesday 3 February, the first sitting of 2009, both chambers agreed to hold a joint sitting later that day to appoint a new member. As Mr Thornley was a member of the Australian Labor Party, as stipulated in the changes made to the Constitution Act 1975, the joint sitting selected a person nominated by that same political party. The Labor Party had nominated Ms Jennifer Huppert to fill the vacancy, and she was elected with unanimous support from other members.

After the conclusion of the joint sitting Ms Huppert came to the Council chamber where she took an oath of affirmation and was sworn in as a member by the President.

### *Reasoned amendments*

A reasoned amendment was moved to the second reading of the Duties Amendment Bill 2008 by an opposition member in March 2009. The wording of the amendment stipulated that all the words after "That" be omitted with the view of inserting in their place "this House refuses to read this Bill a second time until a public consultation process is undertaken to address widespread concern as to the impact and practicality of the proposed changes to the *Duties Act 2000*." The amendment was agreed to, albeit after some confusion due to a pairing arrangement, and the Bill was removed from the Notice Paper.

*May's Parliamentary Practice* states that a successful reasoned amendment is fatal to a bill, and the Legislative Assembly in Victoria has a standing order stating that if a reasoned amendment is agreed to, the bill lapses. As the Council has no similar standing order, the President was asked to provide a ruling on the effect of the carriage of the reasoned amendment. The President ruled that regard had to be made to the terms of the reasoned amendment, which was in effect aimed at delaying the second reading of the Bill until a public consultation process had been undertaken. The reasoned amendment was not aimed at rejecting the Bill. In considering the situation, the President was guided by House of Representatives practice which states:

> "Any determination of the effect of the carrying of a second-reading amendment in the future may well depend upon the wording of the amendment. If the rejection is definite and uncompromising, the bill may be regarded as having been defeated. However, wording giving qualified agreement would be construed to mean that the second reading may be moved on another occasion."

As no order had been made for the second reading of the Duties Amendment Bill 2008, the President ruled the provisions of standing orders relating to the revival of dropped motions and orders applied in this instance.

On 31 March 2009 the Treasurer, Mr John Lenders, moved that the Order of the Day for the second reading of the Duties Amendment Bill 2008 be restored to the Notice Paper. The motion was agreed to, and the Bill was eventually passed with amendments.

### *Dispute Resolution Committee*

In 2009 the Dispute Resolution Committee met for the first time since its establishment, following the defeat by the Legislative Council of a Bill that had been passed by the Legislative Assembly. The creation of the Committee was one of the numerous amendments made to the Constitution Act 1975 in 2003, and was designed to provide a mechanism to resolve disagreement between the two chambers. The Committee along with the other amendments to the Act came into existence at the start of the current Parliament in December 2006.

The Bill in question was the Planning Legislation Amendment Bill 2009, and following its defeat in the Council the Legislative Assembly passed a motion to refer the Bill to the Dispute Resolution Committee, providing the first occasion for the Committee to meet.

The consideration of the Bill by the Committee was not without controversy. Members of the opposition argued that the Committee was established to deal with "disputed bills", which are defined in the Constitution Act 1975 as a Bill "which has passed the Assembly and … has not been passed by the Council within 2 months after the Bill is so transmitted". Numerous members argued that the defeated Bill was technically not a bill anymore, and that the Dispute Resolution Committee was only able to deal with bills amended or delayed by the Council, not defeated bills.

They also expressed concern at the composition of the Committee, which has a Government majority, and the provisions of the Constitution Act 1975 which require the Committee to meet in private. Mr David Davis, Leader of the Opposition in the Council, introduced a motion calling on the Committee

to conduct its proceedings in a way "that is transparent to both chambers of the Victorian Parliament and to the Victorian community", and also requested that reports of the Committee be made public. Notwithstanding objections from the Government, the motion was agreed to, despite its arguable contravention of the Constitution Act 1975.

The Committee met and soon after tabled their resolution which recommended that a new bill be introduced based upon the original Bill, but incorporating amendments recommended by the Committee. On the motion that the Council take note of the resolution, numerous members of the Opposition and minor parties spoke to voice their dissatisfaction with the dispute resolution process, some going as far as to call for the provisions in the Constitution Act establishing the committee to be abolished.

The following day Mr Davis tabled a separate report by certain members of the Dispute Resolution Committee, which was essentially a minority report by members of the opposition parties. The report reiterated the displeasure of members of the Opposition with the validity of referring a defeated bill to the Committee, the time frames stipulated for reaching a resolution, and the lack of transparency in Committee proceedings. The Greens had also expressed their displeasure with the lack of consultation with them during the negotiation process as the dispute resolution had been drafted by members of the two major parties without their input.

Despite these objections, the new Bill was subsequently passed by both the Legislative Assembly and Council, thereby giving effect to the dispute resolution.

### *Orders for the Production of Documents*

Orders for the Production of Documents, a process which was introduced as a new sessional order in early 2007, began to be frequently utilised in 2008, and became increasingly common practice in 2009. The Leader of the Opposition and members of the Greens have increasingly requested documents be produced by the Government, clearly finding it a more effective method to gain access to Government documents than Freedom of Information requests.

In 2009 over 20 motions ordering the production of documents were agreed to, not to mention the numerous follow up resolutions that were also passed. The Government has on the whole been somewhat co-operative with the process and has on most occasions provided some of the requested documents. However, in many cases the Government has claimed Executive Privilege in relation to documents, and has hence failed to provide the Council

with copies of them. In June 2009 the Treasurer, as Leader of the Government in the Council, was suspended for the remainder of a sitting day for the second time this Parliament, for failing to comply with an Order.

The process outlined in the sessional order, whereby disputed documents should be provided to the Clerk and assessed by an independent legal arbiter, has not been utilised as the Government has refused to provide any of those documents.

## CANADA

### House of Commons

The Governor General officially opened the second session of the 40th Parliament on 26 January 2009. Parliament had been prorogued on 4 December 2008, just 13 sitting days after the beginning of the first session in the face of threats from the opposition parties (in reaction to a government economic and fiscal statement) that they might defeat the government.

The Minister of Finance tabled the first budget of the 40th Parliament on 27 January 2009, and a lively debate ensued during the course of which the House of Commons adopted an opposition amendment to the motion approving the government's budgetary policy which required the government to report to Parliament on the economic situation and the implementation of the budget no later than five sitting days prior to the last allotted day of each supply period in 2009. The amendment reflected the opposition's awareness that there was no appetite on the part of the public for a general election. The main budget motion was adopted on 3 February 2009.

By unanimous consent, the House agreed on 10 February 2009 to restrike a special committee to consider the Canadian mission in Afghanistan. The predecessor of the committee had ceased to exist when Parliament was prorogued in December 2008. On 26 March 2009 a take-note debate was held on the International Conference on Afghanistan in The Hague.

On 4 March 2009 the House paid tribute to former Speaker Gilbert Parent following the announcement of his death the previous day. Mr Parent was Speaker of the House of Commons from 1994 to 2001.

The Speaker ruled on 2 April 2009 that the Standing Committee on Finance had exceeded its mandate by publishing its second report recommending that increased funding be granted to the Office of the Parliamentary Budget Officer. Since matters relating to the Parliamentary Budget Officer's mandate and resources are the responsibility of the Standing Committee on the Library of Parliament, the Speaker ruled the report inadmissible and

ordered that it be deemed withdrawn and that no further proceedings be taken in relation thereto.

A "Voting Record Access Service", a new service on the parliamentary website, was officially launched on 20 April 2009. The service offers access to detailed information on votes in the House of Commons beginning with the 38th Parliament.

On 4 May 2009 the Standing Committee on Foreign Affairs and International Development passed a motion requiring the appearance before it of Abousfian Abdelrazik, a Canadian citizen who had been in Sudan since 2003 and who had taken refuge in the Canadian Embassy there a year previously. When concerns were raised regarding the legality of the invitation, the Committee adopted a motion, "That the Chair seek a legal opinion from the Law Clerk concerning the legal issues involved in expediting the appearance of Mr. Abdelrazik before the Committee and the ability of a country to repatriate a citizen whose name appears on the United Nations no-fly list under resolution 1267." After an appearance of the Law Clerk before it on 1 June 2009 the Committee adopted a motion directing the chair to write to the Minister of Foreign Affairs requesting that Mr. Abdelrazik be provided with travel documents. Mr. Abdelrazik arrived in Canada on 27 June 2009, further to an order made by a federal court judge that he be repatriated.

A take note debate was held on 5 May 2009 on the seal hunt and on the recent decision of the European Parliament to ban the importation of seal products.

Pursuant to a special order, the Minister of National Defence rose in the House on 3 June 2009 to make a statement in commemoration of the 65th anniversary of the D-Day landings in Europe. Statements from representatives of each of the parties represented in the House followed, after which the Speaker invited all present to rise and observe a moment of silence.

The House voted unanimously on 19 June 2009 to confer honorary Canadian citizenship upon His Highness the Agha Khan, leader of the worldwide Ismaili Muslim community.

Parliament returned from its summer adjournment on 14 September 2009 to immediate election speculation pursuant to the announcement by the Leader of the Opposition that his party would no longer continue to support the government and would attempt to bring it down at the earliest opportunity. The government went on to survive several tests of confidence. Most notable among these was the vote on an Opposition motion moved on 1 October 2009, "That this House has lost confidence in the government."

The Honourable Peter Milliken became the longest-serving Speaker of the

House of Commons on 12 October 2009. He was first elected Speaker on 29 January 2001. Representatives of all parties rose in the House to offer tributes to Speaker Milliken in observance of this milestone.

There was a disturbance in the public gallery in support of a private member's bill sponsored by a member of the New Democratic Party on 26 October 2009. The following day, the Government House Leader rose on a question of privilege to charge the leader of the New Democratic Party with contempt of the House for his alleged involvement in the incident. On 5 November 2009 the leader of the New Democratic Party denied any involvement. The Speaker elected to take him at his word and ruled the matter closed.

The second edition of *House of Commons Procedure and Practice* was tabled in the House of Commons on 18 November 2009. First published in 2000 in both English and French, the book has proved to be the most comprehensive of a series of reference works on this subject published since the founding of the Canadian Confederation in 1867. It is widely recognised as the primary and most authoritative reference on Canadian parliamentary procedure, and has become a key reference tool for parliamentarians and others who share an interest in the functioning of the House of Commons.

On 10 December 2009 the House adjourned until 25 January 2010. It was prorogued on 30 December until 3 March 2010. This met with protests from the opposition parties which claimed that the prorogation was intended to interrupt the work of the special committee investigating Canada's involvement in the military effort in Afghanistan.

## Québec National Assembly

### *Recognition of the Action démocratique du Québec as a Parliamentary Group and allocation of speaking time and other entitlements*

As part of its parliamentary reform of 21 April 2009, the National Assembly unanimously adopted a document entitled *Recognition of the Action démocratique du Québec as a Parliamentary Group and Allocation of Various Measures Among the Members Sitting in Opposition for the Duration of the 39th Legislature*. This document set out new criteria for the recognition of a parliamentary group for the duration of the 39th Legislature. Under these criteria, a party that won at least five seats and obtained at least 11 per cent of the popular vote in the last general election is considered to constitute a parliamentary group. Having won seven seats and obtained 16.4 per cent of the popular vote in the general election of 8 December 2008, the Action démocratique du Québec (ADQ) was officially recognised as a parliamentary group as soon as the

document was adopted. Consequently, the allocation of speaking times and other entitlements was adjusted to reflect the presence of three parliamentary groups as well as independent members. Hence, in its allocation of speaking times and other entitlements with regard to Business Standing in the Name of Members of the Opposition (Wednesday motions), interpellations, debates upon adjournment, non-confidence motions, statements by members, and questions during Question Period, the document recognised independent members and the proportion of the total opposition formed by the Second Opposition Group (approximately 10 per cent).

In the legislative sphere, the *Act respecting the conditions of employment and the pension plan of the Members of the National Assembly* (R.S.Q., c. C 52.1) was amended to grant an additional annual indemnity to the Second Opposition Group's Party Leader and House Leader. However, this amendment applies only for the 39th Legislature.

In November 2009 when two ADQ Members left the party to sit as independents, the President (Speaker) of the Assembly issued directives aimed at reaffirming the ADQ's status as a parliamentary group and at taking into consideration, in the allocation of speaking times and other entitlements, the recent changes in the composition of the Assembly. To protect the rights of the parliamentary group forming the Official Opposition, and of the single independent with a seat prior to the reform, it was decided that the speaking times and other entitlements to be granted to the two new independent members would be based on those enjoyed up to that time by the ADQ as the second group in opposition. This would also have the advantage of reflecting the change in the proportion of ADQ members in relation to the total number of members in opposition, which fell from 10 per cent to 7 per cent.

On 30 March 2010 the National Assembly was composed of three parliamentary groups and three independent members.

## Saskatchewan Legislative Assembly

### *Leave of absence*

The Assembly passed a motion to waive its privilege and exempted a member from the service of the Assembly in order to attend as a witness before a judicial court while the Assembly was in session. The member was granted a leave of absence so she could voluntarily appear before the Court of Queen's Bench in relation to her previous capacity as a peace officer.

### *Private Members' Motion*

On 2 April 2009 for the first time in the Saskatchewan Legislative Assembly, a vote was required to be called on a Private Member's Motion after it had been adjourned three times. The Private Member's Motion supported the consideration of further development of Saskatchewan's uranium industry. The motion was passed unanimously.

## NEW ZEALAND HOUSE OF REPRESENTATIVES

### *Speaker's approach to question time*

Standing Order 377(1) requires that an answer that seeks to address the question asked must be given if it can be given consistently with the public interest. The Speaker in considering replies does not judge quality or accuracy, nor can the Speaker require a minister to reply in a certain way. Rulings on replies by previous Speakers often focused on whether the answer in each case had addressed the question.

On commencing his tenure of the office (December 2008), the Speaker noted growing dissatisfaction with the conduct of question time, the amount of time spent dealing with points of order about replies, and the amount of time questions were taking each sitting day. In seeking to address these matters, the Speaker has focused on the need for ministers to provide answers to questions if they can be given consistently with the public interest. When considering the adequacy of replies, the Speaker has emphasised that, if a member asks a direct question seeking factual material, an informative reply should be given. The reply should deal directly with the material sought, or at the very least establish why such information cannot be provided. However, if a member seeks an opinion in his or her question or asks an open or vague question, an informative reply will not necessarily be given.

Where questions are direct and replies do not even begin to deal with them, the Speaker has responded in any or all of the following ways, according to the situation:

- invited the minister to respond again in a manner that reasonably deals with the question;
- asked the member to repeat the question;
- allocated further supplementary questions to allow a member to clarify or elucidate the answer given.

The Speaker's approach to question time is explained in more detail in a

paper included in the *Report of the 20th Conference of Speakers and Presiding Officers of the Commonwealth, New Delhi, India, 4–7 January 2010* (J.2F), available on the New Zealand Parliament website.

The Speaker also has tightened rules relating to the tabling of documents by leave, and this has contributed to making question time more focused. New Standing Order 368 came into effect in December 2008, and provides that, if leave has been given for a document to be tabled, the document must be tabled. This has reduced the prospect of members making political statements under the guise of seeking leave to table a document, a practice that had contributed significantly to the time previously spent on question time. The Speaker has now clarified the rule further by prohibiting the manufacture of a document after the event to fit the leave given, and by ruling that leave should not be sought to table a document that is readily available, such as speeches from *Hansard* or recent reports in major daily newspapers.

These measures appear to have had some effect, as public and media perceptions of question time seem to have become more favourable. In the first year of the current term of Parliament, the average time taken to deal with questions each sitting day shortened by nearly 10 per cent from the previous three-year term (down from 76.5 minutes to 69 minutes).

### *Many thousand-fold amendments, and other filibuster techniques*

On Wednesday 13 May 2009, the Government took urgency for the introduction and passing of the Local Government (Auckland Reorganisation) Bill, a bill putting in place a transition process from the existing local authorities to the one unitary authority for the Auckland region. Opposition parties opposed the bill, claiming that there had been insufficient consideration of and consultation on the Government's proposal, particularly as it did not adopt all of the recommendations contained in the report of the Royal Commission on Auckland Governance. The Opposition objected that the bill was to be passed without being referred to a select committee for consideration.

Efforts to frustrate the bill's passage ensued. Deferral amendments were moved to the motions for the first and second reading. On the motion for the second reading, a reasoned amendment was also moved to replace the bill with a referendum, which effectively would have killed the bill. Amendments to motions for bills to be read have been rare in New Zealand up to now.

The committee stage commenced on Thursday morning. The bill was drafted in three parts along with the usual preliminary provisions (title and commencement clauses). Following the standard practice the bill was

considered part by part, with the preliminary provisions debated together after the parts had been dealt with.

During the committee stage, the filibuster took a number of forms:

- the use of technology to generate an immense number of amendments (for example, 18,000 amendments had been lodged when the closure on Part 3 was accepted);
- a number of new parts were proposed by Opposition members (new parts are debated separately if found to be in order);
- Opposition members lodged numerous amendments to the new parts.

The Government wanted the bill to be passed before the House adjourned (at midnight on Saturday at the latest), and this would have been impossible if the House had had to conduct votes in turn on several thousand amendments. When a series of similar amendments were lodged, the Government agreed to the first of them to render the subsequent amendments out of order. The Opposition countered by lodging further series of amendments in reverse order, making it impossible for the Government to agree to the first amendment in each case so as to have all the remaining amendments ruled out.

As proceedings progressed, the minister in charge of the bill lodged amendments to clauses that were subject to many proposed amendments. Since amendments in the name of the member in charge of the bill have priority over other amendments in the same place in a bill, the minister's amendments were dealt with first. Many of the Opposition's amendments were then ruled out of order as inconsistent with a previous decision of the committee.

Debates then collapsed to prevent the minister from lodging amendments to block other amendments. On new Part 5, the minister was forced to require the postponement of further consideration of the new part in order to allow sufficient time for a minister's amendment to be drafted. Under the standing orders, this is the right of the member in charge of the bill. When the committee returned to new Part 5, an amendment lodged by the minister, once agreed to, rendered 4,862 Opposition amendments out of order. The new parts ultimately were defeated.

When the committee finally reached the preliminary provisions, the minister was forced to move amendments to the title of the bill and its commencement in order to overcome a further 5,152 amendments. The bill emerged from the committee renamed the Local Government (Tāmaki Makaurau Reorganisation) Bill (Tāmaki Makaurau is a Māori name for the

Auckland region). The amended commencement clause provided that the bill was to come into force two days (rather than the day) after it received the Royal assent.

The bill received its third reading on Saturday evening and the House rose at 9.42 pm after more than 42 hours (of which about 38 hours were under urgency). In total some 30,046 amendments were lodged. 16 were agreed to, 946 were defeated and 29,084 ruled out of order.

The filibuster highlighted interesting implications for the chair and, more generally, the legislative process. The chairperson was required to deal with many procedural issues and points of order, particularly in terms of the acceptance of the closure and the lodging and admissibility of amendments. While debate is an acceptable delay tactic, concern was expressed about the amount of time spent voting on amendments and the fact that the bill as it emerged from the committee of the whole House contained unexplained features and internal inconsistencies.

Since these events took place, procedures have developed towards the selection of amendments in some situations (such as when many amendments are similar in substance). Further procedural changes may be considered. In particular, the rules for the admissibility and lodging of amendments may need reconsideration to foster a focus on debate and the proper consideration of amendments to ensure a high quality legislative result.

### *Attendance of Māori King at Parliament*

The Māori King, Tuheitia Paki, attended the House to hear the valedictory statement of former Prime Minister Rt Hon Helen Clark on 8 April 2009. The Māori King movement, known as Kīngitanga, arose in the mid-19th century to establish a symbolic role similar to that of the Sovereign. It is invested with a high degree of mana (prestige) and is seen as an important and enduring expression of Māori unity.

King Tuheitia's visit was the first official visit for some 25 years, since the visit of the late Māori Queen, Dame Te Atairangikaahu. However, the King's whānau (family) has previously had links with Parliament. King Tuheitia's tupuna (ancestor), King Mahuta Te Wherowhero, became a member of the Legislative Council (1903–10), and Hon Nanaia Mahuta, a close relative of the King, has been a member of Parliament since 1996.

The Speaker welcomed King Tuheitia into the precincts of the chamber and he was accorded a seat on the left of the chair. The seat on the left of the chair is generally accorded to visiting presiding officers of overseas parliaments, heads of diplomatic missions, and former members of Parliament.

### *Implementation of simultaneous interpretation*

Members may address the Speaker and the House either in English or in Te Reo Māori (the Māori language), a right ensured under Standing Order 104. This reflects the status of Te Reo Māori as an official language of New Zealand under the Māori Language Act 1987. Previously, speeches in Te Reo Māori have been interpreted into English by an interpreter stationed to the left of the chair. This has usually involved members pausing at intervals during their speeches to enable the interpretation to be given. However, in 2008 the Standing Orders Committee recommended that a simultaneous interpretation service be introduced to encourage the more frequent use of Te Reo Māori in the House and to improve the flow of debate. Work to implement this recommendation was carried out in 2009, so that simultaneous interpretation could commence when the House met for the first time in 2010. Viewers of Parliament TV have a choice of audio with the live television coverage. They can hear whatever is spoken in the House, either English or Te Reo Māori, or they can hear "English only."

### *Disclosure of MPs' travel and accommodation expenses*

For the first time in New Zealand, expenses claimed by members of Parliament have been made publicly available. On 30 July 2009 the Prime Minister, Hon John Key, and the Speaker, Hon Dr Lockwood Smith, made a joint statement announcing that members' travel and accommodation expenses would be disclosed. This announcement was followed by the disclosure of expenses for the two quarters up to 30 June 2009. The decision to disclose the information was made by a cross-party committee on expenses in order to enhance openness and accountability to the public.

A summary of expenses issued by the Parliamentary Service and the Office of the Clerk included expense categories paid by the Parliamentary Service (accommodation, air and surface travel) and the Office of the Clerk (interparliamentary travel). Under the Public Finance Act 1989, the Speaker is the minister responsible for these appropriations. This summary (which is available on the New Zealand Parliament website) complemented a summary provided by Ministerial Services under the Official Information Act 1982 that covers expenses for members of the executive, which are separately administered.

It is expected that information on members' expenses will be provided on a quarterly basis. A summary for the next quarter (up to 30 September 2009) was issued in October 2009.

### *eCommittee system introduced*

In September 2009, the Office of the Clerk introduced a new electronic committee system, known as eCommittee. It has been designed to move select committees from a paper-based approach to an electronic environment in which committee documents are viewed and worked with on computer screens rather than printed copies. The eCommittee system is designed to make the committee process more efficient by reducing the amount of time taken to process submissions, enabling members to access a wide range of information almost immediately using their computers, and allowing members of the public to make submissions to select committees electronically through the New Zealand Parliament website.

The traditional approach meant a large amount of paper was used in select committee business, which took a long time to print, photocopy and file. Electronic access to this information makes the select committee process more efficient and frees up more time for members to consider the arguments raised in submissions. It will also mean that members will have a huge range of committee information at their fingertips. If they want a document in the eCommittee system they will not have to wait to consult their office hard-copy filing system—it will be accessible immediately.

The eCommittee system will also make public submissions to select committees easier. Paper-based submissions will still be accepted, but many submitters will prefer the new system due to its ease of use, and the avoidance of postage and photocopying or printing costs.

### *Proposal for referendum about binding referenda*

Under the Citizens Initiated Referenda Act 1993 (CIR Act), a person may seek support for the holding of a referendum by submitting a proposed question to the Clerk of the House for approval. Once the question is determined, the promoter then has one year in which to collect the signatures of at least 10 per cent of registered electors on a petition seeking the referendum. The Clerk of the House then determines whether sufficient signatures have been obtained; if not, two more months are permitted for the collection of signatures. If sufficient signatures have been obtained, the Clerk certifies the petition as correct and gives it to the Speaker for presentation to the House, thus triggering the requirement for a referendum to be held within a year. Under the CIR Act, the outcome of such a referendum is not binding.

On 9 September 2009 the Clerk received a proposal to promote a petition for a referendum. The proposal was from Larry Baldock (a former member

of Parliament), and the wording of the question proposed to be put to voters in a referendum was: "Should Citizens Initiated Referenda seeking to repeal or amend a law be binding?"

Mr Baldock proposed this question largely in response to a referendum held in 2009 on the question, "Should a smack as part of good parental correction be a criminal offence in New Zealand?" Mr Baldock and his supporters were unhappy that the Government was not obliged to take any action in relation to this referendum, despite 87.4 per cent of those who voted having voted "no" (the position that implied a need for legislative change).

Under the CIR Act, the Clerk had three months to determine the precise question to be put to voters. The Clerk considered public comments and undertook consultation with the proposer. In determining the wording of the precise question to be put to voters, the Clerk is required by the Act to ensure that the question clearly conveys the purpose and effect of the referendum, and that it can only be answered one of two ways (such as "yes" or "no"). The Clerk determined the following wording for the question: "Should Parliament be required to pass legislation that implements the majority result of a citizens initiated referendum where that result supports a law change?"

Larry Baldock now has until 17 December 2010 to collect signatures on a petition requesting that a (non-binding) referendum be held on this question.

### *Government supports statutory provision for revision programme*

On 20 November 2009 the Government presented its response to a Law Commission report on the *Presentation of New Zealand Statute Law*. In its report, which had been presented on 16 December 2008, the Law Commission had included a series of recommendations relating to the revision of statutes so as to make them more accessible. These included the enactment of a statutory requirement for a triennial programme of statute revision, and a process for the certification of revision bills as changing only the presentation of the law and not its substance or meaning. The Government agreed that there should be statutory provision for a revision programme and certification process.

### *Law Commission proposes Governor-General Bill*

On 17 December 2009 the Law Commission presented a report entitled *Review of the Civil List Act 1979—The Governor-General.* This report included a number of recommendations in relation to the administration of the remuneration and entitlements of the Governor-General. Such matters are currently covered by the Civil List Act 1979, along with provisions relating to

members of Parliament and the executive. The Commission recommended that the provisions relating to the Governor-General should be separated to form a stand-alone Act. Other recommendations included the ending of the tax-exempt status of the Governor-General's salary; removing the statutory power for the Governor-General to be exempted from paying any public or local tax, duty, rate, levy or fee; and the establishment of permanent legislative authority for the funding of the Governor-General's programme, with enhanced transparency.

### *Adjournment and statistics for 2009*

The House adjourned for the summer break on 16 December 2009. Prior to the adjournment, the Speaker gave the traditional summary of business statistics as part of his final address. During 2009, the House sat for 565 hours and 49 minutes (not including 16 December). 66 Government bills were passed, but no Members' bills reached their third reading. The Speaker announced that a total of 19,822 questions for written answer had been received, though this number increased to 22,920 when the questions lodged on the last sitting day were included.

Before rising, the House adopted its programme for 2010, which comprises 93 sitting days over 31 weeks of sittings.

## UNITED KINGDOM

## House of Lords

### *Scrutiny of European legislative proposals on the ground of subsidiarity*

Scrutiny of proposals for European law has been an important part of the committee work of the House of Lords since 1974. Currently 85 members, supported by 26 staff, sit on the European Union Select Committee and its seven sub-committees. In 2008 this interest spilled into the chamber as the two Houses gave the Government the authority to ratify the Lisbon Treaty through the European Union (Amendment) Act 2008.

Entry into force of the Lisbon Treaty in December 2009 gave all EU national parliaments the opportunity to exercise additional powers over European legislation. Primarily this is through monitoring the principle of subsidiarity: that action should only be taken at EU level when it can't be taken more effectively at national, regional or local level. The House is given the opportunity to object to legislation on subsidiarity grounds in two ways. First

by issuing a "Reasoned Opinion" in the eight weeks following the presentation by the European Commission (in all 23 official languages of the Union) of a proposal for legislation; and secondly by asking the Government to institute proceedings in the European Court of Justice for a judicial review of a new European legal act on subsidiarity grounds.

2008 and 2009 saw discussions on how the procedures of the House should be changed to take account of these two new opportunities. The final procedures are set out in the second report (2009–10) of the Procedure Committee, which was agreed by the House on 16 March 2010.

With regard to proposals for legislation, the House has, in essence, delegated the responsibility for conducting subsidiarity analysis to the EU Committee, whilst keeping the power formally to agree a Reasoned Opinion for itself. This is reflected in a change to the Committee's terms of reference which now empower it additionally to "assist the House in relation to the procedure for the submission of Reasoned Opinions".

The Committee's assessment of proposals for EU legislation has always involved an assessment of subsidiarity so there have been only a few tweaks to the machinery of scrutiny. These include fast tracking work on proposals where subsidiarity may be a concern, working more closely with the devolved assemblies, and issuing legal and procedural guidance on identifying subsidiarity concerns to members and staff in the form of a *Lisbon Treaty Handbook*. Where the Committee considers that there has been a breach of subsidiarity it will make a short report to the House for debate. This report will set out the Committee's reasons. For further information see www.parliament.uk/hleu.

On the floor of the House the Committee's report recommending a Reasoned Opinion will be debated in the same way as any other committee report: on a neutral "take note" motion in the name of the Committee's chairman. However, and here comes the procedural innovation, this motion will be debated jointly with a second, free-standing motion inviting the House to support the Reasoned Opinion contained in the report and instructing that it be forwarded to the Presidents of the EU institutions on behalf of the House. This second motion will be amendable and divisible. At the end of the debate the second motion will be moved without further debate; if there are amendments these will be dealt with in the usual way. If the motion is agreed, then the Clerk of the Parliaments will send the report to the EU institutions on behalf of the House. The procedures also allow for an individual member, without a report from the EU Committee, to table a motion asking the House to agree a Reasoned Opinion.

The Lisbon Treaty requires that the European institutions need to take

action only where a proposal for legislation attracts a prescribed number of Reasoned Opinions from the national parliaments of the Union. This has encouraged a number of chambers, including the Lords, to look for ways to share information on subsidiarity with the other parliaments of the Union. The idea being that sharing our concerns with other parliaments will mean that they are more likely to support us by issuing their own Reasoned Opinions. Formal information, including the texts of Reasoned Opinions, is shared through a dedicated inter-parliamentary website overseen by the Conference of European Speakers (www.ipex.eu) and through the regular meetings of members of European affairs committees (COSAC). Informal information, including where we have identified subsidiarity concerns but have not yet issued a Reasoned Opinion, is shared through the network of staff from national parliaments who are posted to Brussels. With staff from 26 of 27 national parliaments housed in office space in the European Parliament in Brussels this has proved to be an active forum.

To date the House has yet to be asked to agree a Reasoned Opinion.

## ZAMBIA NATIONAL ASSEMBLY

The Constitution of Zambia was amended in order to revise the budget cycle of the Republic. Prior to the amendment, the National Assembly held its budget meeting from January to March each year. Under this arrangement, the budget was approved by the end of March, that is, three months into the financial year to which the budget related. Following the enactment of the Constitution of Zambia (Amendment) Act 2009, the National Assembly is now mandated to approve the national budget not later than 31 December before the financial year to which the budget relates. This has resulted in a change in the Ceremonial Opening of Parliament, which used to take place in mid-January (that is, before the budget meeting). The Ceremonial Opening of Parliament now takes place in September.

In August 2009 the Zambian Parliament commenced the construction of offices in four parliamentary constituencies. This is an on-going project which will result in the construction of offices in all 150 parliamentary constituency offices. The constituency offices continue to serve as a useful platform for interaction between members of Parliament and their electorates.

In 2009 the House passed 30 bills. In relation to members, the House passed the Ministerial and Parliamentary Offices (Emoluments) (Amendment) Bill 2009, which changed the salary and allowances of members.

For the first time in the history of the Zambian Parliament, an honourable

member attempted to move a substantive motion intended to challenge a ruling of a Presiding Officer on the floor of the House. The standing orders of the House provide that such a motion may only be debated in the House with the approval of the Committee on Privileges, Absences and Support Services. Consequently, the motion could not be debated in the House because that committee resolved against it for lack of merit.

# COMPARATIVE STUDY: THE ROLE OF THE CLERK OR SECRETARY GENERAL

This year's comparative study asked, "What are the functions of the clerk of your chamber or parliament? Is he or she the head of the administration as well as chief procedural adviser? Are any functions laid down in statute or in the constitution? What is the relationship between the clerk and the speaker or presiding officer? Does he or she answer to any other members or committees? How would you characterise the leadership role of the clerk? Is there a set term of office? What is the process for removing the clerk from office? If your parliament is bicameral, what is the relationship between the clerks of the two chambers? What contacts are there, and how formal, between them?"

## AUSTRALIA

### House of Representatives

As with most clerks, the Clerk of the House of Representatives performs a dual role. The Clerk is both the principal adviser on parliamentary law and the procedures of the House and the chief executive of the Department of the House of Representatives, with responsibility for management of staff, funding and assets.

The Clerk has a key role in advising the Speaker and the parliamentary chamber as a whole on procedural matters. To fulfil this advisory role effectively it is important that the role be performed with independence and integrity.

The Speaker is provided with frank and fearless advice on procedural and administrative matters, and the Speaker will often discuss matters first with the Clerk, as the custodian of institutional memory and a source of non partisan, confidential advice.

The principal players in the political process, including government ministers, the Opposition, backbenchers and independent members, rely on the Clerk for sound advice on parliamentary law. Moreover, the advice is frequently required on the spot and under intense pressure.

The Clerk exercises the administrative responsibilities of the position under several key pieces of legislation. The Financial Management and Accountability Act 1997 designates the Clerk as the Chief Executive of the Department of the

House of Representatives with responsibility for managing the Department's resources in an efficient, effective and ethical way. The Speaker can be asked questions in the House about matters of administration, and presents to the House the annual report on the operations of the Department of the House of Representatives, but the Clerk is responsible for the day to day management of the Department. The Parliamentary Service Act 1999 also makes the Clerk, under the Speaker, responsible for the management of the Department, for advising the Speaker on matters relating to the Department and for assisting the Speaker to fulfil his accountability obligations to the House. Other legislative provisions relate to detailed aspects of the administrative role of the Clerk.

Under the Parliamentary Services Act, the Clerk of the House is a non-elected official, appointed by the Speaker for a maximum 10-year, non-renewable term. By having a single non-renewable term, the Clerk's advice is not influenced by the fact that he or she might be seeking a renewal of appointment.

Section 58 of the Parliamentary Service Act provides that a person is not to be appointed as the Clerk of the House of Representatives unless the Speaker is satisfied that the person has extensive knowledge of, and experience in, relevant parliamentary law, procedure and practice.

General directions may be given in writing to the Clerk in relation to the management and leadership of parliamentary service employees. However, the Parliamentary Service Act also provides that the Clerk is not subject to direction by the Speaker in relation to any advice sought from, or given by, the Clerk with respect to the House or any of its committees or members.

The appointment of the Clerk may be terminated by resolution of the House, for which notice of six sittings days is necessary. The resolution must state the ground for termination being one of misbehaviour, incapability because of physical or mental incapacity, or insolvency.

There are two Houses in the Australian Parliament and three parliamentary departments to support the Houses. The Clerk of the House works closely with the Clerk of the Senate and the Secretary of the Department of Parliamentary Services in supporting the work of the Parliament.

There is regular informal contact between the Clerk and each of the other heads about procedural or, more frequently, administrative matters. The three heads also meet together informally a number of times each year to discuss matters of cross-parliamentary interest. Whilst there may not always be agreement between the heads on particular matters, the contact is professional and courteous—as indeed is the regular contact between other officials of each department.

## Senate

The Clerk of the Senate is the principal adviser to all senators on matters relating to the business and procedures of the Senate and its committees. When the Senate meets, the Clerk is seated at the table in the centre of the Senate, in front and to the right of the President of the Senate. While on duty in the Senate, the Clerk provides procedural advice primarily to the senator in the chair (the President, Deputy President or Chair of Committees, or senators acting in those positions) and to all senators, including government ministers and parliamentary secretaries.

The Australian Constitution authorises the Senate to make rules (standing orders) that govern the way it conducts its business. Standing order 43 requires that the Clerk record all proceedings of the Senate. The handwritten notes and those of other clerks at the table are used to compile the *Journals of the Senate*, which are the official records of decisions made in the Senate. These records may be used to provide proof in the courts of actions taken in the Senate (although such actions may not be impeached or questioned in a place outside the Senate). Standing orders also require the Clerk to keep custody of all records and documents presented to the Senate.

The Clerk is responsible for announcing each item of business as it occurs in the Senate. The Clerk also announces the receipt of petitions and the postponement of notices of motion, and tables a variety of documents presented to the Senate. The Clerk reads the titles of all bills as they are considered at various stages in their passage through the Senate. The Clerk is also responsible for certifying (by his or her signature) all bills that have been passed by the Senate, amendments agreed to by the Senate and Senate bills before they are sent to the Governor-General for Royal Assent. Whenever the office of President becomes vacant, the Clerk acts as chair of the Senate until a President is elected.

At the direction of the President, the Clerk operates the bells which ring throughout Parliament House to call senators to the Senate for the commencement of proceedings, or for other purposes described below. The Clerk times the ringing of the bells with the use of sandglasses on the table, supplemented by a digital clock which also displays on all television monitors throughout the building the time available for senators to reach the chamber. Frequently the bells are rung to signal a division in the Senate, when senators are called to make a formal vote on a matter before the Senate. The Clerk is responsible for recording the names of the senators who agree with the motion which is the subject of the division (the "Ayes"). Senators may also be called by the ringing

of the bells to form a quorum, which is one-quarter of the total number of 76 senators, or 19. This is the minimum number of senators required in the Senate for business to proceed. When a quorum is reached, the Clerk turns off the bells. If a quorum is not achieved within four minutes of the President noting the absence of a quorum, the Clerk records the names of those senators who have responded to the call and the Senate adjourns until the next usual sitting day. (This adjournment for the lack of a quorum is known as a "count-out".)

Each day on which the Senate is due to meet, before proceedings begin, the Clerk meets the Deputy Clerk, Clerks Assistants, Usher of the Black Rod and other officers who perform duties at the table of the Senate, so that advice and information can be exchanged about how the work of the Senate and senators can best be supported for that day's business. The senior officers then brief their respective staff areas. When not on duty in the Senate, the Clerk monitors proceedings in the Senate and is close at hand to provide advice and support if any complex procedural matters arise.

The Clerk is secretary and adviser to the Senate Procedure Committee which examines and monitors procedural developments in the Senate and in committees. The committee regularly reports and recommends improvements to the rules of procedure which it considers will enable full and fair debate in the Senate and the proper conduct of the business of the Senate and its committees.

The Clerk is editor of *Odgers' Australian Senate Practice* (OASP), a detailed reference work on the Senate's powers, procedures and practices. OASP is published on the internet and updated twice a year. A printed version is published every two or three years. After each period of sittings of the Senate, which usually covers two weeks of Senate meetings, the Clerk produces the *Procedural Information Bulletin*, which identifies and analyses matters of significant procedural interest. The present Clerk is also principal author and editor of the *Annotated Standing Orders of the Australian Senate* (see review in books section).

The Clerk is the administrative head or chief executive officer of the Department of the Senate and is responsible to the President of the Senate, the Appropriations and Staffing Committee and the Senate for the budget, staffing and operations of the department. The Clerk and other senior officers appear at Senate estimates hearings to answer questions from senators about the work of the department.

Under the Parliamentary Service Act 1999, the Clerk of the Senate is appointed by the President after consultation with senators. The Act specifies

that the appointment of Clerk is for a non-renewable term of 10 years. The current Clerk's term is due to expire at the end of 2019. The current Clerk is Dr Rosemary Laing, the first woman to hold the post. She was appointed to the office in December 2009. The appointment of the Clerk may be terminated on specified grounds by a resolution of the Senate of which at least six sitting days' notice has been given.

There is no formal relationship between the Clerks of the two Houses of the Australian Parliament but both officers consult frequently with one another on matters of mutual interest. The Clerk of the Senate administers the Parliamentary Education Office on behalf of the chamber departments while the Clerk of the House of Representatives administers the Parliamentary Relations Office, which co-ordinates inter-parliamentary relations. Each department contributes funding to these services. From time to time, the two Clerks meet the Secretary of the Department of Parliamentary Services which is responsible for the provision of common services including the Parliamentary Library, Hansard, broadcasting, security and estate maintenance.

### *Parliamentary Service Act 1999*

**"58 Appointment of Clerk of the Senate and Clerk of the House of Representatives**

(1) The Clerk of the Senate is to be appointed by the President of the Senate after the President has consulted members of the Senate about the proposed appointment.
(2) The Clerk of the House of Representatives is to be appointed by the Speaker of the House of Representatives after the Speaker has consulted members of that House about the proposed appointment.
(3) An appointment of a person as the Clerk of the Senate or the Clerk of the House of Representatives is to be for a period of 10 years. The person is not eligible for reappointment.
(4) A person is not to be appointed as the Clerk of the Senate or the Clerk of the House of Representatives unless the Presiding Officer making the appointment is satisfied that the person has extensive knowledge of, and experience in, relevant Parliamentary law, procedure and practice.
(5) If the Clerk of the Senate or the Clerk of the House of Representatives has reached the minimum retiring age, he or she is entitled to retire at any time by notice in writing to the Presiding Officer.
(6) An appointment is not affected by any defect or irregularity in or in connection with the appointment.

**60 Termination of appointment of Clerk of the Senate or Clerk of the House of Representatives**

(1) The Senate may, by resolution passed pursuant to a motion of which notice was given at least 6 sitting days before the day on which the resolution is passed, terminate the appointment of the Clerk of the Senate.

(2) The House of Representatives may, by resolution passed pursuant to a motion of which notice was given at least 6 sitting days before the day on which the resolution is passed, terminate the appointment of the Clerk of that House.

(3) A resolution terminating the appointment of the Clerk of the Senate or the Clerk of the House of Representatives must state the ground on which the appointment is terminated, which must be one of the following:

(a) the Clerk has been guilty of misbehaviour;

(b) the Clerk is incapable, because of physical or mental incapacity, of performing his or her duties;

(c) the Clerk has become an insolvent under administration."

## Australian Capital Territory Legislative Assembly

The office of Clerk of the Legislative Assembly is a statutory one. The Clerk, being both principal adviser to the Speaker and members on procedural matters and chief executive of the Assembly Secretariat, has both an administrative and a procedural role.

Other important functions of the Clerk include responsibility for the production of such documents as the *Notice Paper* and the *Minutes of Proceedings*, maintaining the members' roll, the provision of the advice and services necessary to ensure the smooth running of the chamber and the certification of bills agreed to by the Assembly.

The Clerk is the Speaker's chief adviser on procedural matters and also heads the Assembly Secretariat, which provides the Speaker (and other members) with procedural, policy and administrative advice and support.

The appointment of the Clerk is a function of the Speaker on behalf of the Territory. The appointment is made:

(i) on the advice of the appropriate committee of the Assembly;

(ii) in consultation with the executive and the Leader of the Opposition; and

(iii) with due regard to mandated merit principles.

While the Clerk is not answerable to any other members or committee, the Secretariat, which he or she heads, publishes an annual report, and the Clerk appears annually before the Select Committee on Estimates and the Standing Committee on Public Accounts.

There is no set term of office for the Clerk. He or she can be suspended or removed from office by the Speaker on the grounds of physical or mental incapacity or misbehaviour.

As chief executive of the Assembly's Secretariat, the Clerk fulfils a vital leadership and management role, ensuring that the Assembly is appropriately staffed and resourced and that the Assembly functions with a high degree of effectiveness and efficiency.

## New South Wales: joint entry on behalf of the Legislative Assembly and Legislative Council

*What are the functions of the clerk of your chamber or parliament?*

The Clerks are responsible for providing expert advice on parliamentary law, practice and procedure to the Presiding Officers, ministers, members and committees of their respective Houses.

In their respective Houses, the Clerks sit at the table of the House on the Presiding Officer's right. The Clerks are responsible for calling each item of business as it is reached, tabling certain documents, providing detailed procedural advice to the Presiding Officer and other members as required, recording the proceedings of the House, and keeping an attendance list.

Outside their Houses, the Clerks are responsible for the preparation and publication of their House papers, and for the custody of the journals, records and documents tabled in the House. The Clerks also ensure that a Hansard record is kept of debates in their House. In addition, the Clerks sign orders for the production of documents and Addresses for Documents to the Governor. The Clerks also maintain separate Registers of Disclosures by Members and keep their respective Rolls of the House.

During sitting periods, the Clerks also certify bills sent to the other House or returned to the other House, with or without amendment. A bill originated in the other House which has finally passed both Houses is certified by the respective Clerk before presentation to the Governor for assent.

When the Houses are not sitting, the Clerks are also responsible for the receipt of certain reports and other documents. The Clerks must also co-ordinate requests for the recall of their respective Houses.

The Clerks are also responsible to the Presiding Officers for the efficient and effective administration of their respective Departments. The Clerks are also responsible, together with the Executive Manager of the Department of Parliamentary Service, for the management and administration of the Parliament generally.

### *Is he or she the head of the administration as well as chief procedural adviser?*

As indicated above, the Clerks are responsible to the Presiding Officers for the administration of the Department of the Legislative Council and the Department of the Legislative Assembly respectively.

However, the provision of support services such as Hansard, IT, building services, catering, the library and education is the responsibility of the Department of Parliamentary Services (DPS), which is administered by the Executive Manager. The Executive Manager of DPS reports to the Presiding Officers jointly.

### *Are any functions laid down in statute or in the constitution?*

The Constitution does not make reference to Clerk of the Legislative Council, and only oblique reference to the Clerk of the Legislative Assembly. Nor is there any reference to the functions of the Clerks in statute, other than the receipt of reports and other documents. The functions of the Clerks are largely set out in the standing orders of the respective Houses and in regulations.[1]

### *What is the relationship between the Clerk and the Presiding Officer?*

The Clerks are routinely required to provide procedural advice to the Presiding Officers, both within and outside their respective Houses. In addition, the Clerks work with the Presiding Officers to ensure the provision of appropriate support services to all members of their House. The Clerks are also accountable to their Presiding Officer for the efficient and effective administration of the Department of the Legislative Council and Department of the Legislative Assembly respectively, and for the Parliament more generally (together with the Executive Manager of the Department of Parliamentary Services).

### *Does he or she answer to any other members or committees?*

While the Clerks are accountable directly to their Presiding Officer, they are nevertheless required to ensure the provision of advisory, research and

[1] In relation to members' disclosure of their pecuniary interests.

support services to all members of their House. Accordingly, the Clerks are accountable to all members of their House.

The Clerks may also be called to appear before committees of their respective houses, notably the Privileges Committees.

The Clerk of the Legislative Council and the President are also required to appear before the annual budget estimates inquiry, which is conducted by a committee of the Legislative Council. The Clerk of the Legislative Assembly and the Speaker do not appear before the committee as a matter of comity.

*How would you characterise the leadership role of the clerk?*

As the respective heads of the Department of the Legislative Council and the Department of the Legislative Assembly, the Clerks are responsible for setting the strategic directions of the Departments, managing the operation of the Departments in the provision of their core services, and representing the interests of the Departments and their staff.

*Is there a set term in office?*

No. The Clerks holds office during the pleasure of the Governor.

*What is the process for removing the clerk from office?*

There is no formal process for removing the Clerks from office.

The Clerks are appointed by the Governor with the advice of the Executive Council pursuant to section 47 of the Constitution Act 1902. In practice this means the Clerks are appointed on the recommendation of their respective Presiding Officer to the Premier.

Accordingly, the removal of a Clerk would presumably require advice from the relevant Presiding Officer to the Premier requesting that the Governor withdraw the appointment of the Clerk and appoint a new Clerk.

*If your parliament is bicameral, what is the relationship between the clerks of the two chambers? What contacts are there, and how formal, between them?*

A formal governance framework for the Parliament, incorporating regular meetings, monthly finance reports, an audit committee and annual reporting requirements, is set out in the Strategic Plan 2009–18 of the New South Wales Parliament.

Outside of the formal governance framework, the Clerks work closely together concerning matters affecting the whole Parliament, such as the "twinning" arrangement between the NSW Parliament, the National Parliament of

Solomon Islands and the Bougainville House of Representative under the auspices of the Commonwealth Parliamentary Association. The contact varies, but is generally informal.

## Northern Territory Legislative Assembly

The Clerk of the Legislative Assembly is the chief procedural advisor and the head of parliamentary administration.

The Clerk is appointed by the Administrator acting on advice of the Executive Council and on the recommendation of the Speaker. There is no set term of office. Removal from office is by the Administrator (as for appointment).

The primary function of the Clerk is to advise the Speaker (in addition to all other members of the Assembly) and act as Chief Executive Officer of the agency.

The Clerk has secretarial responsibility for the Standing Orders Committee and the Privileges Committee. He is Registrar for the Register of Members' Interests Committee. Further, the Clerk provides advice to other committees as and when required (this is particularly the case for the newly established Council for Territory Co-operation, a sessional committee arising from the agreement between the member for Nelson and the Chief Minister, which itself arises from the motion of no confidence in August 2009).

## Queensland Legislative Assembly

### *What are the functions of the Clerk of your chamber or parliament?*

The Clerk is the Principal Officer of the Parliamentary Service and the custodian of the House and Committee records.[2] The Clerk is responsible for the noting of all proceedings of the Legislative Assembly and for exercising the powers and duties imposed by the Standing Rules and Orders, customs and practices of the Legislative Assembly.[3]

The Clerk has three main roles:

(1) Chief Executive of the Parliamentary Service;[4]
(2) Accountable Officer for the Legislative Assembly and the Parliamentary Service;[5] and
(3) Principal Officer of the Legislative Assembly.

[2] Standing Rules and Orders of the Legislative Assembly of Queensland, SOs 17, 19 and 20.
[3] Parliamentary Service Act 1988 (Qld), section 19.
[4] Parliamentary Service Act 1988 (Qld), section 20.
[5] Financial Accountability Act 2009 (Qld), section 66(1).

The Clerk has detailed knowledge and experience of parliamentary law, practice and procedures and its sources, including the Standing Rules and Orders of the House and the acts of Parliament which relate to the parliament and parliamentary custom and practice.

### *Is he or she the head of the administration as well as the chief procedural adviser?*

The Clerk is the Chief Executive of the Parliamentary Service under the Parliamentary Service Act 1988.[6] Pursuant to the Financial Accountability Act 2009 (FAA), the Clerk is head of administration as well as the chief procedural advisor. The FAA provides that the Clerk, as Accountable Officer, has a range of financial management responsibilities. These include publishing an annual financial statement and an annual financial report.[7]

### *Are any functions laid down in statute or in the constitution?*

Under the Parliamentary Service Act (PSA) the Clerk is the Chief Executive Officer (CEO) of the Parliamentary Service and responsible to the Speaker for the efficient and economical management of the Parliamentary Service.[8] The FAA provides that the Clerk of Parliament is the Accountable Officer of the Legislative Assembly and the Parliamentary Service.[9] As the Accountable Officer, the Clerk must ensure the operations of the Parliamentary Service are carried out efficiently, effectively and economically; establish and maintain appropriate systems of internal control and risk management; establish and keep funds and accounts in compliance with the prescribed requirements; ensure annual financial statements are prepared, certified and tabled in Parliament in accordance with the prescribed requirements; undertake planning and budgeting; and perform other functions conferred on the Accountable Officers.[10]

Pursuant to the FAA, the Clerk must prepare an annual financial statement and certify whether the statements comply in all material respects with the prescribed requirements in relation to the establishment and keeping of accounts, and have the statements audited by the Auditor-General. Additionally, the Clerk must prepare an annual report which is tabled by the Speaker in the Legislative Assembly.[11]

[6] Parliamentary Service Act 1988 (Qld), section 20.
[7] Financial Accountability Act 2009 (Qld), sections 60, 62, 63.
[8] Parliamentary Service Act 1988 (Qld), section 20(1).
[9] Financial Accountability Act 2009 (Qld), section 66(1).
[10] Financial Accountability Act 2009 (Qld), section 61.
[11] Financial Accountability Act 2009 (Qld), sections 62(a), (b), (c) and 63(2).

Pursuant to the Parliament of Queensland Act, the Clerk issues summons on the request of parliamentary committees to non-members to attend or produce a document or other thing and can administer an oath or affirmation. The Clerk has custody of all documents in the possession of the Legislative Assembly, a committee or an inquiry.[12]

### *What is the relationship between the Clerk and the speaker or presiding officer?*

The Clerk is responsible to the Speaker for the efficient and economical management of the Parliamentary Service as well as the chief procedural adviser. Further, the Clerk may make recommendations to the Speaker with respect to any matter for consideration by the Speaker and takes all steps to implement policies and decisions of the Speaker that require action to be taken by the Parliamentary Service.[13] The Speaker may delegate the Speaker's powers to the Clerk.[14] In many respects the relationship is the same as a minister and head of a government department.

### *Does he or she answer to any other members or committees?*

The Clerk is responsible to the Speaker for the discharge of responsibilities under the PSA and standing orders, but to the Premier of Queensland for responsibilities under the FAA.

The Clerk is impartial in his or her dealings with all members of the House, and members may consult the Clerk on any parliamentary matter in confidence.

### *How would you characterise the leadership role of the Clerk?*

The Clerk is the CEO of the Parliamentary Service, and discharges the leadership role of a CEO, not only in respect of procedural matters, but also management and accountable officer matters.

### *Is there a set term of office? What is the process for removing the Clerk from office?*

There is no set term of office for the Clerk; he or she holds office during good behaviour.[15]

The Clerk may at any time be removed or suspended from office by the

[12] Parliament of Queensland Act 2001 (Qld), sections 26, 31 and 61.
[13] Parliamentary Services Act 1988 (Qld), section 20.
[14] Parliamentary Services Act 1988 (Qld), section 8.
[15] Parliamentary Service Act 1988 (Qld), section 21(1).

Governor upon an address from the Legislative Assembly for disability, bankruptcy or misconduct.[16] At any time when the Legislative Assembly is not in session, the Clerk may be suspended from office by the Governor for disability, bankruptcy or misconduct proved to the satisfaction of the Governor but the suspension shall not continue in force beyond two months after the beginning of the next ensuing session of the Legislative Assembly.[17]

## Tasmania House of Assembly

*What are the functions of the clerk of your chamber or parliament?*

The Clerk of the House of Assembly is the manager of all formal and constitutional processes. The officer consults and advises on all parliamentary, constitutional and statutory matters. For the purposes of administration the Clerk of the House is the equivalent of a head of department in respect of the House of Assembly and a joint head in respect of the joint service (Legislature-General)

*Is he or she the head of the administration as well as chief procedural adviser?*

Yes.

*Are any functions laid down in statute or in the constitution?*

Some.

*What is the relationship between the clerk and the speaker or presiding officer?*

The Clerk provides advice to the Speaker and is independent of the Presiding Officer

*Does he or she answer to any other members or committees?*

No.

*How would you characterise the leadership role of the clerk?*

Head of department.

*Is there a set term of office?*

No.

[16] Parliamentary Service Act 1988 (Qld), section 21(3).
[17] Parliamentary Service Act 1988 (Qld), section 21(4).

*What is the process for removing the clerk from office?*

No provision for it.

*If your parliament is bicameral, what is the relationship between the clerks of the two chambers? What contacts are there, and how formal, between them?*

Formal contact and regular friendly informal contact with the other House as necessary.

## Tasmania Legislative Council

The Clerk of the Legislative Council is appointed by Letters Patent issued by Her Majesty Queen Elizabeth II and is the Permanent Head and Chief Executive of the staff of the Legislative Council.

The Clerk is responsible for ensuring that the correct procedure is observed during the passage of legislation and is called upon to advise the President on the interpretation of standing orders and parliamentary practice. The Clerk is responsible only to the President for the efficient and effective administration of the Legislative Council.

The Clerk is also responsible for the preparation of the Notice Paper and the compilation of the Votes and Proceedings, the official record of proceedings in the Council.

The Clerk tables papers in the Council and reads aloud the titles of bills as each stage is agreed to by the Council.

The Clerk must prepare and certify the accuracy of bills agreed to by both Houses before they are submitted by the President to the Governor for Royal Assent.

Functions are not laid down in the Constitution or in any other statute, nor is there a fixed or set term of office.

In the Tasmanian Parliament the Clerks of both Houses act jointly as responsible officers for all parliamentary joint service matters. Contacts are not set down in a formal way; however issues are addressed when a joint authority is required and ongoing joint oversight of the joint service areas is aided by the close working relationship with the Secretary of the Joint House Committee. This officer is a Clerk-at-the-Table appointed on a rotating annual basis to handle the day-to-day administration of the joint services area.

The Clerk is assisted in the administration of the House by the Deputy Clerk.

## Victoria Legislative Assembly

The Clerk is the most senior official of the Legislative Assembly, having responsibilities inside the chamber, procedural duties outside the chamber and as Head of the Department of the Legislative Assembly.

In the House, the Clerk is responsible for providing advice to the Speaker and members on procedural matters and the requirements of standing orders, the Constitution Act 1975, parliamentary precedents and Speakers' rulings. The Clerk is also responsible for certifying bills that have passed the Legislative Assembly, tabling petitions and documents, and recording the proceedings of the House (in the *Votes and Proceedings*).

Under the Parliamentary Administration Act 2005 the Clerk, as Head of the Department of the Legislative Assembly, administers the Department under the general oversight of the Speaker similar to the way government departments operate under a secretary and minister. The Clerk is responsible for ensuring the general conduct and effective and efficient management of the Department. The Clerk is responsible only to the Speaker, and not any other members or committees.

Together with the Head of the Department of the Legislative Council and the Secretary of the Department of Parliamentary Services, the Clerk forms a part of the Parliamentary Executive Group and is jointly responsible, in consultation with the Presiding Officers, for the overall management of the Parliament of Victoria.

It is the responsibilities as Head of the Department that characterise the leadership role of the Clerk. The strategic management and overall responsibility for the activities and functions of the Department of the Legislative Assembly rely upon the authority and leadership of the Department Head. In the chamber, the role of the Clerk is quite different, and is one based on guidance and advice, rather than leadership.

There is no set term of office for the Clerk, and the process for removing the Clerk is laid down in the Parliamentary Administration Act 2005. If a Department Head has engaged in conduct which, in the opinion of the Speaker, renders him or her unfit to continue in the position, the Speaker must report the Clerk to the Governor in Council and may suspend him or her from duty. The Governor in Council may appoint a Board of Inquiry to investigate the matter. If the Board of Inquiry finds that the charges are true, the Governor in Council may dismiss the Department Head, or take other action as set out in the Act.

The Clerk of the Legislative Assembly and the Clerk of the Legislative

Council provide advice to their respective chambers independently. The relationship between them is not formalised, but is based on regular communication and an awareness of procedural impacts on the other House.

The longest serving Clerk is traditionally appointed Clerk of the Parliaments. At present, the Clerk of the Legislative Assembly, Ray Purdey, is also the Clerk of the Parliaments. This role encompasses three main duties: to certify all Acts and present them to the Governor, maintain the register of members' financial interests, and to be the Honorary Secretary of the Commonwealth Parliamentary Association (Victoria Branch).

## Victoria Legislative Council

The Clerk of the Legislative Council is the head of the Department of the Legislative Council, and as such is responsible for all aspects of management and administrative oversight. This includes responsibility for the staffing, financing and administration of the Department. The Clerk supervises the Department's various workgroups and makes certain that these are appropriately serving the needs of the President, the House, its committees and its members. Under the Parliamentary Administration Act 2005 the Clerk is the employer of Council staff.

The Clerk is also the Legislative Council's most senior parliamentary officer and is the principal apolitical advisor to the President and members on the House's rules, practices and procedures. The Clerk must ensure that all business conducted in the chamber meets statutory and procedural requirements. When a bill has completed its passage through the Legislative Council, it must be certified by the Clerk. The Clerk is also responsible for the accuracy of the *Minutes of the Proceedings*, the formal record of the Council's decisions and proceedings. The Clerk also provides oral and written advice to members, and provides written advice to committees if requested. The Clerk is the principal advisor to the Standing Orders Committee and attends meetings to assist the Committee's deliberations on changes to Council procedure.

The Clerk is appointed by the Governor in Council on the recommendation of the President pursuant to the Parliamentary Administration Act 2005. Although each Clerk is employed under a position description which outlines the core duties and responsibilities of the role, many of the duties of the Clerk have evolved over the years and are based on custom and practice.

The Clerk and his or her staff can be regarded as the custodians of the institution of Parliament.

The Clerk is in a somewhat unique position in the political process. He or

she must be apart and be seen to be apart; the need to be apolitical, objective and independent cannot be stressed too much. The Clerk is surrounded by politics and must possess an intimate understanding of the political processes applying in their jurisdiction. As well as being an expert on parliamentary procedure, he or she must be politically aware and sensitive to the slightest political nuance.

It is crucial that the Clerk maintain and stand firm on advice and recommendations that are based on constitutional, parliamentary and statutory frameworks, when at times there may be political pressure and influences imposed by others.

There is no set term of office for a Clerk, who is regarded as a permanent officer of the Parliament. The Parliamentary Administration Act 2005 states that a Clerk may retire at 55, and may serve for as long as they choose. The Clerk resigns by providing written advice of the resignation to the Governor in Council. The Act also provides for a process where a Clerk may be dismissed by the Governor in Council where he or she is deemed to have behaved inappropriately.

Much of the Clerk's work these days involves the administration of the department itself and the Parliament generally, in contrast to the position in the past which largely concentrated on parliamentary practice and procedure. The Clerk of the Legislative Council and the Clerk of the Legislative Assembly together with the Secretary of the Department of Parliamentary Services form the Parliamentary Executive Group which has responsibilities, along with the Presiding Officers, for the strategic direction of the Parliament. The Clerks each work separately in the administration of their own Department however. The more senior of the two Clerks, who has served the longer time at Parliament, takes the role of Clerk of the Parliaments, and it is the Clerk of the Parliaments' responsibility to present bills for Royal Assent to the Governor.

## CANADA

### House of Commons

The Clerk of the House of Commons is the chief executive officer of the House Administration and the senior permanent official of the House. The Clerk reports to the Speaker and is the secretary of the Board of Internal Economy, the governing board that has responsibility for all financial and administrative matters respecting the House of Commons. The Clerk advises the Speaker and all Members of Parliament on the interpretation of parlia-

mentary rules, precedents and practices—indeed, on all procedural questions. He or she is at the service of all members, regardless of party affiliation, and is expected to act with impartiality and discretion.

As the primary procedural adviser and senior officer of the House, the Clerk holds the rank of a Deputy Minister under the authority of the Speaker who acts, in effect, as a Minister. In the Canadian order of precedence, the Clerk ranks ahead of departmental Deputy Ministers. Like a departmental Deputy Minister, the Clerk is the final authority in matters of personnel management for employees of the House.

The Clerk is responsible for maintaining records of the proceedings of the House and for keeping custody of these records and other documents in the possession of the House. All decisions of the House are authenticated by signature of the Clerk. All reports that must be tabled in the House under provision of an Act or resolution can be filed with the Clerk, and are then deemed to have been tabled in the House. The standing orders require the Clerk to provide the Speaker, prior to each sitting of the House, with the official agenda for the day's proceedings, published under the title *Order Paper and Notice Paper*. The Clerk must be in possession of the current issue of this document in order for the day's proceedings to begin.

The procedural and administrative functions of the Clerk are set out in standing orders which have changed little since the establishment of the Canadian Confederation in 1867. It is these standing orders which place the staff and administration of the House under the control of the Clerk (SO 151), assign to the Clerk the responsibility of maintaining and retaining custody of the records of proceedings in the House (SO 151) and make the Clerk responsible for the production of the *Order Paper and Notice Paper* (SO 152). Notwithstanding this, the responsibilities of the office have evolved considerably since Confederation as the administrative apparatus of the House has become increasingly complex.

At the beginning of a Parliament, the Clerk administers the oath of allegiance to all duly elected members as required by the Constitution Act 1867. He or she also administers an oath of allegiance to incoming members of the Board of Internal Economy and to all employees of the House Administration.

In addition to his or her other duties, the Clerk frequently receives delegations of parliamentary officials from other legislatures and participates in interparliamentary activities.

The Clerk is appointed by the Governor-in-Council (effectively, by the Prime Minister) under the provisions of the Public Service Employment Act, although he or she is not technically part of the federal public service. The

standing orders of the House require that the name of any nominee for appointment as Clerk be first referred to the Standing Committee on Procedure and House Affairs and that the appointment be ratified by the House before the issuing of the apposite Order in Council. The Clerk is required under the Parliament of Canada Act to swear an oath of allegiance administered by the Speaker of the House. He or she continues to serve "at pleasure"—usually until retirement.

The staff and administration of the House come under the control of the Clerk, who presides over the "Clerk's Management Group", an executive governing body representing all services of the House of Commons. Senior officials of the House who report to the Clerk include the Deputy Clerk (Procedural Services), the Sergeant-at-arms (Parliamentary Precinct Services), the Law Clerk and Parliamentary Counsel (Office of the Law Clerk and Parliamentary Counsel), the Chief Information Officer/Executive Director, Information Services (Information Services), the Chief Financial Officer (Finance Services) and the Director General, Human Resources and Corporate Planning Services (Human Resources, Corporate Planning and Communications Services).

The Clerk is called upon from time to time to give evidence before committees of the House on procedural or administrative matters. This is particularly the case with the Standing Committee on Procedure and House Affairs. The Clerk does not, however, report to any standing or special committee.

If any complaint or representation is made to the Speaker of the misconduct or unfitness of the Clerk, the Speaker may cause an enquiry to be made into the conduct of that person and if thereupon it appears to the Speaker that such person has been guilty of misconduct, or is unfit to hold his or her situation, the Speaker may suspend him or her and report such suspension to the Governor. His or her removal may then be effected by Order in Council.

The Clerk of the House of Commons and the Clerk of the Senate contribute to the effective management of common issues such as interparliamentary affairs, protocol, security within the parliamentary precinct, and the long-term vision and plan to address the renovation of the Parliament Buildings. The Clerks sometimes meet formally, attending their respective Speakers who meet to discuss issues of common interest, and very often the Clerks meet informally to share expertise, discuss matters of common interest and exchange views on topical questions.

## Alberta Legislative Assembly

In Alberta, reporting solely to the Speaker, the Clerk is the chief permanent officer of the Legislative Assembly and has authority and responsibility equivalent to that of a deputy minister of a government department. The Clerk has both procedural and managerial responsibilities.

As senior procedural officer of the Assembly the Clerk has overall responsibility for:

- providing advice, research and support to the Speaker and members on procedural matters concerning the privileges, rules, usages and proceedings of the Assembly and co-ordinating procedural services by other officers of the Assembly;
- preparing documents of the Assembly and ensuring the safekeeping of the Assembly's documents and records;
- providing all necessary administrative and support services to the Assembly during its sittings and ensuring that essential services are provided to the Assembly chamber;
- presiding over the election of the Speaker at the opening of a new Legislature;
- announcing the Assembly's order of business and conducting its recorded votes or divisions during its sittings; and
- supervising the officers of the Assembly, including the Clerk Assistant/Director of House Services, Clerk of Journals/Table Research, Parliamentary Counsel and Sergeant-at-Arms.

As chief executive officer the Clerk has the following managerial responsibilities:

- directing the operation of the Legislative Assembly Office;
- authorising all financial commitments the Assembly enters into;
- directing the preparation of the Assembly's annual estimates and advising the Members' Services Committee in their consideration and approval;
- acting as liaison at the deputy minister level with government departments on matters related to the Assembly, the chamber and the Legislative Assembly Office; and
- supervising the following managers: Communication Services, Clerk Assistant/Director of House Services, Legal Services, Director of Visitor, Ceremonial and Security Services, Sergeant-at-Arms, Legislature Librarian: Library Services, Director of Information Technology and Human

Resource Services, Director of Financial Management and Administrative Services and Senior Financial Officer.

Under the Speaker's direction, the Clerk assists in co-ordinating the participation of Alberta MLA's in interparliamentary activities, which help provide a free flow of information and the exchange of ideas among parliamentarians through the Commonwealth Parliamentary Association and other interparliamentary associations. In addition, the Clerk acts as Secretary of the Alberta Branch of the Commonwealth Parliamentary Association.

In Alberta, the duties of the Clerk of the Legislative Assembly are prescribed in both the Legislative Assembly Act and in the standing orders. There is no set term of office and no formal process for removing the Clerk from office.

## British Columbia Legislative Assembly

*What are the functions of the clerk of your chamber or parliament?*

The Clerk of the House is the senior permanent officer of the unicameral Legislative Assembly of British Columbia. The Clerk is assisted in the performance of his or her duties by four Clerks Assistant. As the chief procedural adviser, the Clerk has the primary function of interpreting the standing orders, conventions, precedents and usages in order to advise the Speaker and MLAs on parliamentary practice. When the House is sitting, the Clerk observes the daily proceedings from the Clerk's Table on the floor of the chamber.

The Clerk is responsible for the preparation and printing of the Orders of the Day and the Votes and Proceedings, and supervises the production of the Journals of the House. The Clerk is the custodian of all records or other documents of the House and has custody of legislation throughout its stages and proceedings. Approved official copies of revised statutes are also countersigned and kept by the Clerk. The Office of the Clerk archives official documents tabled in the House and makes them available to persons on request.

In addition, the Clerk presides over the election of a Speaker, administers oaths of allegiance to duly elected members and Statutory Officers, and acts as Disclosure Clerk pursuant to the Financial Disclosure Act (RSBC 1996, c 139). The Clerk also oversees the provision of orientation services to new members and plays a prominent role helping to inform members of their duties and responsibilities. After the general election of 2009, for example, table officers participated in separate information meetings held for each caucus and the Legislative Assembly's lone independent. The Office of the

Clerk also advises on protocol arrangements for legislative functions, official ceremonies and parliamentary visits.

### *Is he or she the head of the administration as well as chief procedural adviser?*

The Clerk, on the Speaker's behalf, is the administrative head of the Legislative Assembly. Working in collaboration with other senior management, the Clerk oversees the administration of 128 FTEs in 11 Legislative Assembly branches.

### *Are any functions laid down in statute or in the constitution?*

Some functions of the Clerk are laid out in the province's Constitution Act (RSBC 1996 c 66) and other statutes. For example, under the Constitution Act, the Clerk keeps the record of original acts and endorses the date of assent (or signification date) for every act. Other duties of the Clerk are specified in Standing Order 92.

### *What is the relationship between the clerk and the speaker or presiding officer?*

The relationship between the Clerk and the Speaker is similar to that between a Deputy Minister of a government ministry and a Minister. The Clerk assists the Speaker to exercise his responsibilities as presiding officer and chief administrator of the Legislative Assembly. The Clerk maintains a close relationship with the Speaker, providing advice on matters concerning the privileges, procedures and practices of parliament. The Clerk has daily briefings with the Speaker on anticipated or potential issues of the day and has the sensitive task of deciding when and how to correct a Speaker who may have fallen into error. The Clerk also serves as the Speaker's designate pursuant to various provincial statutes. For instance, the Clerk can accept resignations from members and legislative officers when the speakership is vacant or the Speaker is unavailable.

### *Does he or she answer to any other members or committees?*

The Office of the Clerk provides support to the Legislative Assembly Management Committee, which is chaired by the Speaker. The Committee's powers and duties, derived from the Legislative Assembly Management Committee Act (RSBC 1996 c 258), relate to matters necessary for the efficient and effective operation and management of the Legislative Assembly. More generally, the Clerk, along with the Clerks Assistant, is responsible for advising parliamentary committees on procedure.

*How would you characterise the leadership role of the clerk?*

The tenure of the current Clerk of the House is impressive by any standard. E. George MacMinn, O.B.C., Q.C. is the longest serving Table Officer in Commonwealth parliaments. Originally appointed as a Clerk Assistant in 1958, he was appointed to the position of Clerk of the House in 1993. He has a well-deserved reputation as an expert on Westminster-style parliamentary procedure. His book, *Parliamentary Practice in British Columbia*, now in its fourth edition, remains the primary parliamentary authority on procedural questions arising in the Legislative Assembly as is used as a valuable reference in other provincial legislative assemblies across Canada, as well as internationally.

*Is there a set term of office? What is the process for removing the clerk from office?*

In accordance with section 39 of the province's Constitution Act, the appointments of all permanent officers of the Legislative Assembly must be made by resolution of the Legislative Assembly. Such an appointment has no set term of office and continues until the person dies, resigns or is removed from office. The latter would presumably require the kind of process defined in the enabling legislation of statutory officers—viz., a resolution passed by two-thirds or more of the members present in the Legislative Assembly.

## Manitoba Legislative Assembly

The Clerk is the Chief Parliamentary and Executive Officer of the Legislative Assembly and is appointed by Order-in-Council.

He or she is responsible through the Speaker to the Assembly for:

- providing to the Speaker, the Deputy Speaker, the Deputy Chairpersons, the committee chairpersons and all members of the House advice and assistance relating to parliamentary procedure and the operations of the Assembly, and advice and assistance relating to the interpretation and application of the relevant statutes, rules, practices and precedents;
- managing the administration, staffing and provision of services by the non-political offices of the Legislative Assembly;
- directing the activities of the Deputy Clerk, Visitor Tour Program Manager, the Hansard Manager, the Office Manager and other staff of the Assembly;
- overseeing the Members' Allowances Office;
- providing general administrative and support services to the Assembly, the

Assembly's Committees and the Legislative Assembly Management Commission;
- advising the Speaker on protocol arrangements for legislative functions and assisting with the organisation of visits of parliamentarians from other jurisdictions and countries;
- maintaining the records of the business of the Assembly and for the custody of all legislative documents;
- overseeing the preparation of the Legislative Assembly Management Commission (LAMC) Annual Report;
- answering enquiries from the public concerning parliamentary procedure and the Manitoba Legislative Assembly, and through the Clerk's Office providing information documents on the Legislative Assembly;
- providing orientation and training sessions for new MLAs, new committee chairpersons and new whips;
- developing, interpreting and applying administrative policy for the Legislative Assembly;
- presenting plans and results, issues and recommendations to LAMC.

In addition, the Clerk is the Secretary of the Legislative Assembly Management Commission, the Secretary of the Manitoba Branch of the Commonwealth Parliamentary Association, the Administrator of the Manitoba Legislative Internship Program, and a Member of the Administration and Selection Committees of the Internship Program.

The Clerk is the Head of Administration for the Clerk's Office, Chamber Branch Committees Branch, Journals Branch, Hansard, Visitor Tours, Research Branch and Members' Allowances Office in addition to being the Chief Procedural Advisor.

Section 4(3) of the Legislative Assembly Act specifies that the Clerk is the Secretary to the Legislative Assembly Management Commission, while section 32 of the Civil Service Act specifies that unless appointed by an Act of the Legislature, the Lieutenant Governor in Council shall appoint the Clerk.

In terms of the Speaker and Clerk, the Clerk reports directly to the Speaker, similar to how a deputy minister reports to a minister. In addition, the Legislative Assembly Management Commission also acts as the administrative and policy decision making body for the Assembly, and would also have the ability to provide direction to the Clerk.

The Clerk is considered to be the deputy ministerial equivalent for the Legislative Assembly.

There is no set term of office for the Clerk. There is also no defined process for removing the Clerk, though it is likely that a decision of the Legislative Assembly Management Commission would be required to remove the Clerk. Manitoba is a unicameral jurisdiction, hence there is no relationship or contact with a second chamber.

## Québec National Assembly

The Secretary General (SG) is the highest-ranking civil servant of the National Assembly. His or her main role is to assist the President in administrative and parliamentary tasks. The SG's administrative responsibilities are the same as those of a deputy minister, in that a large part of the job is to administer the services of the Assembly and supervise its personnel. The SG exercises any other function assigned by the Office of the National Assembly and serves as secretary of this board of internal economy. The functions of the SG are set out in sections 28 and 119 of the Act respecting the National Assembly (RSQ, c A-23.1).

In the parliamentary sphere, the SG is not only responsible for the various publications (Order Paper, Votes and Proceedings, *Journal des débats* (Hansard)), but is also chief adviser on parliamentary procedure to the President and the members.

The SG is appointed by the Assembly on a proposal of the Premier, for a term of unspecified (in law or elsewhere) duration. Since 1867 only nine persons have occupied the office of SG at the National Assembly. On the principle that the power to appoint encompasses the power to dismiss, as stated in section 55 of the Interpretation Act (RSQ, c I16), an SG may only be removed from office on a motion to that effect carried by the majority of the members.

## Saskatchewan Legislative Assembly

### *What are the functions of the clerk of your chamber or parliament?*

As outlined in the Legislative Assembly and Executive Council Act 2007 and the *Rules and Procedures of the Legislative Assembly of Saskatchewan*, the Clerk is the chief permanent officer of the Legislative Assembly and is responsible to the Speaker for the administration and other support services required for the proper conduct of the Legislative Assembly and its members. He is responsible for the safekeeping of all papers and records of the Assembly and must provide a list of reports or other periodical statements at the commencement of every session. As the administrative head and upon approval of the

Speaker, the Clerk may also determine the organisation and staff establishment of the Legislative Assembly Service.

### *Is he or she the head of the administration as well as chief procedural adviser?*

The statute designates the Clerk as the head of administration and chief procedural adviser.

### *Are any functions laid down in stature or in the constitution?*

The Legislative Assembly and Executive Council Act 2007 outlines the Clerk's role as the head of the Legislative Assembly Service and as being responsible to the Speaker.

### *What is the relationship between the clerk and the speaker or presiding officer?*

The Clerk is the chief adviser on parliamentary process and law to the Speaker.

### *Does he or she answer to any other members or committees?*

The Clerk reports to the Board of Internal Economy and the Standing Committee of House Services. The Board of Internal Economy has a statutory responsibility for the financial and administrative policies affecting the Legislative Assembly, its members and the Legislative Assembly Service. The Board has the power and duty generally to oversee the finances of the Assembly.

The Clerk of the Legislative Assembly is responsible, through the Speaker, to the Board for the day to day management and administration of the programmes and services provided to the Legislative Assembly, individual members, legislative committees and caucuses.

Also, the Clerk appears as a witness with the Speaker before the Standing Committee on House Services to defend the Estimates of the Legislative Assembly.

### *How would you characterise the leadership of the clerk?*

The Clerk is responsible for the leadership of the Legislative Assembly Service and provides advice to the Independent Officers of the Assembly.

### *Is there a set term of office?*

No.

*What is the process for removing the clerk from office?*

On the recommendation of the Speaker, the Board of Internal Economy shall dismiss the Clerk. If the Clerk is removed from office, the Speaker shall immediately table a statement of the reasons for the removal in the Legislative Assembly and if the Assembly is not sitting, the Speaker shall provide a statement to each member of the Legislative Assembly.

## Yukon Legislative Assembly

*What are the functions of the clerk of your chamber or parliament?*

The Clerk is the chief permanent officer of the Yukon Legislative Assembly and is responsible for all matters pertaining to the management of the operations of the Legislative Assembly. This includes providing parliamentary advice to the Speaker and members of the Legislative Assembly on procedural matters concerning privileges, rules, usages and proceedings of the Assembly. The Clerk is also responsible for the maintenance and custody of the records and other documents of the Assembly. The duty of the Clerk and those who report to that position is not to meet goals and objectives set out by the Government of the day but, rather, through the provision of independent non-partisan advice and service, to enable the Legislative Assembly and all its members to carry out their constitutionally mandated responsibilities.

The Clerk of the Assembly also has the following responsibilities: Secretary to the Members' Services Board, Secretary to the Yukon Branch of the Commonwealth Parliamentary Association, Secretary-Treasurer of the Parliamentary Broadcasting Society, and Chair of the Board of Trustees responsible for the MLA pension plan trust fund. The current clerk is also Clerk to the Standing Committee on Public Accounts and the Select Committee on Whistle-blower Protection.

*Is he or she the head of the administration as well as the chief procedural officer?*

Yes.

*Are any functions laid down in statute or in the constitution?*

Yes, for example the Yukon Act (a federal statute that functions as Yukon's constitution) requires the Clerk to transmit "A copy of every law made by the Legislature … to the Governor in Council within 30 days after it is made" (section 25(1)).

The Legislative Assembly Act charges the Clerk with accepting disclosure statements from members (section 2), noting resignations of members from the Assembly in the Journals (section 13(2)), submitting a record of a member's resignation to the Commissioner of Yukon in order to facilitate a by-election (section 14), informing the Assembly of the absence of the Speaker in order that the Deputy Speaker can take the chair (section 24), and accepting notices from members regarding accommodation costs (section 46(1)).

The Legislative Assembly Retirement Allowances Act 2007 directs the Clerk to accept a notice from a newly-elected member should he or she choose to opt out of the pension plan (section 6(1)). Section 8(6) gives the Clerk the authority to administer the MLA pension plan in the absence of the Members' Services Board (for example, after the House has been dissolved and before a new MSB is appointed).

Pursuant to section 5(1)(c) of the Conflict of Interest (Members and Ministers) Act the Clerk is to accept disclosures from members regarding gifts they receive during the course of their duties. Section 7(2) of the act requires the Clerk to forward MLA disclosure statements to the Conflict of Interest Commissioner annually.

The Cabinet and Caucus Employees Act assigns to the Clerk the authority to administer contracts with caucus employees (section 12(1)(b)(ii)).

The Clerk also gets to swear in the Ombudsman/Information and Privacy Commissioner (section 10(1) of the Ombudsman Act) and the Child & Youth Advocate (section 9(1) of the Child & Youth Advocate Act).

### *What is the relationship between the clerk and the speaker or presiding officer?*

The Clerk is the primary adviser to the Speaker for both procedural and administrative matters. The Clerk also accepts direction from the Speaker on administrative matters, within the policy guidelines established by the Members' Services Board (MSB). The MSB is the Yukon Legislative Assembly's board of internal economy. It is a committee of the House responsible for approving administrative policy for the Legislative Assembly. It also is responsible for reviewing the estimates of the Legislative Assembly, Elections Yukon, the Office of the Ombudsman/Information & Privacy Commissioner, the Conflict of Interest Commission and the Child & Youth Advocate. Once the MSB has approved those estimates they are included in the government's budget.

*Does he or she answer to any other members or committees?*

While the Clerk of the Legislative Assembly has a close working relationship with the Speaker, he or she does not report to any single position or authority. Depending on the circumstances, the main reporting relationships are to the Legislative Assembly, the Speaker or the MSB.

*How would you characterise the leadership role of the clerk?*

The Clerk directly supervises the Deputy Clerk, the Director of Finance, Administration & Systems, the House & Committee Assistant, the Committee Clerk and the Sergeant at Arms. The Clerk provides leadership and management direction by directing the operations, delivery and evaluation of programmes through Legislative Assembly staff; directing the development of the Assembly's annual Capital and O & M budget estimates; directing the monitoring and approval of expenditures and reporting variances; reviewing and evaluating programme priorities with staff, the Speaker and the Members' Services Board and allocating resources based on these priorities. The Clerk also directs the development of management systems to support effectively the Assembly's operations.

*Is there a set term of office?*

The Order in Council that appointed the current clerk said he was "to hold office during pleasure for a term not to exceed five years." However, it is not understood that the term cannot be renewed after five years. The previous clerk held the position from 1978 to 2007.

*What is the process for removing the clerk from office?*

That is a good question. As mentioned above the Clerk is appointed "to hold office during pleasure." The question is, at whose pleasure? As far as is known no Clerk has been involuntarily removed from office, so there is no established procedure for doing so. The legal instrument by which the Clerk is appointed is an Order in Council, signed by the Commissioner in Executive Council (the Commissioner of Yukon acting on the advice of Cabinet) pursuant to the Public Service Act. This is the same process used to appoint deputy ministers. The process for removing a deputy minister from office is to issue a new OIC revoking the appointment. In the case of a deputy minister, however, it is clear that he or she serves at the pleasure of the Premier. When the Clerk's position was last filled (in 2007) the search was conducted by an all-party sub-committee of MSB. The sub-committee recommended the current incumbent. So

while the removal of a deputy minister by OIC is the accepted practice, the same process might prove politically problematic as regards the Clerk, given that he or she serves all members equally and was recommended to the position by an all-party sub-committee.

INDIA

### Rajasthan Legislative Assembly

The functioning of the Clerk-at-the-Table (i.e. Secretary), Rajasthan Legislative Assembly is two-pronged: first, to aid and advise the presiding officers in the smooth conduct of the proceedings of the House, guiding and helping honourable members in discharging their legislative and parliamentary functions and assisting the different committees in fulfilling their constitutional obligations; and, secondly, to oversee the functioning of the Legislature Secretariat on the administrative side. Occupying the highest post in the secretariat and hailing from the non-partisan Rajasthan Higher Judicial Service cadre, the position of Clerk is manifestly mandated with a crucial role in the successful functioning of legislative and parliamentary affairs. As such, in addition to the statutory provisions, conventions relying greatly on the impartiality, integrity and honesty of the Clerk-at-the-Table have come to be established and associated with the post without being spelt in so many words. The Clerk acts instinctively, keeping in mind the constitutional and statutory provisions as well as acting on the special directions of the Speaker within the broad parameters of the constitutional scheme of things, maintaining strictly his neutrality in all circumstances. All the incumbents of the office have proved themselves true to their exalted position in the democratic set up. The High Court of Judicature administration, which is the controlling authority of the Rajasthan Higher Judicial Service from whose cadre senior-most officers are posted on deputation to the Legislature Secretariat, maintains a three-year posting for its officers and, more often that not, this term of office has been observed in the case of Clerk-at-the-Table. There has been no instance wherein a need for removing the Clerk from the office was felt. The Rajasthan Legislative Assembly is unicameral and, as such, only one Clerk is there to assist in the functioning of the legislature.

STATES OF JERSEY

The Greffier of the States (Clerk) in Jersey is the head of the administration of the Assembly as well as its chief procedural officer. He or she is chief officer

of the States Greffe (Clerk's Office) and manages and leads the staff. A number of specific duties are laid down in the States of Jersey Law 2005 and the standing orders of the States concerning his or her role in the Assembly. As well as being the conduit for all propositions, questions and reports for the Assembly he or she is required by the statutory provisions to produce the Order Paper, the Minutes and the Official Report.

There is a very close working relationship between the Greffier and the Bailiff (Presiding Officer) with almost daily contact in person, by telephone and by email on a range of procedural and practical issues. The Greffier attends all meetings of the Privileges and Procedures Committee (which deals with procedural matters, conduct issues and practical matters such as facilities) and advises the Committee but he or she is not directly answerable to that Committee as, in law, the Greffier reports to the Bailiff. The Greffier is appointed by the Bailiff with the prior approval of the States which must debate and agree the proposed appointment. There is no set term of office although the normal retirement age is 65. The Greffier can only be dismissed from office by the Assembly as a whole following a debate although, in practice, no Greffier has ever been removed from office in this way.

Somewhat unusually, the Greffier and his or her Deputy in Jersey can be called on to act as Presiding Officer in the Assembly if both the Bailiff and Deputy Bailiff are unavailable. In 2009 the Greffier presided for a total of some 99 hours and the Deputy Greffier for some 8 hours out of a total of just over 351 sitting hours. (This was, by comparison with other years, a larger percentage of the total because there was no Deputy Bailiff in post for some four months of the year.)

## NEW ZEALAND HOUSE OF REPRESENTATIVES

The Clerk of the House of Representatives is the principal permanent officer of the House. The Clerk and Deputy Clerk are statutory appointments under the Clerk of the House of Representatives Act 1988. Both are appointed by the Governor-General on the recommendation of the Speaker, after the Speaker has consulted the Prime Minister, the Leader of the Opposition and other members (in practice, the leaders of any other parties). The Clerk's functions are to—

- note all proceedings of the House (published as the Journals) and of any committee of the House;
- provide the official report (*Hansard*) of the proceedings of the House and its committees;

- provide procedural advice to the Speaker and other members;
- prepare and present copies of bills passed by the House for Royal assent;
- oversee all parliamentary printing, including the Order Paper, Journals, select committee reports, and papers authorised or ordered by the House to be published.

The Clerk is the principal officer and chief executive of the Office of the Clerk of the House of Representatives, which supports the Clerk in carrying out these functions and is the secretariat of the House and its committees. One of the Clerk's statutory functions is to manage the Office efficiently, effectively and economically. The broadcast of proceedings and the provision of inter-parliamentary relations services also fall within the Clerk's responsibilities.

Further statutory functions for the Clerk of the House include—

- receipt of certain documents in respect of the conduct of elections and referenda, and the custody and disposal of ballot papers (several Acts, including the Electoral Act 1993);
- determination of questions and certification of petitions for citizens-initiated referenda (Citizens Initiated Referenda Act 1993 (see miscellaneous notes section));
- witnessing the public reading of proclamations summoning, proroguing, or dissolving Parliament (Constitution Act 1987).

Under the standing orders, the Clerk (with the agreement of the Speaker) appoints the Registrar of Pecuniary Interests of Members of Parliament. If no person is so appointed for the time being, the Deputy Clerk of the House holds the office of Registrar.

The Clerk does not exercise responsibility for the Parliamentary Service, which is a separate body that provides administrative and support services to the House and to members of Parliament. Thus, the Clerk is not responsible for the provision of secretarial or executive assistant services to members, or for the Parliamentary Library, security or for the management of the parliamentary buildings and precincts.

The Speaker is deemed to be the "responsible Minister" for the Office of the Clerk, which involves accountability for the Office's estimates and operating intentions, and arm's-length oversight of the Office's achievement of its outcomes. The Speaker signs and presents the Office's annual report and statement of intent. Questions for written answer relating to the Office of the Clerk may be addressed to the Speaker. However, under New Zealand's state sector model, the Speaker does not become involved in the day-to-day running of the Office. The Clerk is answerable as chief executive for these

operational matters, and this accountability may involve attendance to give evidence to a select committee during the annual financial review process.

As well as chief executive responsibilities, the Clerk provides professional leadership. The Clerk is expected to be an authority on parliamentary procedural, legal and policy matters in New Zealand. On a weekly basis, the Clerk leads a meeting of senior procedural staff to discuss the business of the House and its procedural implications and developments. Along with the Deputy Clerk, the Clerk ensures the on-going development of the Office's professional and leadership capacity and capability.

The term of office for both the Clerk and Deputy Clerk is seven years, although each is eligible for reappointment from time to time. The holder of either office must resign on attaining the age of 68 years. The Clerk or the Deputy Clerk may be removed or suspended from office by the Governor-General, upon an address from the House of Representatives, for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct. The Parliament of New Zealand has been unicameral since 1951.

## NORTHERN IRELAND ASSEMBLY

The Clerk/Director General has three main roles:

- as Clerk he is responsible for the provision of procedural advice to the Speaker and members;
- as Director General he is responsible to the Assembly Commission (the governing body of the Assembly) for the management of administrative support services to the Assembly; and
- the Clerk/Director General is the Accounting Officer for the Assembly's budget.

The Clerk answers to members of the Commission and is the leader of the 400-strong secretariat. He was appointed as a full-time, permanent member of staff in August 2008. No specific procedures other than normal Assembly human resources policies have been established for removal from office.

## PAKISTAN

### Provincial Assembly of the Punjab Lahore

The Secretary assists the Speaker during the Assembly session as well as being responsible for running the routine affairs of the secretariat. The Secretary is in charge of the administration and also assists the Speaker in his decisions on

routine affairs of the secretariat, while the Speaker is the constitutional head of the secretariat. As per the Rules of Procedure of the Provincial Assembly of the Punjab, 1997, the Secretary has been assigned various duties with regard to the business of the Assembly. The Secretary is also *ex-officio* Secretary to all standing committees of the Assembly.

UNITED KINGDOM

## House of Commons

*What are the functions of the clerk of your chamber or parliament? Is he or she the head of the administration as well as chief procedural adviser? Are any functions laid down in statute or in the constitution?*

The office of Clerk of the House, the senior official of the House of Commons, is nearly 650 years old. He is the principal adviser of the House, its committees, the Speaker and other occupants of the chair, and members individually, on the practice and procedure of the House, the formal and informal rules which govern its everyday activities. Neither the Clerk of the House nor any of the House's staff are civil servants; they are non-partisan and not politically appointed.

The Clerk of the House is the principal adviser of the House of Commons Commission. This is the body of members of the House, presided over by the Speaker, which is established by the House of Commons (Administration) Act 1978 to oversee the administration of the House. The Clerk is similarly the principal advisor to the Members Estimate Committee, a committee of the House (with identical membership to the Commission) which has a comparable role in relation to expenditure on members.

The Clerk is also Chief Executive of the House of Commons Service and its staff. As Chief Executive the Clerk chairs the Management Board, to which the Commission formally delegates responsibility for day-to-day management of the House Service. The Management Board is comprised of the Directors General of the four departments of the House (Chamber and Committee Services, Information Services, Facilities and Resources), together with the Director of the Parliamentary ICT service (a bi-cameral department established under the Parliament (Joint Departments) Act 2007) and an external member. The Clerk is the Head of the Department of Chamber and Committee Services. The House departments are accountable to the House of Commons Commission and to the Clerk as Chief Executive. The Clerk's role includes duties as Corporate Officer (by virtue of the Parliamentary Corporate Bodies Act 1992).

The Clerk is Accounting Officer for expenditure borne on both House Estimates. Responsibility for the Administration Estimate (for administrative services and works) is delegated to him as a member of House staff by the House of Commons Commission. He is also responsible for the Members Estimate (which supports Members of Parliament in discharging their parliamentary duties and responsibilities). Following the creation in statute of the Independent Parliamentary Standards Authority in July 2009, a significant part of the expenditure under the Members Estimate (that relating to members' pay and allowances and the pay of their staff), will transfer to the new body following the May 2010 general election.

The Clerk presides over the Whitley Committee, where management meets trade unions representing many staff in all House Departments. The Clerk is also Data Controller under the Data Protection Act 1998.

### *What is the relationship between the clerk and the speaker or presiding officer?*

The Clerk of the House's principal responsibilities, as procedural adviser to the House and as Chief Executive, mirror the Speaker's duties in respect of the chamber and the administration. He is on hand to advise the Speaker on these matters and ensure that the Speaker's views and intentions are put into effect. While at the Table, the Clerk may be called on to give immediate procedural advice to the Speaker or any other members. The Clerk will normally assist the Speaker to prepare for a sitting, discussing at a regular daily briefing any foreseeable points of procedural difficulty.

The relationship is based on complete trust and absolute confidentiality.

### *Does he or she answer to any other members or committees?*

As well as being adviser to the Commission and Members Estimate Committee, the Clerk of the House appears regularly before the Administration Committee, which considers the services provided to MPs by the House service, and represents the views of MPs to the Commission. The Clerk of the House provides oral or written evidence on request to any select committee, most frequently the Modernisation and Procedure Select Committees, as well as to joint committees of both Houses considering parliamentary subjects affecting both Houses. In his role as Accounting Officer the Clerk may be called before the Public Accounts Committee.

### *How would you characterise the leadership role of the clerk?*

The Clerk's role is to lead the House of Commons Service in its support to

members, committees and the institution of Parliament.

The Clerk and his colleagues on the Management Board lead the House of Commons Service by setting its strategic aims, priorities, values and standards, in accordance with the decisions of the House of Commons Commission; approving business and financial plans, ensuring controls, managing risk, monitoring performance and making corporate policy decisions.

*Is there a set term of office?*

There is no set term of office for the Clerk of the House. He is appointed by the Crown but customarily retires around the age of 65.

*What is the process for removing the clerk from office?*

The Clerk of the House is appointed by the Crown by letters patent and could only be removed from office by the Crown, following the passing of addresses by both Houses. In this the position of the Clerk differs from other staff of the House, who are employees of the House of Commons Commission (apart from the Clerk Assistant and Serjeant at Arms who are also Crown appointees).

*If your parliament is bicameral, what is the relationship between the clerks of the two chambers? What contacts are there, and how formal, between them?*

The Clerk of the Parliaments is the Clerk of the House's equivalent in the House of Lords. The two Clerks are responsible for endorsing the House copies of bills which are passed between the Houses as part of the legislative process. They also come into formal contact through the ceremonies associated with the opening and closing of Parliament (Prorogation and State Opening).

The two Clerks are in regular, informal contact, including through monthly meetings to discuss matters of mutual concern and interest. The Clerk of the Parliaments is the Accounting Officer for the House of Lords and the two Clerks are often required to liaise over the approval of business cases which relate to both Houses.

## House of Lords

*What are the functions of the clerk of your chamber or parliament? Is he or she the head of the administration as well as chief procedural adviser? Are any functions laid down in statute or in the constitution?*

The office of Clerk of the Parliaments originated towards the end of the 13th century during the reign of King Edward I. The plural term "Clerk of the Parliaments" came into existence in Henry VIII's reign and signifies that the Clerk of the Parliaments serves from one Parliament to the next.

The current responsibilities of the Clerk are multifaceted. In addition to being the chief procedural adviser, he is head of the administration. He chairs the House of Lords Management Board, which has the function of supporting and advising the House Committee, providing a forum for strategic decision making and developing a sense of corporate identity and purpose in the service of the House.

The Clerk of the Parliaments also has a number of specific legal and contractual administrative responsibilities. As the employer of all of the permanent staff of the House, he is responsible for the performance of statutory and contractual duties towards employees and others. As Corporate Officer of the House of Lords, he is authorised to enter into contracts on behalf of the House and to acquire and manage land and other property. As Accounting Officer for the House of Lords, he has analogous responsibilities to those of accounting officers in the civil service in terms of public finances, resource accounting and internal control. He is also custodian of the records of Parliament stored in the Victoria Tower in the House of Lords.

Until 2009, the Clerk was also Registrar of the Court and exercised formal authority in respect of the judicial functions of the House. This responsibility ended with the setting up of the UK Supreme Court.

The Clerk of the Parliaments sits for a significant proportion of each day in the chamber of the House, and keeps a supervisory watch over its proceedings. He calls on the business of the House and participates in certain ceremonial occasions.

The Clerk of the Parliaments is responsible for maintaining the authentic records of proceedings of the House and signs or endorses all orders and official communications of the House. He is also responsible for preparing the texts of Acts of Parliament and for endorsing the proper copies of bills and Acts.

The Clerk of the Parliaments Act 1824 still governs the duties of the Clerk who is appointed by the Crown by letters patent, on the advice of the Leader of the House following consultation with the membership.

### *What is the relationship between the clerk and the speaker or presiding officer?*

In the absence of a speaker vested with formal powers of order the Clerk of

the Parliaments is expected actively to provide authoritative advice on procedural matters on a daily basis to the Lord Speaker, as well as the Leader of the House and other members of the frontbenches, the Chairman of Committees and individual members.

The Clerk and Lord Speaker meet daily on a range of issues, and he normally assists the Lord Speaker to prepare for sittings, including any foreseeable points of procedure which might arise. He and his fellow Clerks at the Table may be called on to give immediate procedural advice to the Lord Speaker and other members.

The Clerk of the Parliaments participates in and advises the Lord Speaker or the Lord Speaker's representative at speakers' conferences and in other international fora.

The relationship is based on complete trust and absolute confidentiality.

### *Does he or she answer to any other Members or committees?*

As head of the administration and Accounting Officer, the Clerk of the Parliaments is accountable to the House Committee, which sets the policy framework for the administration and approves the House's strategic, business and financial plans. The Clerk of the Parliaments in addition provides oral or written evidence on request to any select committee, as well as to joint committees of both Houses considering parliamentary subjects affecting both Houses.

In his role as Accounting Officer, the Clerk may also be called before the Commons Public Accounts Committee.

### *How would you characterise the leadership role of the clerk?*

The Clerk's role is to lead the House of Lords administration in delivering services to members, committees and supporting the institution of Parliament. The Management Board, which the Clerk chairs, leads the administration by setting its strategic aims, priorities, values and standards, in accordance with the decisions of the House Committee. In addition he approves business and financial plans, ensures that adequate controls are in place, manages risk, monitors performance and makes corporate policy decisions.

### *Is there a set term of office?*

There is no set term of office.

### *What is the process for removing the clerk from office?*

The Clerk of the Parliaments is appointed by the Crown by letters patent and could only be removed from office by the Crown, following the passing of an

address by the House of Lords. In this the position of the Clerk differs from most other staff of the House, who are his employees. Black Rod is also appointed by the Crown, whilst the Clerk Assistant (the deputy clerk) and the Reading Clerk (the third clerk) are appointed by the Lord Speaker, subject to the approbation of the House.

## ZAMBIA NATIONAL ASSEMBLY

The Office of the Clerk is provided for under Article 73 of the Constitution of Zambia which states that "There shall be a Clerk of the National Assembly and such other offices in the department of the Clerk of the National Assembly as may be prescribed by an Act of Parliament".

Pursuant to Article 73 above, the House passed the National Assembly Staff Act, Chapter 257, of the Laws of Zambia, under which the President of the Republic of Zambia appoints the Clerk. Section 3(1) of the Act states that "There shall be a Clerk of the National Assembly who shall be appointed by the President: Provided that no person shall be appointed Clerk unless a proposal for the appointment of that person has been submitted to the Assembly and the Assembly has resolved that he/she should be so appointed."

The law does not specifically set a term of office for the Clerk. The National Assembly Staff Act, however, provides that the Clerk shall vacate office upon attaining the age of 55, which is the current statutory retirement age in Zambia.

The Clerk of the National Assembly is the Chief Executive Officer of the Parliamentary Administration. The Clerk is also the Controlling Officer of the finances of the National Assembly. In this regard, the Clerk is answerable to the Public Accounts Committee for the expenditure of the National Assembly.

The Clerk is the chief procedural adviser to the House and its committees, the Speaker, the Deputy Speaker and the Deputy Chairman of Committees of the Whole House. The functions of the Clerk are not laid down in statute or in the Constitution, but have evolved through practice existing in other Commonwealth parliaments. In her/his duties, the Clerk is assisted by staff falling under the various departments in the Office of the Clerk.

The National Assembly standing orders, however, do attempt to describe the duties of the Clerk in Standing Order 61, which stipulates that "The Clerk, to whom all correspondence shall be addressed, shall be responsible for the regulation of all matters connected with the business of the Assembly, and shall have the direction and control over all the officers employed by the Assembly, subject to such orders as he or she may from time to time receive from the Speaker or the House."

During the sittings the service of the House is maintained by the Clerk and her/his assistants who sit at the Table of the House. They keep the minutes of proceedings of the House, which are subsequently published as the Votes and Proceedings. The Clerk is the custodian of all records and documents. She or he prepares the order paper and any other paper issued in connection with the business of the House. This information helps members to know the business of the House on a particular day.

The Clerk reads the bills which are brought before the House. She or he also scrutinises and checks all public and private bills during their passage in the House. She or he examines public petitions before submitting them to the Speaker.

In addition, the Clerk is, *ex officio*, the Secretary/Treasury of both the Zambia Branch of the Commonwealth Parliamentary Association and the Zambia National Group of the Inter-Parliamentary Union. The holder of the office of the Clerk is expected to be of a mature disposition, industrious and firm, but fair minded.

# PRIVILEGE

## AUSTRALIA

### Senate

During 2009 three cases of possible contempt were referred to the Senate Committee of Privileges, two of them arising from the same committee hearing of the Senate Economics Legislation Committee on 19 June 2009. That committee was holding a public hearing on the Car Dealership Financing Guarantee Appropriation Bill 2009, which provided a government guarantee to new financing arrangements for car dealerships when the previous financing companies withdrew from the market because of the global financial crisis. A major purpose of the hearing, however, was to explore allegations that a particular car dealer, known to both the Prime Minister and the Treasurer, had received special treatment following representations to the Treasury Department from the Prime Minister's office. These allegations had been denied in the House of Representatives by both ministers.

Under intense questioning, an officer of the Treasury Department, Mr Godwin Grech, revealed that he thought he remembered receiving an email from an adviser in the Prime Minister's office, seeking assistance for the car dealer in question. A more senior Treasury officer at the hearing explained that, despite wide searches, no trace of such an email had been found. The media arrived at the hearing in droves and at its conclusion, contrary to the Presiding Officers' guidelines, pursued Mr Grech from the hearing room and continued to film him in areas of Parliament House normally off limits to the media. Blanket media coverage followed of possible misfeasance by the Prime Minister, but two days later a search warrant was executed on the home of Mr Grech by the Australian Federal Police (AFP) who, in a most unusual move, issued a press release after the raid stating that the email in question had been found and that it was a fabrication. Later that day, Mr Grech admitted himself to a psychiatric facility where he remained for many months.

The first matter referred to the Committee of Privileges was whether any adverse action had been taken against Mr Grech as a consequence of his evidence to the committee and, if so, whether any contempt had been committed in that regard. A second reference, concerning the possibility of false or misleading evidence having been given to the Economics Legislation Committee, was initially defeated on party lines with the Opposition and a minor party

senator opposing it. Some weeks later the Auditor-General presented a report on the administration of the scheme and, on the same day, a statement by Mr Grech was published in the press. Mr Grech had also provided a lengthy response to the Auditor-General. These statements revealed that Mr Grech had met the then Opposition leader and a senator and had shown them a copy of the email which he now admitted to fabricating on the basis of an alleged recollection. After the meeting, the senator initiated the reference of the bill to the Economics Legislation Committee. Following these revelations, the second matter was then referred to the Committee of Privileges, also including whether there had been any improper interference with the Economics Legislation Committee.

After a lengthy and complex inquiry which, among other things, revealed the nature and extent of Mr Grech's relationship with the then Opposition leader and other people with Liberal Party links, his prior dealings with a senior journalist about the alleged contents of the email and the chain of events leading to the referral of the matter to the AFP, the Privileges Committee presented its report to the Senate on 25 November 2009 (the 142nd report, online at http://www.aph.gov.au/Senate/committee/priv_ctte/report_142/index.htm). It was frustrated in its attempt to make a finding against Mr Grech by his continued hospitalisation and by the production late in the day of a statement from his treating psychiatrist to the effect that he was unfit to participate in any inquiry. Without being able to afford him natural justice, the committee was unable to conclude that he was in contempt, despite the weight of evidence against him. The behaviour of the press was criticised but no finding of contempt was made. Likewise, forensic analysis of the chain of events leading to the AFP enquiry (and the instigation of departmental disciplinary proceedings against Mr Grech for, among other things, improper use of his computer account) cleared the AFP and the Treasury Department, among others, of taking any adverse action against Mr Grech as a consequence of his evidence.

The third matter referred to the Privileges Committee was much more straightforward and involved a possible penalty against a witness as a consequence of her evidence to another Senate committee, the Legal and Constitutional Affairs References Committee. In this case, a woman employed by the Aboriginal Legal Service of Western Australia made a submission to that committee's inquiry into access to justice. When her employer became aware of the submission, her supervisor issued her with a written warning for misconduct. The woman contacted the committee which wrote to the employer pointing out that its action was a potential contempt, and seeking

the withdrawal of the warning and an undertaking that the woman would not be penalised any further. When the employer proved to be less than fully co-operative, the matter was referred to the Privileges Committee. Written submissions were sought from both parties and on the basis of these the committee was able to conclude that the employer now understood the position and had not intended any harm to the inquiry. The committee found that no contempt had been committed but made a strong statement about the unrestricted right of persons to participate in parliamentary committee inquiries. See the committee's 141st report (online at http://www.aph.gov.au/Senate/committee/priv_ctte/report_141/index.htm).

## Australian Capital Territory Legislative Assembly

Only one potential matter of privilege was raised with the Speaker, who determined that the matter warranted precedence. A motion was agreed to establish a select committee on privileges which was required to examine whether any breach of privilege or contempt had been committed in respect of a letter sent to a member by a public servant. The member alleged that the letter constituted an attempt to interfere with his duties as a member and, as such, a possible improper influence of a member.

The Select Committee on Privileges found that the letter did not breach the member's privileges or that a contempt, as outlined in the standing orders, had been committed. The Select Committee recommended that the Government clarify the position between public servants and non-executive members of the Legislative Assembly with a view to issuing guidelines for any interaction not covered by existing guidelines.

## New South Wales Legislative Assembly

Whilst there were no significant cases of breaches of privilege or contempt in the Legislative Assembly in 2009, three privilege issues that were raised during the year are worthy of note.

First, during Question Time on 5 March 2009 a point of order was taken that a photographer in the Speaker's Gallery had breached the guidelines for photography in the chamber. The Speaker referred to a ruling the previous day and stated that leave was granted for the media and photographers to be in the chamber only on the basis that they adhere to the rules in relation to chamber photography. The Speaker then reaffirmed that he would ensure that those rules were upheld. Immediately following Question Time a member rose

on a matter of privilege in relation to the incident and requested that the Speaker investigate the matter, which he undertook to do.

The following sitting week, the Speaker made the following statement in relation to the matter:

> "At the sitting on Thursday 5 March 2009 the member for East Hills raised the issue of the actions of a photographer in the Speaker's Gallery taking photographs of members who did not have the call. Such action is not authorised by the guidelines in place for still photography, by which photographers agree to abide when they seek approval for photography. However, there has been a practice over the years for photographers to take file photographs, having advised the Speaker that this was their intention. In these circumstances members would be advised accordingly. On Thursday I was not advised of the photographer's intention beforehand. I have since received an apology for this lapse. For the information of members I will table a copy of the rules that are currently in force. I ask that photographers comply with the guidelines in future to ensure the orderly conduct of business of the House. Blatant disregard of the rules will be dealt with accordingly."

Secondly, on 10 March 2009 the Deputy Leader of the Nationals, as a matter of privilege, raised concerns about alleged remarks made by a member to Opposition staff seated behind the chair during Question Time that day. The Speaker undertook to investigate the matter and report back to the House. Immediately afterwards the member who had allegedly made the remarks, by leave, made a personal explanation in relation to the purported matter of privilege.

The following sitting day, the Speaker made the following statement in relation to the matter:

> "Order! I refer to proceedings at yesterday's sitting when the member for Murrumbidgee raised an issue of privilege, a matter concerning the member for Bathurst approaching the staff of the Leader of the Opposition sitting in the advisers' area behind the Chair. I should say that this is not a matter of privilege. I would like to say first, however, that all staff, both Government and Opposition, have responsibilities and obligations to conduct themselves quietly and professionally at all times and in particular in the precincts of the House. I remind the House that persons occupy the area behind the Chair only at my discretion.
>
> Second, if members have concerns about the conduct of any member of

> staff present in the advisers' area of the Chamber or any person present in the gallery they have an obligation to raise this directly with the Speaker. They should desist from challenging staff directly. Further, since the events of yesterday I have spoken to the member for Bathurst and the member has offered an apology to me, which I convey to the House. He has also advised me that he has apologised in writing to a female member of the personal staff of the Leader of the Opposition. I take the opportunity to remind all members of their obligation to conduct themselves in such a manner as to uphold standards that would meet community expectations."

Following a point of order the Speaker further advised the House that he had met all of the staff members involved and that they were aware of what future actions were available to them.

Thirdly, on 17 June 2009 a member raised as a matter of privilege her dissatisfaction with an answer to a written question she had submitted. The Speaker ruled that the matter was not one of privilege.

## New South Wales Legislative Council

On 23 June 2009 during debate on the Motor Sports (World Rally Championship) Bill 2009 the President made a statement to the House indicating that the door to the Members' Lounge had been locked following the dinner break, thereby denying Revd the Hon Dr Gordon Moyes access to the chamber on the resumption of the second reading debate on the bill. The member consequently missed the call to give his speech. This being a breach of the member's privilege, although the question on the second reading had been put and passed and the House had commenced a division on the question that the House resolve itself into committee of the whole, the President called off the division and called on Revd Dr Moyes to give his second reading speech.

A further three members who had also missed the call for contributions to the second reading debate, in the expectation that Revd Dr Moyes would speak after the dinner break, subsequently spoke to Part 1 of the bill during debate in committee of the whole. However, they were not given leave to deliver their second reading speech in the same manner as Revd Dr Moyes, as it was not considered that there had been any breach of their privilege.

## Queensland Legislative Assembly

### *Alleged failure to declare an interest in the Register of Members' Interests*

The matter referred to the Members' Ethics and Parliamentary Privileges Committee concerned an allegation that the then Leader of the Opposition failed to register a benefit received in the Register of Members' Interests. The alleged benefit was sponsored travel (namely helicopter flights) received on numerous occasions, paid for by a wealthy mining businessman. This was the second referral of an alleged failure to register a benefit considered by the committee. The committee deferred consideration of the other referral, relating to a former member, whilst the matter is before the courts.

In considering whether or not the Leader of the Opposition breached the requirements of the register, the committee examined two separate tests and their elements, as derived from the standing orders—

(i) whether or not the matter required disclosure; and
(ii) if the matter did require disclosure, whether or not the non-disclosure resulted in a contempt.

In considering test (i), the committee looked at the requirements to declare benefits under two categories: "sponsored travel or accommodation" and "any other interest". The committee noted that the relevant travel had been directly related to the member's official capacity as Leader of the Opposition. In Report No. 96, tabled on 17 June 2009, the committee found in response to test (i) that the member was not required to register the travel, which was received in an official capacity, in the Register of Members' Interests in accordance with schedule 2 of the standing orders.

As a result, the committee did not need to consider if the member knowingly failed to register the travel. However, the committee noted that it would have been difficult to prove that the member knowingly failed to disclose the benefit in breach of schedule 2, given that he had received advice from the Registrar of Members' Interests to the contrary.

### *Alleged deliberate misleading in a question*

The alleged deliberate misleading referred to the committee related to a preamble to a question without notice from a member. The question appeared to rely on a supplementary environmental impact statement (EIS) report. However, the member was also relying on additional sources not quoted in his preamble. This may have given the impression that the figures came from the supplementary EIS report.

The Members' Ethics and Parliamentary Privileges Committee was of the view that the member's statement was equivocal and left itself open to interpretation that he was misleading the House. The committee, on the material before it, had no evidence that the member intended to mislead the House. The committee therefore found that there was no breach of privilege or contempt in this matter.

However, in its Report No. 97, tabled on 19 June 2009, the committee requested that the member correct the parliamentary record at the earliest opportunity, by making a statement in the House clarifying that his preamble to the question without notice relied on additional sources to the supplementary EIS report. The committee requested that the member provide that additional material to the House, as set out in his letter to the committee. The member subsequently corrected the record, as per the committee's recommendation on 19 June 2009.

### *Alleged deliberate misleading by a member*

The alleged deliberate misleading related to a statement in the House by a member, who had indicated in the statement that she had taken positive action to remove herself and her son from the register of lobbyists for the Prime Minister and Cabinet within days of being elected as a member of the Queensland Legislative Assembly. The member submitted that failing to confirm details as of a particular date would have resulted in the registration lapsing.

The Members' Ethics and Parliamentary Privileges Committee found that there were alternative explanations for the member's statement, but that the member's submission provided an explanation of the facts that was consistent with her statement in the House. The committee was of the view that in this case the statement was not misleading and there was no evidence before the committee of any intention to mislead the House.

In its Report No. 100, tabled on 8 October 2009, the committee found no breach of privilege or contempt in this matter. However, the committee recommended that the member make a statement in the House clarifying that her earlier statement was based on her understanding that her decision not to confirm her details on the register by 16 April 2009 would have resulted in her registration lapsing. The committee noted that the members' statement could have been worded more carefully to convey the correct information. The member clarified the record in the House on 8 October 2009.

### *Alleged lack of parliamentary authorisation of unforeseen expenditure incurred in 2007–08*

In August 2009, the Speaker referred to the Members' Ethics and Parliamentary Privileges Committee a matter of privilege raised by a member concerning the alleged failure of the Treasurer to seek parliament's authority for unforeseen expenditure in line with established practice and timeframes.

The Speaker summarised the member's contention as follows—

- there had been a significant departure from previous practice in terms of the timeframe for this approval being sought and given;
- a new approach had been implemented based on an extended timeframe and different method for seeking and gaining parliamentary approval for unforeseen expenditure incurred during a financial year; and
- the parliament had not been advised of, nor did it approve, the changed approach to its introduction.

The committee's report on the matter was tabled on 12 November 2009. In its report, the committee canvassed a number of issues.

#### *(1) Did the Treasurer fail to seek parliament's authority for the appropriation of unforeseen expenditure in 2007–08 within an appropriate time frame?*

The committee was unanimously of the view that the new process for seeking parliament's authority for the appropriation of unforeseen expenditure in 2007–08 (that is, incorporating it into the Appropriation Bills for 2009–10) was a significant departure from past practice in Queensland at least dating back to the mid 1980s. The committee noted that the 2007–08 process was the first time parliament's authority has been obtained more than 12 months after the relevant financial year (August 2009). However, the committee also noted that such a practice was not unprecedented in other Australian states and there was no impediment in the relevant Queensland legislation to incorporating the 2007–08 unforeseen expenditure into the Appropriation Bills for 2009–10. The committee found that while the parliament's authority for the 2007–08 unforeseen expenditure was sought later than previously experienced in Queensland, this was not unprecedented in other jurisdictions.

#### *(2) If yes to (1), did this failure amount to an improper interference with the free exercise by the Assembly of its authority or functions?*

*Power to control appropriation*

The committee found that despite the alteration to the process for seeking par-

liament's authority for the appropriation of unforeseen expenditure in 2007–08, the parliament's power to control the appropriation of funds from public accounts still remained.

*Right to scrutinise unforeseen expenditure*

With respect to the parliament's right to scrutinise the unforeseen expenditure, the committee noted that the opportunity for scrutiny under the new process was less obvious than with the previous practice whereby a separate Appropriation Bill appeared on the notice paper to be debated in the House. The committee noted that the extent, if any, that parliament's power to control the appropriation of funds or its right to scrutinise the unforeseen expenditure was diminished by the new process was arguable. However, the committee noted that one way to ensure that the right to scrutinise unforeseen expenditure was affirmed would be to amend the standing orders with respect to estimates committees. Such amendments might include allowing additional questions on notice or extending timeframes for questions without notice in hearings on the specific topic of unforeseen expenditure incurred in the previous financial year. The committee flagged this proposal for the consideration of the Standing Orders Committee.

*Improper influence*

The committee accepted the Treasurer's submission that there was never any intention on his part to not seek parliament's authority for the 2007–08 unforeseen expenditure. Accordingly, the committee found that there was no direct evidence that, by introducing the new process, the Treasurer had sought to interfere improperly with the free exercise by the Assembly of its powers or functions.

***(3) Should the Treasurer have provided an earlier explanation of the government's intention to alter the long-standing practice which would interfere with one of the important powers of the Assembly?***

The committee found that as the responsible minister the Treasurer had a duty to keep the House informed of any significant departure from previous long-standing practice with regard to the appropriation process. The committee noted the Treasurer's concession that "insofar as this could have avoided confusion, an earlier statement could have been beneficial". The committee recommended to the Leader of the House that all future resolutions that set the terms of reference for estimates committees be drafted to clarify that the previous year's unauthorised expenditures included in the Appropriations Bill are open to scrutiny by the estimates committees.

CANADA

## House of Commons

On 3 November 2009 Peter Stoffer, a Member of Parliament belonging to the New Democratic Party, rose on a question of privilege claiming that the subsidised mailing of a pamphlet (known as a "ten-percenter") to some of his constituents by Maurice Vellacott, a Member of Parliament belonging to the governing Conservative Party, was critical of his voting record on the issue of Canada's long-gun registry. Having accused Mr Vellacott of deliberately misleading his constituents and impugning his reputation, he asked that the Speaker find that his privileges had been infringed.

The Speaker ruled that the mailing had distorted Mr Stoffer's position on the long-gun registry and that it might also have had the effect of unjustly damaging his reputation and his credibility with the voters of his riding, thus infringing on his privileges by affecting his ability to function as a member. Accordingly, he found that a *prima facie* case of privilege did exist and the matter was referred to the Standing Committee on Procedure and House Affairs.

On 19 November 2009 the Honourable Irwin Cotler, a Member of Parliament belonging to the Liberal Party, rose in the House on a question of privilege also related to the mailing of a "ten-percenter" to some of his constituents, in this case by Joe Preston, a Member of Parliament belonging to the governing Conservative Party. The pamphlet in question compared the positions of the members' respective parties on three issues: fighting anti-Semitism; fighting terrorism; and supporting Israel. Mr Cotler alleged that it was "false and misleading, slanderous, damaging and prejudicial" both to his party and to himself.

The Speaker informed the House that in his view the mailing in question would likely have left the member's constituents with an impression at variance with the member's long-standing and well-known position on the above matters. He concluded that this constituted an interference with his ability to perform his parliamentary functions in that its content was damaging to his reputation and credibility, and ruled that there was accordingly a *prima facie* case of privilege. The matter was referred to the Standing Committee on Procedure and House Affairs.

The Standing Committee on Procedure and House Affairs had not reported on either case before Parliament was prorogued on 30 December 2009.

## Alberta Legislative Assembly

On 19 March 2009 Rachel Notley (ND, Edmonton-Strathcona) raised a purported question of privilege alleging that the rights of the Assembly had been breached by the Government attempting to prevent members of the Assembly from fulfilling their responsibility to review legislation or proposed legislation.

The basis of the question of privilege was related to provisions in Bill 18, Trade, Investment and Labour Mobility Agreement Implementation Statutes Amendment Act 2009, a Bill that was, at the time, being considered by Committee of the Whole. Section 5 of the Bill would allow the Government to amend legislation that is passed by the legislature without returning to the Assembly.

This type of provision is often referred to as a "Henry VIII" clause (a provision in a bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further parliamentary scrutiny) and is the subject of much discussion both in Canada and across the Commonwealth. However, there is no precedent in references by Canada or the United Kingdom that use of this type of clause in legislation leads to a *prima facie* breach of privilege. Additionally, it is the role of the court, not the Speaker, to rule on the legality or constitutionality of bills.

Speaker Kowalski found no *prima facie* case of privilege. He noted that he did not want to be seen as endorsing the use of these types of clauses because they detract from the role of the Assembly; however, the question as to whether a Henry VIII clause ought to be used is different from the question as to whether it may be used. The ability of Parliament or a legislature to delegate authority to amend statutory provisions was set out as long ago as 1917 in a decision by the British House of Lords.

On 27 April 2009 Brian Mason (ND, Edmonton-HigWands-Norwood) raised a purported question of privilege. He argued that his ability to perform his duties as an opposition MLA was interfered with when he was denied access to a press conference scheduled by the Government. The press conference was held at Government House, which is located a few kilometres from the legislature, and is commonly used by the Government for various purposes, including caucus meetings and ceremonial events.

The member argued that part of his responsibility as an MLA is to be informed and able to respond to media enquiries regarding Government policy and being denied access to the press conference interfered with his duty to become informed about the policy being discussed at the conference.

In his ruling Speaker Kowalski referred to a prior ruling he made on 7 March 2000 about a similar issue, where an opposition member was denied

access to a media briefing held in the media room of the Legislature Building. The Speaker ruled there was not a *prima facie* case of privilege in that instance because the media room where the briefing was held is not part of the parliamentary precincts and therefore the Speaker has no control or say in who is or is not allowed in the room.

Speaker Kowalski found no *prima facie* case of privilege. In his ruling, he indicated that:

> "allowing or not allowing a member to attend a media briefing does not constitute an impediment or obstruction to the member performing his or her parliamentary duties, which presumably is the category of privilege that the leader of the third party relies on. If the facts had been different and the question of privilege involved the denial of access to this Chamber or a proceeding in this parliament and on the precincts of the Legislative Assembly of Alberta, this ruling may have been very different."

On 2 June 2009 Kevin Taft (Lib, Edmonton-Riverview) raised a purported question of privilege alleging that the Ethics Commissioner interfered with his ability to perform his functions as a member by providing conflicting advice as to whether he could participate in debate on a bill. The bill in question was Bill 43, Marketing of Agricultural Products Amendment Act 2009 (No.2), which amends the Act by allowing producers in four commodity groups—beef, pork, sheep and lamb, as well as potato growers—to request refunds on the service fees they pay to agricultural commissions that represent them.

While presenting his arguments, Dr Taft referenced a letter dated 21 May 2009 from the Ethics Commissioner Neil Wilkinson that had been read into the record of the Assembly on 25 May 2009 by Speaker Kowalski. The letter provided general advice regarding Bill 43, pursuant to the Conflicts of Interest Act, in particular section 2(2) which requires that members who have reasonable grounds to believe that they, their minor or adult children, or their direct associates have a private interest in a matter before the Legislative Assembly must declare that interest and withdraw without voting on or participating in the consideration of the matter.

In this letter, the Ethics Commissioner stated that he had previously advised members who were producers affected by the Bill that they could participate in the vote on the Bill as it was his opinion that it was a matter of general application. However, after reviewing Bill 43, he determined it was not a matter of general application but rather a private interest since producers could request refunds of service charges, which for some members would be considered a

direct financial benefit. He advised that those members should declare that interest and withdraw without participating in the debate or voting on the Bill. After the letter was read to the Assembly, Dr Taft contacted the Ethics Commissioner to clarify his personal situation since his father-in-law owns a small herd of cattle. At that time the Ethics Commissioner advised him to recuse himself from debating and voting on Bill 43. He was also advised by the Ethics Commissioner that he should not ask questions regarding the Bill during question period.

On 1 June 2009 Dr Taft received a letter from the Ethics Commissioner's office apologising for his earlier advice and informing Dr Taft that he could participate in further debate as well as vote on Bill 43. At this point, the Bill had already been reported to the Assembly by Committee of the Whole.

During his arguments in support of a *prima facie* case of privilege Dr Taft included suggestions for possible remedies to the problem such as amending the Act and requiring that the Ethics Commissioner have a legal background.

On 3 June 2009 Speaker Kowalski found no *prima facie* case of privilege. He did, however, recommend the following—

- that the Ethics Commissioner meet caucuses to discuss and receive input on the application of the Conflicts of Interest Act;
- that Parliamentary Counsel and counsel from the Department of Justice and Attorney General meet the Ethics Commissioner to discuss the legislation;
- that the Speaker and Minister of Justice and Attorney General should avail themselves to the Ethics Commissioner to discuss issues regarding the application of the Act; and
- prior to the fall sitting, the Ethics Commissioner provide an interpretation of the Act and what constitutes a private interest.

## Manitoba Legislative Assembly

Prior to Routine Proceedings on 25 May 2009 the Official Opposition House Leader raised a matter of privilege regarding the accuracy of Hansard in relation to an answer to an Oral Question given in the House by a minister on 19 May 2009. The Official Opposition House Leader suggested that the discrepancy between the spoken word and the written record should be investigated. Speaker George Hickes ruled this as a matter of order not privilege, noting that he had already taken steps to correct it. He further indicated that he had met the Hansard manager and the Clerk, and ultimately

sent a letter to the House leaders relating his instructions that from now on Hansard would be 100 per cent verbatim. After further consideration this instruction was relaxed somewhat to allow for minor corrections of false starts and pauses.

During Oral Questions on 14 September 2009 an independent member rose on a matter of privilege contending that the Premier was in a potential conflict of interest due to his recent appointment as Canadian Ambassador designate to the United States while continuing to act as First Minister. Speaker George Hickes ruled no *prima facie* case of privilege, noting that the Legislative Assembly and Executive Council Conflict of Interest Act deals with such issues by describing prohibited actions as well as steps to avoid conflict of interest situations. He further reminded the House that the chair does not interpret either the law or the Constitution.

Immediately following the prayer on 4 December 2009 an independent member rose on a matter of privilege stating that the recently tabled report of the All-Party Special Committee on Senate Reform did not represent the views of all parties involved in the process. Speaker George Hickes ruled that matters of privilege regarding events in committees must be raised in the House by way of a committee report.

### Québec National Assembly

On 27 October 2009 the Government House Leader advised the President of his intent to move a motion to impugn the conduct of the Member for Lotbinière, alleging that the latter, in her statements made during Question Period on 22 October, had attacked the conduct of the members of the Executive Council. Her question on this occasion was whether the Minister of Public Security, in the course of his verifications, had been informed that the Premier was aware that three of his ministers had been aboard the boat of a well-known businessman. The President reserved decision on the matter and allowed the House Leaders to comment in writing on its admissibility. In his ruling of 29 October the President judged that the facts adduced by the Government House Leader did not allow the chair to conclude *prima facie* that the Member for Lotbinière was in contempt of Parliament.

### Saskatchewan Legislative Assembly

On Tuesday 3 November the Opposition House Leader raised a question of privilege which alleged that the Minister of Public Safety, Corrections and

Policing was attempting to mislead the House. The Minister indicated that he had no knowledge of a dangerous sex offender being at large. When provided with further information of the specific case, the Minister corrected the record. The Speaker outlined the evidence and concluded that the Opposition House Leader had not provided sufficient evidence to find a *prima facie* case of contempt.

Two days later, the Opposition House Leader raised another question of privilege. He claimed the Minister of Corrections, Public Safety and Policing made remarks in the Assembly that were perceived as a threat and discouraged him from performing his duties and exercising his freedom of speech. The Minister apologised and withdrew the inappropriate remarks. The Speaker found that the threatening comments were contemptuous. However, given that the Minister had apologised, the Speaker ruled that the apology ended the matter. He reminded members that if there had been no apology given he would have had no other choice but to find a *prima facie* case of privilege.

## INDIA

### Rajasthan Legislative Assembly

Nine cases of breach of privileges were forwarded to the Privileges Committee. In one case the alleged contemnor died and therefore the matter was dropped; the other eight cases are pending a decision of the Committee.

## STATES OF JERSEY

### *Breach of privilege in relation to in camera proceedings*

On 3 February 2009 the Chairman of the Privileges and Procedures Committee of the States of Jersey raised a matter in the States Assembly which she believed affected the privileges of the States. The matter in question related to the publication in the local daily newspaper, the *Jersey Evening Post*, and by a member of the States on his internet blog of certain details of an *in camera* debate that had been held on 21 January 2009 in relation to the suspension of the Chief Officer of the States of Jersey Police.

In addition to the normal role of the States of Jersey as a legislature, the Assembly undertakes a number of other executive functions including the approval of certain public appointments. The relevant function in this case related to the appointment and dismissal of the Chief Officer of the States of Jersey Police where the relevant Article of the Police Force (Jersey) Law 1974 reads—

"**9 The Chief Officer and Deputy Chief Officer**
(1) The Chief Officer shall be appointed by the States on such terms as to salary and conditions of service as the States Employment Board may from time to time determine.
(2) The Chief Officer may be suspended from office by the Minister who shall refer the matter to the States at their next Sitting and may be dismissed from office by the States.
[…]
(4) Any discussion in the States regarding the appointment, suspension or dismissal of the Chief Officer shall take place *in camera*."

The Chief Officer had been suspended from office by the then Minister for Home Affairs in November 2008 and a member who was concerned about the suspension had tabled a proposition seeking a review of the suspension. The debate on the proposition had been held *in camera* in accordance with Article 9(4) of the Police Force (Jersey) Law 1974 quoted above.

The manner in which the Chairman addressed the Assembly is set out as follows in Hansard—

"**Chairman, Privileges and Procedures Committee**
I wrote to you last week to give notice as required under Standing Order 8 but I wish to raise a matter that my committee considers affects the privileges of the States. Following the *in camera* debate during the last sitting on the proposition of the Connétable of St. Helier, Senator [S] published information about the content of the *in camera* debate on his internet blog site. It would clearly be inappropriate for me to refer to what he wrote except to say that he made it very clear that he was aware that he was knowingly publishing this material, even though the debate had been held *in camera* as required by the Police Force (Jersey) Law 1974 and that he might be sanctioned for that action. If you agree that this matter affects the privileges of the States, Standing Order 60 allows me to propose any matter relating to it without notice. I do not believe that it would be appropriate to hold any substantive debate on this matter today but I would like to propose that the issue is formally referred to P.P.C. (Privileges and Procedures Committee) to allow my committee to investigate it, to allow Senator [S] to address us if he wishes to do so and to consider what action, if any, is appropriate. I appreciate that the information in question has also been published in the *Jersey Evening Post* and it is therefore possible that one or more other anonymous Members may have revealed this information to a journalist. If that Member or those Members were to reveal who

they are I would also propose that this issue be referred formally to the P.P.C."

After discussion the States voted by 38 to 5 to refer the matter to the Privileges and Procedures Committee as requested by the Chairman so that it could be investigated.

Following the referral, the Committee gave initial consideration to the matter and noted that there were no formal written procedures in the States of Jersey Law 2005 or in standing orders which set out any particular consequences if a member leaked information following an *in camera* debate. Standing orders simply set out the procedure for conducting an *in camera* debate and specify that the transcript of such a debate must not be published. The Committee concluded that it was nevertheless implicit that if a debate was held *in camera* it was incumbent on every member not to disclose the content of the debate or the whole principle of holding a debate *in camera* would be undermined.

The Committee decided from the outset that the issue under consideration was much broader than the single incident involving the internet blog of one member. The Committee was equally concerned about the leaks that had been given to the *Jersey Evening Post* that enabled that newspaper to publish certain details of the debate. The Committee noted, in fact, that the senator who had written on his blog had at least been open about his intentions and the possible consequences of his actions which was not the case for the unnamed members who had spoken to the media. In practice, the matter referred to became a very public one very shortly after the leaks, and there were subsequently questions in the Assembly about it and a public statement issued by the former Minister for Home Affairs which was reported in the media. In the Committee's view this did not nevertheless diminish the importance of the investigation into the breach and it was recognised that nothing would have entered the public domain about the debate if no member had disclosed details of the proceedings.

The Committee agreed that it would be helpful to research the position in other jurisdictions and the Greffier of the States (clerk) was requested to contact colleagues in other Commonwealth jurisdictions for advice. The Committee received extremely helpful advice following the enquiries made by the Greffier but noted that other parliaments virtually never sat *in camera*. It was therefore necessary to seek parallels with other matters, the most common being the premature leak of committee reports or the disclosure of confidential committee proceedings.

The information received from other jurisdictions showed that there was almost universal agreement from parliamentary clerks that the disclosures to the media and on the internet in Jersey did constitute a breach of privilege. The Committee was informed, for example, of an incident in the Legislative Assembly of British Columbia which occurred in March 2002 when a draft committee report had been leaked and its preliminary conclusions reported on by the media in a newspaper article. A member of the committee of that Assembly had admitted to sharing a copy of the draft report with union officials, who later offered public criticism of its content. The committee member later apologised to the House for her action, but as her statement did not satisfy all members of the House, the matter was referred to the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills for further investigation. That Committee decided not to investigate the role of the newspaper reporter, or the union official, and focused instead on the actions of the member herself. A few weeks later, the Committee's report concluded that the member should offer an unqualified apology for her actions and that, in the future, all members serving on legislative committees be reminded by the committee chair or the clerk to the committee of the rules pertaining to confidentiality of draft reports and other committee proceedings.

Having considered the matter carefully, the Privileges and Procedures Committee in Jersey concluded that the actions of the senator and of unnamed members who had spoken to the *Jersey Evening Post* did constitute a breach of privilege. The Committee came to this conclusion because it considered that one of the fundamental principles of parliamentary privilege is that members are able to speak freely in the Assembly without inhibition. During an *in camera* debate members may wish to mention very serious confidential matters and needed the assurance when the Assembly was sitting *in camera* that their remarks would not subsequently be reported outside. If members believed that anything that they said *in camera* could subsequently be leaked by another member, they might feel constrained in their ability to speak freely and this was therefore, in the Committee's view, the fundamental breach of privilege caused by this incident. The Committee felt that members needed a guarantee that their remarks made *in camera* would remain confidential and if it became common practice for the content of *in camera* debate to be disclosed by members, members could be prevented from exercising their privileges.

In its final report to the States the Privileges and Procedures Committee stressed that it did not believe it was relevant that the Senator considered that the remarks he had published were in the public interest. During the

discussion on the matter of privilege on 3 February 2009 he had stated: "I have absolutely no regrets whatsoever about publishing the information I did. It was a profoundly important piece of public disclosure information, the public good required that it be known." The Committee concluded that the public interest test could not be applied by members in relation to *in camera* proceedings. The Committee ruled that if members took the view that they could disclose information from an *in camera* debate simply because they believed it was in the public interest, members would not be able to speak freely during such debates for fear of having their remarks reported and their privileges would therefore be breached.

The Committee considered whether any action could be taken against the *Jersey Evening Post* for publishing the material. The Committee concluded that realistically there was no action that could be taken by the Assembly against the media and stressed that the real "culprits" in this matter were the unnamed members who had spoken to that newspaper.

The Committee concluded that it did not consider it was appropriate in the particular circumstances of this case to take any further action or recommend any reprimand or sanction against the member concerned but gave notice that it would not necessarily take this view in the future. In its report the Committee urged all members to appreciate the fundamental importance of *in camera* debates that may be necessary to discuss highly confidential matters and reminded all members that they must respect the confidentiality of the matters discussed.

## NEW ZEALAND HOUSE OF REPRESENTATIVES

### *Privileges Committee report on freedom of speech and sub judice rule*

On 28 May 2009 the Privileges Committee reported on a question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders. This question had been referred to the committee by the Speaker in the previous Parliament. The then Speaker, Hon Margaret Wilson, had received a letter raising as a matter of privilege statements made in the House by Heather Roy MP on 27 June 2008 which might be in breach of a suppression order made in the High Court at Nelson on 4 December 2007 and hence in breach of standing orders. The Speaker ruled that the immediate matter complained of could not be regarded as tending to impede or obstruct the House in the performance of its functions. However, the Speaker determined that serious issues regarding the privilege of freedom of speech had been raised and warranted the attention of the House. The

Privileges Committee therefore was asked to consider the general question of privilege in terms of the exercise of the privilege of freedom of speech by members in the context of court orders, the implications for the relationship of mutual respect and restraint between the House and the courts, and the publishing of the House's proceedings.

Standing Orders 111 and 112 set out the House's *sub judice* rule in a general way, and give the Speaker discretion in applying it. As expressed in these standing orders, the rule focuses on avoiding prejudice to the trial of matters before the courts, and still largely reflects the *sub judice* rule of the House of Commons in 1963, adopted by the New Zealand House of Representatives in 1968.

The Privileges Committee recommended that the *sub judice* rule in the standing orders be revised to recognise clearly that there are two strands to the rule:

- issues concerning prejudice to a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing; and
- the principle of comity between Parliament and the courts.

The Privileges Committee proposed that Standing Order 111 be reworded so that no matter awaiting or under adjudication in a New Zealand court could be referred to in proceedings, subject to the discretion of the Speaker and the right of the House to deal with legislation on any matter. The committee recommended that the process for obtaining a waiver by the Speaker be formalised, and that principles to be taken into account when exercising the discretion to waive the rule be set out in the standing orders. These principles would balance the freedom of speech of members against the public interest in maintaining confidence in the judicial system. The Speaker would also be required to take into account the constitutional relationship of mutual respect that exists between Parliament and the courts, and the risk of prejudice to the trial of a case.

In relation to court orders, an amendment was proposed to Standing Order 212 that would permit a select committee to return or expunge evidence suppressed by an order of a New Zealand court (SO 212). New examples of contempts would also be included in Standing Order 401 in respect of knowingly referring to a matter suppressed by an order of a New Zealand court, contrary to the standing orders.

Furthermore, the Privileges Committee recommended to the Government that it introduce legislation to amend the Legislature Act 1908 to provide that:

- the live broadcast of Parliament's proceedings, including select committee hearings, is protected by absolute privilege;
- delayed broadcasts or rebroadcasts of Parliament's proceedings, including select committee hearings, that are made by order or under the authority of the House of Representatives are protected by absolute privilege;
- a fair and accurate report of proceedings in the House, or a summary using extracts of proceedings in the House, by any person is protected by qualified privilege;
- the broadcast and other publication of extracts of Parliament's proceedings, including select committee hearings, that are not made by order or under the authority of the House of Representatives are protected by qualified privilege, in a manner consistent with the provisions of the Defamation Act 1992.

The committee reiterated the criticisms made by a previous Privileges Committee in 2005 of the Privy Council decision in *Buchanan v Jennings* regarding "effective repetition". It recommended that those criticisms be addressed so that a member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees, will not be liable to criminal or civil proceedings.

The report of the Privileges Committee, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders* (I.17A), is available on the New Zealand Parliament website. The House debated the report on 2 June 2009.

The recommendations are yet to be adopted by the House, and may be considered as part of the regular review of the standing orders later in this parliamentary term.

## UNITED KINGDOM

### House of Commons

On Thursday 27 November 2008, the day after the 2007–08 session had been prorogued by Royal Proclamation and a few days before the State Opening of the 2008–09 session, Metropolitan Police officers from Scotland Yard began a search of the offices of Damian Green, the Member of Parliament for Ashford and an opposition front-bench spokesman on immigration, in Portcullis House on the parliamentary estate at Westminster. Mr Green had

been arrested in his constituency for an alleged offence of aiding and abetting, counselling or procuring misconduct in public office by a Home Office civil servant who had admitted leaking official documents about immigration and other matters. The Serjeant at Arms had signed a police consent form for the search of Mr Green's parliamentary offices. The Speaker had been informed of the police intention to search, but he was not aware that the police had not obtained a search warrant from a magistrate. In April 2009 the Director of Public Prosecutions announced he would not be formally charging Mr Green with any offences. The Committee appointed by the House to review the internal processes of the House administration for granting permission for such action reported in March 2010.[1] The Committee did not consider that anything the police did amounted to a breach of privilege or a contempt of the House, although it made a number of criticisms of almost all of those involved, including the police, the Serjeant at Arms, the Clerk of the House and the Speaker.

## ZAMBIA NATIONAL ASSEMBLY

The House dealt with matters of breach of parliamentary privilege, among which the following two cases are significant.

The first case occurred in the House on Wednesday 11 February 2009 during questions on points of clarification following a ministerial statement. A member conducted himself in a grossly disorderly manner by making loud interjections when another member was speaking. When the chair ordered the member to withdraw from the House for 10 minutes to enable him cool down, the member continued with loud interjections and shouting as he defiantly walked out the chamber, contrary to parliamentary etiquette.

The matter was referred to the Committee on Privileges, Absences and Support Services for consideration. The Committee established that the Hon Member was disorderly in his conduct by showing disrespect to the chair. The Committee found him guilty of contempt of the House, and the House resolved to suspend him from parliamentary business for 60 days.

The second significant case occurred on 13 February 2009. This involved two female Hon Members who, after an incident in the chamber, fought within parliamentary precincts and hurled insults at each other. The Committee on Privileges, Absences and Support Services found the two members guilty of breach of parliamentary privilege, etiquette and contempt

[1] House of Commons Committee on Issue of Privilege, first report, session 2009–10: *Police Searches on the Parliamentary Estate* (HC 62).

of the House and recommended their suspension from the service of the House. The House accordingly resolved to suspend one member, who was a first offender, for 60 days, and the other member, who was not a first offender, for 90 days.

# STANDING ORDERS

## AUSTRALIA

### House of Representatives

On 17 August 2009 amendments were made to standing orders 192 and 193. The amendments changed the meeting time of the Main Committee on Mondays from 6.40 p.m. to 4 p.m., and made provision for a period of members' three-minute constituency statements as the first item of business on any day on which the Main Committee meets. Previously, constituency statements were only provided for on Tuesdays, Wednesdays and Thursdays.

### Senate

The principal change to the standing orders in 2009 was the re-adoption of the committee structure that applied from 1994 to 2006, providing for a system of legislation and references committees in each of eight subject areas, the former having government chairs (and majorities) and the latter having non-government chairs (and majorities). These changes were agreed to on 13 May 2009.

Experimentation continued with question time, with the adoption of a temporary order reducing the time for answering primary questions to two minutes instead of four minutes, and providing 30 seconds rather than one minute for the asking of supplementary questions. These arrangements are to continue until the end of the current Parliament and for the first two weeks of the next Parliament.

A new order of continuing effect was agreed to in May 2009, providing a mechanism for raising and dealing with claims of public interest immunity, when the executive seeks to withhold information from the Senate.

### Australian Capital Territory Legislative Assembly

A major review of standing orders was undertaken in 2008 and there have been a number of minor amendments made since then.

## New South Wales Legislative Assembly

In June 2009 the Legislative Assembly adopted a number of new standing orders, which were approved by the Governor on 3 July 2009. Many of the new standing orders were sessional orders that had been adopted by the House in 2007 and 2008 to change the routine of business to accommodate more "family-friendly" sitting times and the Speaker also canvasses members for their views. The key changes to the standing orders were as follows—

- The Speaker is empowered to issue formal guidelines from time to time on matters not provided for in the standing orders. It is envisaged that the standing order could be used for guidelines on matters such as the operation of the *sub judice* convention, examples of actions that might constitute contempt of the House, broadcasting guidelines, and the responsible use by members of their right to freedom of speech.
- Provision is made for a Questions and Answers Paper to be published outside of sitting days when the House is adjourned for longer than two weeks. Given that ministers are required under the standing orders to submit answers to questions within 35 calendar days it was considered practical for such answers to be published even if the House is not sitting.
- The new routine of business provides for "family-friendly" hours, being the automatic adjournment of the House at 7.30 pm on Tuesday and Wednesday (or at the conclusion of the matter of public importance if before 7.30 pm) and at 6.30 pm on Thursday (or at the conclusion of private members' statements), and at the conclusion of private members' statements on Fridays (usually around 1 pm).
- The routine of business for the Friday sittings now provides for the giving of both Government and General Business notices and for the notification of petitions.
- The procedures used to determine the general business to be considered by the House each week—a combination of members' advice to the Clerk and motions in the House—are confirmed in the standing orders.
- Two separate standing orders now provide for the slightly different procedures required for the conduct of motions of no confidence in the Government (no confidence motions pursuant to section 24B(2) of the Constitution Act 1902 (NSW), and otherwise).
- Petitions signed by 500 or more persons are to be referred to the responsible minister for a response. The response is to be tabled in the House within 35 calendar days and published.
- The restrictions on questions being ruled out of order for referring to

debates of the current session and for anticipating debate have been removed.

- A standing order now provides for a private member to be able to declare a bill, for which the member has carriage, to be an urgent bill and for the question to be put on this proposition.
- Several changes were made in respect of how bills received from the Legislative Council are dealt with in the Legislative Assembly. In regard to private members' bills, the Speaker must be informed of the name of the Assembly member who will have carriage of the bill before the message can be reported. Also debate can now continue forthwith on a bill from the Legislative Council immediately after the minister's agreement in principle (second reading) speech, whereas previously the agreement in principle debate was required to be set down as an order of the day for a later time. This speech can be a so-called "truncated agreement in principle speech" where the bill is received is in the same form as the bill was introduced into the Council.
- The standing orders now make it clear that a member who is removed from the chamber is excluded from the precincts of the Parliament and is also not to participate in any committee proceedings.
- There were also a number of amendments to the standing orders relating to committees. For instance, the election of the chairs and deputy chairs is to be reported to the House; committees are authorised to conduct proceedings by electronic communication (e.g. telephone and video conferencing) with safeguards regarding quorums being present (not necessarily physically present in the one location); committee chairs are now required to advise the House of inquiries that have been referred to a committee by a minister or that the committee has resolved to conduct; and the Government is required to respond to recommendations made in committee reports within six months of the report being tabled.

## New South Wales Legislative Council

The standing orders were not significantly amended in 2009, although three sessional orders were adopted in June 2009 dealing with debate on the question that standing and sessional orders be suspended, the resumption of debate on proceeding interrupted by the lack of a quorum, and the tabling of documents when the House has been prorogued. No major review of the standing orders is pending or in progress.

## Northern Territory Legislative Assembly

In November 2009 standing orders were amended to provide for General Business to be scheduled for each Wednesday afternoon at 5.30 pm until the automatic adjournment time of 9 pm. This change was a significant departure from General Business Day occurring every 12th sitting day of the Assembly.

## Queensland Legislative Assembly

The Standing Rules and Orders of the Legislative Assembly of Queensland were amended in 2009 as a result of meetings held by the Standing Orders Committees in 2008 (52nd Parliament) and 2009 (53rd Parliament). This was the first time the committee had met since significant changes were made to the standing orders in 2004.

The most significant amendments on 28 October 2009 included—

- A requirement that ministers must provide a ministerial response to petitions within 30 days (or if an interim response is provided, a final response within three months);
- The anticipation rule not applying to the Annual Appropriation Bills;
- The power for the Speaker to withdraw a member for up to one hour (previously members could only be withdrawn for the whole day, either including or excluding divisions); and
- The Speaker's ability to request further information from all relevant parties, prior to making a decision on a matter of privilege (previously information could only be sought from the complainant).

On 26 November 2009 the standing orders were amended to require the publication of the Register of Members' Interests on the Parliament's internet website. This change stemmed from the Government response to the Integrity and Accountability review released in November 2009. The Register had not been published on the website prior to this time, as the Members' Ethics and Parliamentary Privileges Committee had previously recommended it should not be published in the interests of privacy.

## Tasmania House of Assembly

### *Attendance of Legislative Council ministers in the House of Assembly at Question Time*

In a departure from tradition possibly unparalleled in the bicameral Westminster system, the Tasmanian Houses of Parliament have agreed to allow

the appearance of two Government ministers who are members of the Legislative Council at daily House of Assembly Question Time. The arrangement is based on the fact that the Assembly sits at 10 am each day and the Council at 11am. Whenever the Council bells are rung the Legislative Council ministers are required to repair to their chamber immediately.

For background on this issue readers should consult the Report of the Joint Select Committee on the Working Arrangements of the Parliament (No. 18) (Paper No. 5 of 2009) at: http://www.parliament.tas.gov.au/ctee/Joint/Reports/QuestionTimeAttendanceofLCMembers.pdf

The upper house ministers first appeared in the Assembly for Question Time on 26 March 2009. They continued to be present each day until the end of the present session on 19 November 2009. The Legislative Council ministers are subject to control of the Speaker while present during Question Time. The arrangement expired at the end of the 2009 session of Parliament.

### *Question Time*

Under new trial arrangements agreed to by the Standing Orders Committee, Question Time in the House of Assembly has been operating in recent months subject to a ratio of questions. Concern had been expressed at the length of questions and answers. The trial provision seeks questions to be delivered with a maximum of 1 minute per question and 4 minutes per answer. The ratio of questions is six Opposition: three Greens: three Government backbenchers. Question time may continue beyond the one hour limit until a minimum of 12 questions are disposed of.

### *Private Members' Business*

The time for conduct of Private Members' Business was extended for 2009. This occurs on Wednesdays. Hitherto Private Members' Business commenced at 3.30 pm and lasted until 6 pm. During 2009 the time commenced at noon on Wednesdays, the sitting was suspended from 1 until 2.30 pm and then Private Members' Business continued until 6 pm. A fixed roster allocated the time equitably between the Opposition, Greens and Government backbenchers.

### *Miscellaneous amendments to standing and sessional orders*

Speaking time limits have been standardised wherever possible, so that a number of limits are now seven minutes per member.

A citizens' right of reply has been introduced into the House of Assembly. The provision has been available in the Legislative Council for some years.

The ringing of the bells for successive divisions now may be curtailed by the Speaker by unanimous agreement, if it can be seen that all members are present in the chamber. The bells are stopped, the division taken and counted.

## Victoria Legislative Assembly

No amendments were made to standing orders during 2009.

However, the Legislative Assembly Standing Orders Committee did undertake investigations into e-petitions and a number of other matters involving the day-to-day and procedural operations of the chamber.

The *Report on Epetitions* was tabled on 7 May 2009, and in that report the Committee recommended that e-petitions be permitted in the Legislative Assembly with a procedure being used that mirrors that already used for paper petitions. The House is yet to consider the report.

In the *Report on the Inquiry into Petitions, the Opening of Parliament, and the Passage of Legislation*, tabled on 10 December 2009, the Committee made seven recommendations, some of which are listed below.

- That in relation to the opening of the 57th Parliament—
  - an indigenous smoking ceremony be held on the fronts steps of Parliament House upon arrival of the Governor;
  - an indigenous Welcome to Country ceremony be conducted in the Legislative Council chamber prior to the Governor's speech.
- That within 90 days of a petition being tabled, the relevant minister be required to provide a response in writing to the member who tabled the petition.
- That where a matter raised on the adjournment debate is not addressed by the minister in the House at the time, the minister must provide a written response to the member who raised the matter.
- That, in regard to divisions in the House, a member with childcare responsibilities be able to sit in the Speaker's gallery with a child and cast a vote.

# CANADA

## House of Commons

On 4 June 2009 Standing Order 153 (List of Reports) was amended and Standing Order 156 (Editorial Corrections), which had been deleted in 1994, was restored. The changes to Standing Order 153, which had formerly

required the Clerk of the House to deliver to each member at the commencement of every session of Parliament a list of reports or other periodical statements which it is the duty of any officer or department of the government, or any bank or other corporate body to make to the House, transferred this duty to the Law Clerk, who was required only to make the aforementioned list available to Members of Parliament rather than delivering a copy to each. The restored Standing Order 156 conferred upon the Law Clerk the authority to make minor, non-substantive, corrective changes to bills before the House. The changes were intended to empower the Law Clerk to discharge additional duties appropriate to his or her role with respect to the business of the House.

Also on 4 June 2009 by unanimous consent the House concurred in a report of the Standing Committee on Procedure and House Affairs proposing numerous changes to the *Conflict of Interest Code for Members of the House of Commons*, which is appended to the standing orders. In its report, the Committee reminded the House that the *Code* "was always intended to be a 'work in progress' with adjustments and modifications to be considered as and when required." It noted that it had undertaken a comprehensive review of the provisions and operation of the *Code* during the first session of the 39th Parliament, and that its recommendations were the result of that process. In addition to a number of technical amendments, the amendments adopted were intended to clarify the obligation of members not to accept any gift or benefit connected with their position that might reasonably be seen to compromise their personal judgment or integrity.

## British Columbia Legislative Assembly

On 27 August 2009 the House approved a motion, on division, to amend Standing Order 2.1 relating to the hours for daily sittings in the House. At that time permanent provision was made for two distinct sittings on Monday, Tuesday and Thursday from 10 am to 12 noon and from 1.30 pm to 6.30 pm. On Wednesday the House was scheduled to sit from 1.30 pm to 6.30 pm.

Subsequently, on 5 October 2009 the House approved a motion to replace Standing Order 2.1 with a sessional order extending the Wednesday afternoon sitting from 6.30 pm to 7 pm, and adjourning the Thursday afternoon sitting at 6 pm.

The changes to daily sittings of the House support the more family-friendly schedule that has been the practice for the last three years through sessional orders.

## Manitoba Legislative Assembly

No changes to the standing orders were made in 2009, though a sessional order was adopted to specify sitting periods for the House as well as indicating completion dates for key pieces of House business.

## Québec National Assembly

### *Parliamentary reform*

An important exercise in parliamentary reform was completed on 21 April 2009, when the Assembly unanimously adopted a series of amendments to its standing orders. Though not a complete overhaul of the standing orders, this reform did usher in a number of significant changes.

The reform had four main objectives: to promote autonomy and initiative on the part of members; to increase the efficacy of members' work; to reaffirm the democratic equilibrium in parliamentary proceedings; and to bring the Assembly closer to the citizenry.

To promote autonomy and initiative on the part of members, new rules were adopted to provide officially for the President's election by secret ballot. In addition, at the end of the Premier's Opening Speech of the session, he or she must henceforth propose that the Government's general policy be adopted by the Assembly. Other matters of confidence are now expressly provided for in the standing orders. Still with a view to granting a greater role to individual members, a new item of business, "Statements by Members", was added to Routine Proceedings. Lastly, parliamentary committees were granted more time to formulate observations, conclusions and recommendations, and more flexibility as to the conditions under which they may meet at a location other than the buildings of the parliamentary precinct.

To increase the efficacy of members' work, changes were made in the parliamentary calendar and sitting schedule for both the Assembly and the committees. The fall and spring sessional periods now begin a month earlier, and the standing orders set aside specific weeks for members to work in their ridings. Also, committee areas of competence were revised to ensure a more even distribution of work. Some committees have a new name, while other committees have been merged, dissolved or created.

To reaffirm the democratic equilibrium in parliamentary proceedings, changes were made to the rules governing Business Standing in the Name of Members in Opposition and Motions Without Notice. A motion introduced under these headings now requires that the sponsor of the main motion grant

permission for the motion to be amended. Another change concerns the motion to suspend procedural rules, which has been replaced by a new procedure known as the "exceptional procedure". It allows the Government to adopt a measure rapidly while still giving members sufficient debate time to fully express their opinions. Lastly, in the case of persons appointed by the Assembly pursuant to a statute, new rules allow the Committee on the National Assembly to hear the candidates prior to their appointment.

Citizen participation in public debate, an important aspect of the reform, is being encouraged by a number of measures. People can now sign petitions online via the Assembly's website; moreover, inherent in the right to petition is the Government's obligation to respond once the petition has been tabled. Also via the website, people may signal their intention to testify at a public hearing, or they may submit a brief electronically. In addition, public consultations may now be held online.

For more information on all these changes please see http://www.assnat.qc.ca/fr/actualites-salle-presse/nouvelle/Actualite-19493.html.

### Saskatchewan Legislative Assembly

#### *Splitting of bills*

For the first time in Saskatchewan history, the government had to split a bill. Bill No. 72, the Traffic Safety Amendment Act 2008, contained two areas of focus; to increase the driving privileges of volunteer firefighters when en route to an emergency and to introduce "enhanced" driver's licences. The Information and Privacy Commissioner tabled a report raising concerns about the privacy implications of the enhanced driver's licences. The opposition supported the provisions of the bill relating to volunteer firefighters but objected to the passage of the enhanced driver's licence portions based on the Commissioner's apprehensions. The government opted to divide the bill and the new firefighter bill passed without controversy while the government chose to cancel the plan for the new identification.

## STATES OF JERSEY

A small but significant change was made to the standing orders of the States of Jersey during 2009 in relation to the publication of names in the Official Report ("Hansard").

The requirement to produce an Official Report is set out Standing Order 160 which states—

**"160 Greffier to prepare transcript of meeting**

(1) The Greffier shall prepare a written transcript of a meeting.

(2) The transcript shall include—

(a) all questions and answers, whether written or oral;

(b) all matters of privilege raised; and

(c) all public business.

(3) The transcript may also include—

(a) such other business as the Greffier, after consultation with the PPC, if necessary, considers appropriate; and

(b) any supporting or illustrative material that a speaker has distributed to members of the States during a debate."

As can be seen there is a requirement for the Greffier of the States (Clerk) to produce a full transcript and there is no discretion to omit any of the matters listed.

During 2009 concern was expressed about the interaction between the requirement in Standing Order 160 quoted above and Standing Order 104(2)(i) on the use of names in the Assembly. That Standing Order states that "A member of the States must not— [...] (i) refer to any individual who is not a member of the States by name, unless use of the individual's name is unavoidable and of direct relevance to the business being discussed".

On a small number of occasions members of the States had mentioned names of third parties in breach of Standing Order 104(2)(i) and been asked to withdraw the name by the Presiding Officer. (In practice the Presiding Officer will only normally ask for a name to be withdrawn if it appears that the member is making allegations or assertions about a person who is not a member of the States and a name mentioned to simply compliment or thank a person would not be treated as a breach of the standing order.) Because of the requirements in relation to the production of a full transcript the Greffier was required, before the recent amendment, to record the name mentioned even though the name was followed in the transcript by a record of the withdrawal request from the Presiding Officer.

Although this requirement was no doubt identical to the position which still prevails in many parliaments around the Commonwealth it should be noted that Jersey is a relatively small jurisdiction with some 90,000 people living in an island 10 miles by five miles. In any small community a person mentioned by name in parliament may be easily recognisable and known to many people in the community. An unfounded allegation made in the States Assembly about a member of the public could have a significant impact on that person's

personal or professional life. The problem was compounded by the requirement in standing orders for the Official Report to be published on the States Assembly internet site meaning that names mentioned were fully searchable across the world on any internet search engine.

In considering this issue the Privileges and Procedures Committee of the States of Jersey weighed up very carefully the problem being caused to a small number of members of the public against the need to defend the freedom of speech of members of the States.

The solution proposed by the Committee was an amendment to standing orders that was subsequently adopted by the Assembly to give the Presiding Officer the power to direct that a name spoken in breach of Standing Order 104 should be omitted from the transcript. The amendment provided that if "the presiding officer is of the opinion that the words consist of or include a name in contravention of standing order 104(2)(i), he or she may direct that such name is omitted from the transcript of the meeting". The process is a transparent one as a further part of the amendments to standing orders requires the Greffier to insert a note in the Official Report specifying where a name has been omitted under the new rule—

> "(3A) If the presiding officer has directed the omission of a name under standing order 109(7), the transcript shall not include that name and such omission shall be marked in the transcript as follows—
>
> '[name omitted in accordance with standing order 160(3A)]'".

The amendments do not, of course, prevent the immediate broadcast of the name on the local BBC radio transmission of proceedings or through the web broadcast by the local television station but they do address the concern that a name remained indefinitely in the transcript and was searchable on the internet across the world.

The amendment may have had a deterrent effect as, at the time of writing, there had never been cause to invoke it.

## NEW ZEALAND HOUSE OF REPRESENTATIVES

The standing orders were not amended in 2009, and no significant sessional orders were adopted. It is customary for the standing orders to be reviewed during each parliamentary term, and such a review is likely to commence in 2010. The House ordered in 2008 that the rules relating to the pecuniary interests of members of Parliament be reviewed (see *The Table,* vol 77, 2009, p 149), and this will be a specific area of focus for the Standing Orders Committee.

NORTHERN IRELAND ASSEMBLY

The main changes arose from a review of questions carried out by the Procedures Committee.

UNITED KINGDOM

## House of Commons

In November 2008 the House had appointed select committees for each of the regions of England, apart from London; a London Regional Select Committee was added on 25 June 2009.

On 22 January 2009 the House established a Committee on Members' Allowances, to advise the House of Commons Members Estimate Committee on the discharge of its functions and to advise the Speaker, the Members Estimate Committee and the Leader of the House on the potential development of the arrangements made by or under the Resolutions in force from time to time regarding members' allowances. On 3 March 2009, the Committee was tasked in addition with approving practice notes to be used in administering members' allowances and determining the application of the rules in individual cases referred to them by hon. members. Reviewing the "Green Book" Guide to Members' Allowances was added to its terms of reference on 30 April 2009. The role of the Committee is likely to be reviewed once the Independent Parliamentary Standards Authority takes over responsibility for paying members' expenses and allowances after the 2010 general election.

A new Standing Order No 152H (Planning: national policy statements) was made on 20 May 2009 to provide for select committee scrutiny of planning national policy statements made under the Planning Act 2008.

## House of Lords

### *Standing orders on judicial business and peerage claims*

The creation on 1 October 2009 of the United Kingdom Supreme Court, which resulted from the Constitutional Reform Act 2005, brought to an end the House of Lords' long history as the final court of appeal in the United Kingdom.

A minor by-product of this major constitutional development was the need to make numerous changes to the House's standing orders. These changes

were set out in two reports by the Procedure Committee,[1] agreed by the House on 15 December 2009.

Most of the changes were self-explanatory—Standing Order 87, for instance, which governed the establishment of the House's Appellate and Appeal Committees, was repealed in its entirety. Two changes, however, merit more detailed description.

The first of these changes was the repeal of Standing Order 21:

> "21. The Judges, when summoned to attend the House, are not to speak or deliver any opinion until it be required, and they be admitted so to do by the major part of the House in case of difference."

The date given for this Standing Order is 27 March 1621, the same date as is given for all the House's most ancient standing orders. In fact, what the Journal records for that date is that the House ordered "That the Records of this Parliament be entered and enrolled, *videlicet,* the Journal Book to be ingrossed in Parchment; and the Acts, Judgments, and Standing Orders of the House, be inrolled and kept in Parchment." In other words, what seems to have happened as a result of this resolution was that existing practices and rules were consolidated and clarified, rather than that new rules were agreed. The standing order on judges thus cannot be traced back to a single decision of the House; rather, its formulation has to be seen in the context of the wider constitutional developments of the early 17th century, and in particular the House's constant efforts, in relation to both the courts and the House of Commons, to carve out its unique judicial authority.

The truth is that Standing Order 21 was obsolete for many years before its repeal. Indeed, it is hard to see why the Standing Order was retained once the Appellate Jurisdiction Act 1876 had enabled the creation of "Lords of Appeal in Ordinary"—that is, professional judicial members whose titles were conferred only for life. Nevertheless, retained it was, and its repeal, though hardly noticed among the many other matters preoccupying the House in 2009, underlined the profound change in the House's historic role.

One other change to standing orders may be of interest—not least, because to some extent it appears to undercut the constitutional developments just described. As the 2004 edition of *Erskine May* indicates, the House, as a court of judicature, exercised several kinds of jurisdiction. Of these, its appellate jurisdiction was abolished by the Constitutional Reform Act 2005; its jurisdiction

[1] Procedure Committee, 2nd Report, 2008–09 (HL Paper 165) and 1st Report, 2009–10 (HL Paper 13).

in impeachments by the Commons has "fallen into disuse"; the third component of this jurisdiction, its jurisdiction in peerage claims, was unaffected by the 2005 Act. Historically this jurisdiction has been exercised, on behalf of the Crown, by the Committee for Privileges; the Committee's composition (including when hearing peerage claims) is set out in Standing Order 77 (formerly 78), which in its unamended form read as follows:

> "78. A Committee for Privileges shall be appointed at the beginning of every session; sixteen Lords shall be named of the Committee, together with any four Lords of Appeal[2]; in any claim of Peerage, the Committee shall not sit unless three Lords of Appeal be present."

In May 2009 the Procedure Committee was accordingly invited to consider whether the House should continue to accept responsibility for determining peerage claims (and, if so, what the composition of the Committee for Privileges should be), or whether it should disclaim this responsibility, and invite the Government, in consultation with the judiciary, to propose an alternative involving the courts.

The Procedure Committee decided, first, that the Committee for Privileges should retain responsibility for deciding peerage claims. However, the Committee accepted that the determination of peerage claims was inherently a judicial function; it therefore concluded that, in determining such claims, the Committee for Privileges should call upon the assistance of senior serving judges, who were not members of the House.[3] The Committee further agreed that, as a matter of course, the Committee for Privileges should in future include amongst its membership a number of retired senior judges, so that even when not formally considering a peerage claim (for instance, when hearing appeals by members against findings that they had breached the Code of Conduct) it could call upon an element of judicial expertise.

In implementing these decisions, the first requirement was to secure the

[2] A "Lord of Appeal" meant, in essence, any current or former holder of high judicial office (including the offices of Lord Chancellor, Lord of Appeal in Ordinary, or senior judicial positions in the Scottish or Northern Irish legal systems). The term "Lord of Appeal" was defined in the Appellate Jurisdiction Act 1876; the repeal of that Act by the Constitutional Reform Act 2005 means that the term has now fallen into disuse. The term "holder of high judicial office" is now used.

[3] Although at the time of writing the majority of the Justices of the Supreme Court continue to be members of the House (having formerly served as Lords of Appeal in Ordinary), they are disqualified from taking any part in the work of the House by section 137 of the Constitutional Reform Act 2005. However, this disqualification is limited to members of the House: judges who are not members are under no such disqualification.

agreement of the judiciary to assisting the House in the event of a peerage claim. Fortunately, both the Lord Chief Justice and the President of the Court of Session expressed their willingness to nominate senior judges to assist in such a case. The next step was to propose a new standing order reflecting the new procedure for hearing peerage claims. It was essential above all that the new standing order should clarify the status and rights of the non-members who would assist in hearing peerage claims.

The text finally agreed by the House was therefore as follows:

> "77. A Committee for Privileges and Conduct[4] shall be appointed at the beginning of every session; sixteen Lords shall be named of the Committee, of whom two shall be former holders of high judicial office. In any claim of peerage, the Committee for Privileges and Conduct shall sit with three holders of high judicial office, who shall have the same speaking and voting rights as the members of the Committee."

There is no doubt that the inclusion of non-members in a committee of the House, and the conferring upon them of speaking and voting rights, raises interesting questions regarding the status of that committee and the extent of parliamentary privilege. It remains to be seen whether these will be tested in reality—the last time a peerage claim was decided by the Committee for Privileges was in 1997, and further reform of the House of Lords may intervene before the next such case.

## NATIONAL ASSEMBLY FOR WALES

The Assembly's standing orders were temporarily amended in 2009 to allow the Finance Committee an additional week in which to scrutinise the Government's draft budget for the financial year 2010–11. The temporary standing order ceased to have effect once an annual budget motion had been tabled (Standing Order 27A).

## ZAMBIA NATIONAL ASSEMBLY

There were no amendments to the standing orders in 2009. It is, however, expected that on conclusion of the constitutional review process scheduled to end this year, the new constitution, when enacted, will necessitate a revision of the standing orders.

[4] The Committee has also been renamed, to reflect its increasing involvement in matters of members' conduct.

# SITTING TIMES

Lines in Roman show figures for 2009; 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 | 11 | 7 | 0 | 7 | 12 | 0 | 7 | 8 | 8 | 8 | 0 | 68 |
| Aus Sen | 0 | 7 | 7 | 0 | 3 | 8 | 0 | 7 | 8 | 4 | 9 | 0 | 53 |
| Aus ACT | 0 | 6 | 4 | 2 | 4 | 6 | 0 | 6 | 3 | 3 | 6 | 3 | 43 |
| Aus N Terr | | | | | | | | | | | | | 37 |
| Aus NSW LA | 0 | 0 | 12 | 3 | 8 | 12 | 0 | 0 | 11 | 8 | 8 | 3 | 65 |
| Aus NSW LC | 0 | 0 | 10 | 2 | 6 | 8 | 0 | 0 | 9 | 6 | 6 | 3 | 50 |
| Aus Queen LA* | 0 | 3 | 0 | 3 | 3 | 7 | 0 | 6 | 6 | 6 | 6 | 0 | 40 |
| *Aus S Aus HA* | *0* | *6* | *3* | *8* | *4* | *6* | *4* | *0* | *5* | *6* | *6* | *0* | *48* |
| *Aus S Aus LC* | *0* | *8* | *7* | *1* | *9* | *6* | *5* | *0* | *7* | *8* | *8* | *4* | *63* |
| Aus Tasm HA | 0 | 1 | 9 | 4 | 5 | 6 | 2 | 6 | 2 | 9 | 6 | 0 | 50 |
| Aus Tasm LC | 0 | 0 | 3 | 5 | 6 | 6 | 4 | 4 | 3 | 9 | 7 | 0 | 47 |
| Aus Vict LA | 0 | 6 | 4 | 2 | 3 | 9 | 3 | 3 | 6 | 3 | 6 | 3 | 48 |
| Aus Vict LC | 0 | 6 | 4 | 2 | 2 | 9 | 3 | 3 | 6 | 3 | 7 | 3 | 48 |
| Aus W Aus LA | 0 | 0 | 6 | 6 | 11 | 9 | 0 | 9 | 9 | 7 | 8 | 1 | 66 |
| *Aus W Aus LC* | *0* | *0* | *6* | *6* | *11* | *9* | *0* | *6* | *9* | *7* | *8* | *3* | *65* |
| *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 | 5 | 15 | 17 | 12 | 15 | 15 | 0 | 0 | 8 | 17 | 16 | 8 | 128 |
| *Canada Sen** | *3* | *9* | *6* | *11* | *10* | *9* | *0* | *0* | *0* | *0* | *6* | *2* | *56* |
| Canada Alb | 0 | 6 | 12 | 15 | 12 | 3 | 0 | 0 | 0 | 4 | 12 | 0 | 64 |
| Canada BC* | 1 | 12 | 14 | 0 | 0 | 0 | 0 | 4 | 11 | 12 | 13 | 0 | 67 |
| Canada Man | 0 | 0 | 0 | 15 | 15 | 8 | 0 | 0 | 11 | 5 | 1 | 11 | 66 |
| *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* | *0* | *0* | *7* | *11* | *4* | *0* | *5* | *0* | *4* | *0* | *0* | *0* | *31* |
| *Canada Ontario* | *0* | *0* | *8* | *19* | *13* | *11* | *0* | *0* | *6* | *16* | *12* | *8* | *93* |
| *Canada PEI* | *0* | *0* | *0* | *15* | *13* | *0* | *0* | *0* | *0* | *0* | *11* | *2* | *41* |
| Canada Québec | 3 | 0 | 10 | 11 | 13 | 11 | 0 | 0 | 9 | 10 | 13 | 4 | 84 |
| Canada Sask | 0 | 0 | 18 | 14 | 8 | 0 | 0 | 0 | 0 | 6 | 16 | 3 | 65 |
| Canada Yukon | 0 | 0 | 7 | 17 | 8 | 1 | 0 | 0 | 0 | 1 | 16 | 11 | 61 |
| *Cayman Island* | *0* | *0* | *13* | *0* | *0* | *7* | *0* | *0* | *10* | *0* | *15* | *0* | *45* |
| *Cook Islands* | | | | | | | | | | | | | |
| *Cyprus* | *5* | *1* | *4* | *3* | *4* | *5* | *2* | *1* | *0* | *5* | *4* | *3* | *37* |
| *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* | *2* | *1* | *1* | *2* | *2* | *1* | *4* | *2* | *2* | *2* | *2* | *4* | *25* |
| *India LS* | *0* | *10* | *9* | *12* | *6* | *0* | *9* | *12* | *0* | *0* | *0* | *16* | *74* |
| *India RS* | *0* | *5* | *12* | *11* | *2* | *0* | *0* | *0* | *0* | *6* | *0* | *10* | *46* |
| *India Gujarat* | *0* | *10* | *17* | *0* | *0* | *0* | *0* | *0* | *3* | *0* | *0* | *0* | *30* |
| *India Haryana* | *0* | *0* | *16* | *0* | *0* | *0* | *0* | *0* | *3* | *0* | *0* | *0* | *19* |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| India Him Pr | 0 | 11 | 0 | 0 | 0 | 0 | 0 | 17 | 0 | 0 | 0 | 6 | 34 |
| *India Kerala* | *0* | *1* | *12* | *0* | *2* | *0* | *12* | *0* | *19* | *0* | *7* | *0* | *53* |
| *India Maharash* | | | | | | | | | | | | | |
| *India Nagaland* | *0* | *0* | *4* | *0* | *0* | *5* | *0* | *0* | *0* | *0* | *0* | *1* | *10* |
| *India Orissa* | *0* | *0* | *12* | *0* | *0* | *0* | *12* | *3* | *0* | *0* | *0* | *7* | *34* |
| *India Punjab* | *0* | *0* | *13* | *0* | *0* | *0* | *0* | *0* | *2* | *0* | *0* | *0* | *15* |
| India Rajasthan | 7 | 2 | 0 | 0 | 0 | 0 | 17 | 0 | 0 | 0 | 0 | 0 | 26 |
| *India Sikkim* | | | | | | | | | | | | | |
| *India Tamil Nadu* | *5* | *0* | *7* | *16* | *6* | *0* | *0* | *0* | *0* | *0* | *5* | *0* | *39* |
| *India Uttar P* | *0* | *10* | *0* | *0* | *0* | *0* | *7* | *5* | *0* | *0* | *6* | *0* | *28* |
| *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 | 4 | 4 | 6 | 4 | 8 | 5 | 0 | 9 | 6 | 6 | 6 | 60 |
| *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* |
| *Montserrat* | | | | | | | | | | | | | |
| *Namibia* | | | | | | | | | | | | | |
| NZ H Reps | 0 | 6 | 10 | 8 | 8 | 10 | 8 | 9 | 6 | 7 | 4 | 5 | 81 |
| *Nigeria Borno* | *20* | *19* | *24* | *10* | *10* | *20* | *25* | *18* | *28* | *20* | *6* | *2* | *202* |
| Northern Ireland | 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 | 0 | 17 | 3 | 0 | 0 | 12 | 1 | 0 | 0 | 8 | 6 | 0 | 47 |
| *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* | *2* | *11* | *8* | *0* | *28* | *24* | *0* | *3* | *5* | *3* | *4* | *0* | *88* |
| *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* |
| *Sri Lanka* | *1* | *8* | *1* | *5* | *3* | *6* | *8* | *8* | *8* | *8* | *4* | *2* | *62* |
| *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 | 12 | 13 | 22 | 11 | 13 | 21 | 14 | 0 | 0 | 13 | 15 | 10 | 144 |
| UK Lords | 13 | 14 | 19 | 11 | 12 | 19 | 13 | 0 | 0 | 13 | 16 | 11 | 141 |
| Wales | 6 | 6 | 9 | 3 | 6 | 9 | 5 | 0 | 4 | 6 | 8 | 4 | 66 |
| *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**

| | |
|---|---|
| As an afterthought, the Minister added, "Of course, the Government would also need to be convinced that the risk to the safety of our troops … is an acceptable one" | 23 February |
| Coward! Engage in the debate! | 17 March |
| The party for binge drinking | 18 March |
| I am firmly against illicit drugs, unlike the Minister for Health and those on the other side | 12 May |
| The Member for Paterson, known as "Paterson's curse" | 14 May |
| The Member for xenophobia over there | 14 May |
| The spirit of Hansonism alive and well on the benches of those opposite | 14 May |
| Sloppy Joe | 26 May |
| A rather spoilt brat running the show | 27 May |
| Mr Squiggle! | 27 May |
| Toughen up, princess! | 1 June |
| Been in the pockets of the distillers | 2 June |
| The statement … contains a certain amount of racial arrogance | 3 June |
| Standover tactics that used to be used | 16 June |
| Some sort of delusion | 16 June |
| What a fraud this is | 16 June |
| Go back, attack chihuahua! | 17 June |
| Get the wax out of your ears so you can hear the question. Sit down | 17 June |
| The reason he does not believe that that is corruption is that he actually did it, and he did it with real public money | 23 June |
| Which does raise the interesting possibility that he was on both sides of the transaction | 23 June |
| I do put the Leader of the Opposition on notice: if anything happens to Jasper the cat, questions will be asked | 25 June |
| He is a disgrace | 13 August |
| Mr Deputy Speaker, are you awake over there? | 8 September |
| You're the biggest fraud in this parliament | 16 September |
| Does not have the integrity to ask the question himself | 17 September |
| This clown | 20 October |
| He strayed a long way indeed from any decency in immigration policy when he occupied that portfolio | 22 October |
| The culture of non-cooperation led by the member for Menzies and the member for Berowra | 27 October |
| Sit down, motormouth! | 29 October |
| So the deal was, "I'll pretend I'm sober but I'll get drunk on four occasions, or at least have a few drinks" | 29 October |

| | |
|---|---|
| How do you remember, with dementia! | 17 November |
| Every four days a farmer in Australia was committing suicide—where was your heart? | 25 November |
| How much tobacco money did you get? | 26 November |
| **Australian Capital Territory Legislative Assembly** | |
| Cowardly | 10 February |
| Low-life, gutless wimp | 10 February |
| Duplicitously | 12 February |
| Knave or a fool | 12 February |
| Dwarfs | 25 February |
| Allegedly | 24 March |
| Slimy | 25 March |
| Arse | 26 March |
| Hypocritical | 1 April |
| You're a joke … an absolute joke | 2 April |
| Pommie basher | 2 April |
| Fraud … fraudulently alleged | 16 April |
| Light greens | 17 April |
| Spac attack | 23 April |
| Could not be straightforward and truthful … had to misrepresent | 24 April |
| Worth telling the truth | 20 August |
| Vexatious | 26 August |
| Puss in boots | 16 September |
| Arse-covering motion | 18 November |
| Attempt by the Minister to interfere with the electoral process of this Territory | 19 November |
| Contempt for the legitimate process of this Assembly | 10 December |
| Poorest performer when it comes to committees | 10 December |
| **New South Wales Legislative Assembly** | |
| You are doing it corruptly and rottenly with the money that has been paid to the Labor Party | 4 March |
| To denigrate the work ethic of the 100,000 people who work in the New South Wales [health] system | 5 March |
| To reveal sensitive police intelligence to the bikies | 12 May |
| Windbag | 14 May |
| Foolish | 4 June |
| Incompetent ... and ... corrupt | 4 June |
| [Trolling] around as grubs | 4 June |
| A silver spoon sticking out of [his] mouth | 4 June |
| A complete twit | 24 June |
| You shut up! | 24 June |
| Criminals | 29 October |
| Wanker | 11 November |
| We can listen for only so long to a chihuahua attacking | 26 November |
| This is a Liberal candidate who has harassed and antagonised indigenous Australians | 26 November |
| Goose … princess | 26 November |
| The one thing people will not find in the Liberal Party is a paedophile | 26 November |

| | |
|---|---|
| No-brains Bundy | 3 December |
| **New South Wales Legislative Council** | |
| The underbelly of the Labor Party | 10 September |
| Dunderhead | 12 November |
| **Northern Territory Legislative Assembly** | |
| You learned nothing about the kick in the arse that the … | 10 February |
| You are a smart arse | 10 February |
| Look at your federal colleague, you dipstick! | 11 February |
| The person who drafted the legislation at the time was the then Solicitor-General, Tom Pauling, who did a great job in drafting that legislation and having it available for the parliament. He was, I believe, justly rewarded. | 11 February |
| The derogatory things you said about Aboriginal people on your radio show just shows enormous … | 11 February |
| … just said: "Oh, $200m! I will take that, thanks. Phew, that is this year's drug fix sorted out" | 17 February |
| If Mrs Robinson over there is a little sensitive about these things, then so be it. | 17 February |
| [Former Prime Minister] Johnny Howard and his mates spent their time in Canberra … | 17 February |
| … some sort of half-arsed crap … | 18 February |
| I will piss in my pocket. | 19 February |
| And the rumours I am hearing about the multimillions of dollars that it is siphoning out of SIHIP to help run the Northern Territory government because of its $200m black hole. | 19 February |
| He virtually said these people are political hacks. Ted Egan is a political hack; Bill Moss is a political hack | 28 April |
| It is strange the member for Katherine would run down a member of the Katherine community who is on the steering committee. | 28 April |
| You have no decency, Madam Speaker. | 29 April |
| Mr Acting Deputy Speaker, I offer an apology to Madam Speaker which I will do fulsomely and without reservation. During the last division in this House, I said words which reflected on her capacity as the Speaker of this House. I seek to withdraw those words, if the Hansard microphones picked them up, and I offer an unqualified apology to Madam Speaker. NB The words to which the member referred included: "You have no courage" and "you are a disgrace" and he accused the Speaker of "cowardice in the lowest and most vile terms". | 29 April |
| She chose to do it over "chook gate", where she was caught with her hand in the till | 30 April |
| The minister for frivolous points of order jumps up | 5 May |
| When you watched the way this government spent money, it was like watching a drug addict going back to its dealer every so often. | 6 May |
| It is no coincidence that members on this side sometimes refer to her as "gag girl" | 7 May |
| The way the Speaker is so quick to dismiss the media out of here after Question Time so we cannot have the place ... | 7 May |

| | |
|---|---|
| This mob on the other side is nothing but a pack of standover merchants and bullies who are trying to constantly gag debate and discussion on something that is incredibly important. | 7 May |
| I am not some businessman they can blackmail and dictate to, and standover and bully … absolute schoolyard bullies. Thugs and standover merchants … who turn up, threaten, intimidate and the minute someone calls their bluff they chicken out … Gutless; cowards and curs. | 7 May |
| It is like he is waiting for someone to put a couple of pennies on his eye sockets. | 9 June |
| Maybe they will even trundle in the corpse; he has seemingly no influence on anything these days. | 10 June |
| … goes to show how far some of the fascists on the other side go to hang on to power. | 10 June |
| We just had the dodgy Treasurer give a dodgy … | 11 June |
| They like to talk and mutter, with spin, fluff, maladministration of funds, and all these types of things. | 17 August |
| Looks like old Hendo—somebody said they threw him a lifeline and he actually got a hangman's noose around his neck—did not realise it. The member for Karama is there waiting to kick him out the chair—hang the poor old Chief Minister. | 17 August |
| That is a grubby deal. | 18 August |
| You are just sitting on your bum doing nothing, mate! | 12 October |
| There is absolutely bugger all out there, when it comes to comparisons between what goes on along the Douglas Daly and what goes on along the Murray, absolutely stuff all. | 20 October |
| They have paid the bank; they have to pay their Labor mates from interstate. | 21 October |
| They are making you look like an absolute bloody fool; a bloody idiot. | 22 October |
| I ask myself: what is in this for the member for Nelson? Quite clearly, there is some reward for this; he is on the government tit. | 24 November |
| The bar is open, is it? Yes, well, I believe you have been there for the afternoon | 25 November |
| One ministerial speech in six years, a supporting speech. | 25 November |
| If you had listened to what I just said, you would realise you were the idiot responsible for not telling me this bill was coming on now. | 26 November |
| **Queensland Legislative Assembly** | |
| You are offensive, old mate. You will find out what offensive is when you go out into the bush. | 23 April |
| … because the Greens have done this dirty little grubby deal with the Labor Party so Labor could get into parliament. I believe it is bordering on corruption because what we are seeing are the views of a minority party in regard to the moratorium on suckers. | 23 April |
| It is about political bastardry | 23 April |
| You were in that trough, the snout was down, the little wiggly tail was up in the air and you were just scoffing at that trough. | 23 April |
| Isn't it interesting that we have a plague of mice but a single goose on the opposite side of the House! | 19 May |
| Is he in charge or is the dill next to him still in charge? | 2 June |

| | |
|---|---|
| You've never done a bloody thing. | 3 June |
| I have just had a gutful of these debates being axed. | 4 June |
| The reason that Toowoomba has a water supply of less than 11 per cent today is down to gutless people like you. | 4 June |
| He has sold out the unions and he doesn't give a damn about the people of Queensland. | 16 June |
| Before the interruption from the muppets bench at the back of the parliament … | 16 June |
| Come on, "Kid Chaos"; get it right. | 16 June |
| They ripped the guts out of the communities of Queensland | 19 June |
| … and the so-called "Debt Man" can listen to this … | 19 June |
| You are too stupid to work it out. | 16 September |
| You are scraping the bottom of the barrel here. Couldn't you get anybody else? | 16 September |
| The one thing you got wrong is you can't tell the truth. | 17 September |
| Well, aren't you worried about your kids paying off the debt that you clowns have put together? | 27 October |
| It is now official; everything this Government touches turns to crap. | 27 October |
| Just take a look at the corrupt bunch opposite. | 28 October |
| Some attended and others were ringing people up saying, "For Christ's sake, don't go. Whatever you do, don't go." | 28 October |
| Gordon's porkies were the subject of an in-depth inquiry | 28 October |
| **Victoria Legislative Assembly** | |
| It is always a delight to follow the member for New South Wales … | 11 March |
| You are a grub, a grub | 3 June |
| The member for South-West Coast continues to carp on. Clearly he has been to the bar and has just walked into the chamber | 10 June |
| … just used words which started with "f" in referring to me | 28 July |
| … he makes me sound half intelligent | 13 August |
| **Victoria Legislative Council** | |
| He again brought along his largest handbag—the Minister for Planning. | 5 February |
| You did a deal with those crooks. | 5 February |
| The Minister killed 80 jobs. | 11 March |
| Talking like a motormouth. | 4 June |
| The name of Theophanous is a name in infamy. | 2 September |
| Do-nothing Dick. | 3 September |
| Fruitloop. | 12 November |

**CANADA**

| | |
|---|---|
| **House of Commons** | |
| Little leprechaun | 3 February |
| Niaiseuse [idiotic] | 23 February |
| Tar baby | 1 June |
| What the hell is wrong with those people? | 9 June |
| Sweet stench of a hypocrite | 17 September |
| Stole | 1 October |
| Complètement malhonnête [completely dishonest] | 19 October |

| | |
|---|---|
| No-good bastards | 24 November |
| Bribe money | 7 December |
| **Alberta Legislative Assembly** | |
| Skewed to some sort of an advantage | 22 April |
| Listen to the government, not the opposition | 23 April |
| Using a crime-reduction strategy to cover up your failure to provide enough mental health care | 27 April |
| Asinine questions | 7 May |
| Ride over democracy and put it under their totalitarian heel | 1 June |
| If she would know the difference between appropriate use of public borrowing as defined by just about every democracy and country in the world right now and gibberish | 29 October |
| **British Columbia Legislative Assembly** | |
| Big mouth | 27 August |
| They're on Liberal crack | 31 August |
| Fudged the budget numbers | 2 September |
| Screwed | 17 September |
| Suck it up | 26 October |
| Absolute crap | 3 November |
| Jacking up | 4 November |
| Another way to screw the working person | 5 November |
| They think they can just sort of goose-step | 5 November |
| What the heck | 6 November |
| **Manitoba Legislative Assembly** | |
| Speaking of two-watt bulbs, I really do appreciate the comments that the Minister put on the record | 7 May |
| We fear not the kind of Animal House kind of approach he takes to politics | 11 June |
| He finally got up on his hind legs, but he's still not talking | 11 June |
| The Member for foggy bottom | 17 September |
| The American Ambassador designate | 22 September |
| The Member opposite is the Member for hot air | 5 October |
| **Québec National Assembly** | |
| Honnêteté (avoir perdu cette honnêteté) [honesty (to have lost that honesty)] | 26 March |
| Vérité (tronquer) [truth (to truncate/foreshorten)] | 2 June |
| Inconscience crasse [gross recklessness] | 4 June |
| Amis du regime [friends of the regime] | 30 September |
| Trafiquer les chiffres [tamper with/doctor the figures] | 12 November |
| Logique tordue [twisted logic] | 18 November |
| Aveuglement volontaire [voluntary blindness] | 24 November |
| Rôle de la victime (lui sied bien) [role of victim (suits him/her to a T)] | 26 November |
| **Saskatchewan Legislative Assembly** | |
| Idiotic motion | 23 March |
| A little suspect in the intellect department | 23 April |
| I'm happy to talk about the lack of integrity regarding those questions | 23 April |
| More money than brains | 30 April |
| **Yukon Legislative Assembly** | |
| Shell game | 9 April |

| | |
|---|---|
| Up to some mischief | 22 April |
| Hogwash | 23 April |
| Becoming unglued | 27 April |
| Chicken Little approach | 27 April |
| Gets caught with his hand in the cookie jar | 29 April |
| Railroaded | 5 May |
| Obfuscate | 11 May |
| Screws the pooch | 11 May |
| Turn misinformation into fact | 4 November |
| Hijacked democracy | 5 November |
| Bullying | 10 November |
| Wordsmithing | 23 November |
| Amateur-hour motion | 25 November |
| Sell out Yukoners' interests | 25 November |
| Frivolous and vexatious | 2 December |

**INDIA**

**Himachal Pradesh Vidhan Sabha**

| | |
|---|---|
| This Vidhan Sabha is acting in a partisan manner. | 17 August |
| This issue has been brought in the House in collusion and connivance of the Government and thus this Calling Attention Motion was allowed. | 17 August |
| Time and again you are making mockery of Vidhan Sabha in every session; the sooner it is stopped the better it would be. | 16 December |
| He is a hooter | 16 December |
| He is a number one idiot | 16 December |
| I would say it has become a plundering Samiti. | 18 December |

**Rajasthan Legislative Assembly**

| | |
|---|---|
| Loyal to father (*in derogatory sense*) | 3 January |
| H.E. the Governor has not done right thing in that matter | 3 January |
| Lankesh (*the demon king of Lanka*) | 3 January |
| Joker of the circus | 3 January |
| Good-for-nothing | 3 January |
| Nonsensical talks | 3 January |
| H.E. the Governor has lost his mental balance. Chief Minister has lost his mental balance. | 6 January |
| Poor fellow | 7 January |
| Blemished | 9 January |
| Remain within limits. Don't discharge the functions of the Chair in an undignified manner. | 10 January |
| Thieves, you people are … thieves | 10 January |
| Chicanery | 25 February |
| Lass | 9 July |
| Ill-minded | 10 July |
| Hey, you are a kid | 10 July |
| Out of clothes | 10 July |
| Under their pressure | 10 July |
| Melee of horse race | 10 July |

| | |
|---|---|
| Within your limits … your limit too | 16 July |
| You will cry | 17 July |
| Bhabhi [elder brother's wife] | 17 July |
| Hey, Famine Man | 17 July |
| Speak to me properly or I will give you proper medicine. | 17 July |
| Governor Saheb had not signed on that … At the instance of the Congress leaders, H.E. the Governor did not sign on that | 20 July |
| In collusion with Congress from the side of the Congress leaders | 20 July |
| Mr Brahmdev ji Kumawat, possessing the post of the Parliamentary Secretary | 22 July |
| You all drunkards are sitting ... You are all drunkards. At this time of after 8 in the night, you will drink. You will not drink before, you will drink after 8 in the night. | 22 July |
| There is nothing of you. What one can spoil of you? | 22 July |
| He has come to the House after having a drink | 22 July |
| Dashanan [ten-headed man] | 22 July |
| Murderers … these people are murderers | 27 July |

**STATES OF JERSEY**

| | |
|---|---|
| It seemed to me the Executive of the time managed to manipulate about 10 million quid's worth of pre-election lollipops out of their political underpants when they really needed to, so can we not afford a couple of hundred thousand pounds? | 3 February |
| Does the Chief Minister not accept that he really misjudges the seriousness with which the public view this and, in fact, it will just be viewed as a smokescreen for him perhaps not possessing the political testicular fortitude for suspending the Chief Officer? | 3 February |
| On a point of order. I am sorry to interrupt the Minister but the Minister to my right is shouting ... well, not shouting but saying in my ear: "You are full of fucking shit. Why do you not go and top yourself, you bastard." I really do not think that this conduct is acceptable. | 10 March |

**NEW ZEALAND HOUSE OF REPRESENTATIVES**

| | |
|---|---|
| Never had the courage to raise it in the House | 10 February |
| The foul mind that conceived it | 18 February |
| The same Minister who fiddled the books | 5 March |
| "Phil-in" and "Phil-in-thropic" | 25 March |
| Bigot | 29 April |
| Paternalistic speech | 5 May |
| Barbie doll | 13 May |
| Young whippersnapper | 13 May |
| Smiling assassin | 14 May |
| Gerry Mander | 16 May |
| Monkeys | 28 May |
| Slap-it-on-the-bill-Phil | 2 June |
| Phil-who-cried-wolf | 24 June |
| The angry one | 25 June |

| | |
|---|---|
| The notion of him and energy is a mathematical impossibility | 25 June |
| Influenced | 1 July |
| Jackbooted Minister | 9 September |
| Hit man | 16 September |
| Apart from that being a bit rich | 18 November |
| Labour and the Greens opposed fewer suicides | 25 November |

**NATIONAL ASSEMBLY FOR WALES**

| | |
|---|---|
| Lack of breeding | 6 October |
| Perma-tanned retread resurrected the undead | 25 November |

**ZAMBIA NATIONAL ASSEMBLY**

| | |
|---|---|
| Shy | 6 February |
| Guys, cantankerous | 19 February |
| Crooked minds | 31 July |
| It would be very difficult for a “simpleton” to understand what I am talking about | 13 November |
| It is a clear way of cheating by government | 18 November |
| Hell hath no fury ... like a woman conned | 3 December |
| You can go to hell | 3 December |

# BOOKS ON PARLIAMENT IN 2009

## AUSTRALIA

*Papers on Parliament. No. 50: Parliament, Politics and Power, March 2009*, Department of the Senate, Australia, free (electronic version available via the internet at the publisher's home page: http://www.aph.gov.au/senate/pubs/pops/index.htm), ISSN: 1031-976X

Contains transcripts of eight lectures on parliamentary issues.

*Papers on Parliament. No. 51: Republics. Citizenship and Parliament, August 2009*, Department of the Senate, Australia, free (electronic version available via the internet at the publisher's home page: http://www.aph.gov.au/senate/pubs/pops/index.htm), ISSN: 1031-976X.

Contains transcripts of eight lectures on parliamentary issues.

*Papers on Parliament. No. 52: Harry Evans: Selected Writings, December 2009*, Department of the Senate, Australia, free (electronic version available via the internet at the publisher's home page: http://www.aph.gov.au/senate/pubs/pops/index.htm), ISSN: 1031-976X.

Commemorates the career of Harry Evans who recently retired after 21 years as Clerk of the Senate. It contains a selection of his writings from the 1980s to the present day along with tributes by Senator the Hon John Hogg, President of the Senate, and Cleaver Elliott, Clerk Assistant (Committees), on behalf of all staff.

*Annotated Standing Orders of the Australian Senate, 2009*, ed. by Dr Rosemary Laing, Department of the Senate, Australia, $65 (hardback), $45 (paperback) (electronic version available via the internet at the publisher's home page: http:// http://www.aph.gov.au/Senate/pubs/aso/index.htm. The online version is more heavily illustrated), ISBN: 9781742290829 (hardback), 9781742290839 (paperback).

The standing orders have been amended extensively in the Senate's 108-year history. This major new reference book provides in an easily accessible form a history of the standing orders, their underlying rationale and of the many changes to them. The book includes commentary on how some of the key events in Australian political history—such as the 1930s waterfront disputes, the VIP flights scandal, the overseas loans affair and the Australia Card Bill—influenced the standing orders and the work of the Senate.

*Politics One—Fourth Edition*, by Ian Ward and Randal G Stewart, Palgrave Macmillan, $65, ISBN: 9781420256185.

Provides an introduction to Australia's parliamentary and federal system of government, explaining the importance of key institutions including the cabinet and the prime minister, parliament, the Australian public service and the High Court. It also explains what it is that parties do, how elections are conducted and decided, how policy is made, the importance of interest groups and social movements, and the role of the media and the Canberra press gallery.

*Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, ed. by Mark McRae, Legislative Assembly for the Australian Capital Territory, ISBN 9780642604910.

*Comparing Westminster*, by RAW Rhodes, John Wanna and Patrick Weller, Oxford University Press 2009, ISBN 9780199563494.

*Principles of Australian Public Law*, 3rd edition, by David Clark, LexisNexis Butterworths 2010, ISBN 9780409327014.

*The Governors of NSW*, ed. by David Clune and Ken Turner, The Federation Press 2009, ISBN 9781862877436.

*Constitutional Conventions in Australia*, by I Killey, Australian Scholarly Publishing 2009, ISBN 9781921509230.

*Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton*, ed. by HP Lee and Peter Gerangelos, The Federation Press 2009, ISBN 9781862877610 (in particular chapter 9, "Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis" by Peter Gerangelos).

*Why Politics Doctor?, or politics: warts and all*, by Frank Madill, Mowbray Heights, Tas, ISBN 9780980624700.

*Electric Eric: the life and times of Eric Reece, and Australia State Premier*, by Jillian Koshin, Launceston, Tas.: Bokprint, ISBN 9780980615739.

## CANADA

*House of Commons Procedure and Practice*, 2nd edition, ed. by Audrey O'Brien and Marc Bosc, House of Commons, Ottawa & Éditions Yvon Blais, Montreal, $198.95, ISBN 9782896353217.

*Parliamentary Democracy in Crisis*, ed. by Peter H. Russell and Lorne Sossin, University of Toronto Press, Toronto, $24.95, ISBN-10: 144261014X, ISBN-13: 9781442610149.

*The Canadian Regime: An Introduction to Parliamentary Government in Canada*, 4th edition, by Patrick Malcolmson and Richard Myers, UTP Higher Education, Toronto, $37.95, ISBN-10:1442600470, ISBN-13: 978-1442600478.

*Contemporary Canadian Federalism: Foundations, Traditions, Institutions*, by Alain-G. Gagnon, University of Toronto Press, Toronto, $37.95, ISBN-10: 080209533X, ISBN-13: 9780802095336.

*The Democratic Dilemma: Reforming the Canadian Senate*, by Jennifer Smith, McGill-Queen's University Press, $24.95, ISBN-10 155339190X, ISBN-13 9781553391906.

*Dictionnaire des parlementaires du Québec de 1792 à nos jours*, by Martin Rochefort et al, Québec: Publications du Québec: Assemblée nationale du Québec, CAN $69.95, ISBN 9782551198368.

*Le Parlement du Québec de 1867 à aujourd'hui*, by Louis Massicotte, Québec: Presses de l'Université Laval, CAN $34.99, ISBN 9782763787398.

*With the People Who Live Here: The history of the Yukon Legislature 1909–1961*, by Linda Johnson, Legislative Assembly of Yukon, $20, ISBN 1553624394. To commemorate the 100th anniversary of representative government in Yukon, the Legislative Assembly held a Special Sitting in Dawson City, in the old Territorial Administration Building (now the Dawson City Museum), on 12 June 2009. (Dawson City had been Yukon's capital and seat of government from the territory's creation until 1953, when the federal government decided to move the capital to Whitehorse.) In anticipation of this centennial, Yukon Speaker Ted Staffen commissioned this book, to chronicle the first half-century of the history of the legislature. Officially released at the Special Sitting, the book was written by Yukon archivist and historian Linda Johnson, under the guidance and direction of Speaker Staffen, Floyd McCormick, the Clerk of the Assembly, and former Clerk, Patrick Michael. The project was co-sponsored with Yukon College President, Terry Weninger.

As the book's overleaf notes, the title "recognize[s] the efforts and contributions of all Yukon people past and present in building the rich legacy that is ours to enjoy in Yukon today. *IVuit* is taken from the words of Councillor James Smith at the opening of the 1958 session of the Yukon Council: "Make no mistake—the success or failure of the vision of the North rests with us, the people who live here.""

## INDIA

*Vidhan Mala, January—June 2009.*

*Who's Who: Members of Parliament of Rajya Sabha and Lok Sabha from Himachal Pradesh 1952–2009.*

## STATES OF JERSEY

*Parliamentary Privilege in Jersey* (presented to the Assembly by the Privileges and Procedures Committee of the States of Jersey on 22 July 2009). The report is available to purchase from the States Assembly Information Centre, Morier House, St, Helier, Jersey, JE1 1DD and can be viewed on the States Assembly website www.statesassembly.gov.je under "Reports" (go to 79 on the archive list of 2009 reports).

Following concerns that elected members of the States were unaware of the extent of parliamentary privilege in Jersey the Greffier of the States (Clerk) was requested to prepare a comprehensive report on this subject. The report (R.79/2009) sets out the main features of privilege and explains how these apply in Jersey (which follows very closely the principles at Westminster and many other Commonwealth parliaments).

## UNITED KINGDOM

*Dod's Parliamentary Companion 2009*, Dod's Parliamentary Communications, £235, ISBN 9780905702797.

*The Judicial House of Lords: 1876–2009*, edited by Louis Blom-Cooper et al, Oxford University Press, £95, ISBN 9780199532711.

*A Short History of Parliament: England, Great Britain, the United Kingdom, Ireland and Scotland*, edited by Clyve Jones, Boydell Press, £75, ISBN 9781843835035.

*The British Constitution*, by Anthony King, Oxford University Press, £18.99, ISBN 9780199576982.

*What's Wrong with the British Constitution?*, by Iain McLean, Oxford University Press, £50, ISBN 9780199546954.

*Democracy: 1,000 Years in Pursuit of British Liberty*, by Peter Kellner, Mainstream Publishing, £25, ISBN 9781845965068.

*Parliaments and Politics during the Cromwellian Protectorate*, by Patrick Little et al, Cambridge University Press, £19.99, ISBN 9780521123099.

*From Gladstone to Lloyd George; Parliament in Peace and War*, by Paul Cavill, Oxford University Press, £55, ISBN 9780199573837.

*All Wales Convention: report*, by the All Wales Convention, ISBN 9780750454193.

*All Wales Convention: report summary*, by the All Wales Convention, ISBN 9780750454209.

The All Wales Convention had three key objectives: to increase understand-

ing of how the National Assembly for Wales works; to undertake public consultation about the National Assembly for Wales having more law-making powers; and report back to the Welsh Government at the end of the debate. The report covers the issues raised in the course of the consultation with the people of Wales.

*Breaking up Britain: four nations after a union*, ed. by M Perryman, Lawrence and Wishart, £16.99, ISBN 9781905007967.

*Breaking up Britain* takes stock of the development of devolution ten years after the first elections to the Scottish Parliament and National Assembly for Wales. Contributions have been made by key political activists, commentators, academics and journalists covering the four nations. Each contributor explores the impact of change in their own country and on Britain as a whole.

*Clear red water: Welsh devolution and Socialist politics*, by N Davies and D Williams, Francis Boutle Publishers, £7.99, ISBN 9781903427446.

Warning of the dangers posed by the incomplete devolution process and the democratic deficit in Labour politics, the authors call on Welsh Labour to consolidate its initial achievements and follow a consistently socialist path to enable Wales to reach its full potential.

*Critical mass: the impact and future of female representation in the National Assembly for Wales*, by J Osmond, Institute of Welsh Affairs, £7.50, ISBN 9787904773474.

This paper assesses the impact of the National Assembly for Wales' achievement in attaining gender balance in its membership and asks how sustainable it will be in future.

*Devolution in the UK*, by J Mitchell, Manchester University Press, £17.95, ISBN 9780719053580.

This book explains devolution today in terms of the evolution of past structures of government in the component parts of the United Kingdom. It highlights the importance of the English dimension and the role that England's territorial politics played in constitutional debates. Similarities and differences between how the components of the United Kingdom were governed are described.

*Equal opportunities and human rights: The First Decade of Devolution in Wales: a report commissioned by the Equality and Human Rights Commission*, by Dr P Chaney, Equality and Human Rights Commission, ISBN 9781842061640.

Ten years on from the establishment of the National Assembly for Wales, the Commission asked Dr Paul Chaney of Cardiff University to examine what devolution has done for the equality and human rights agenda in Wales.

*Funding devolved government in Wales: Barnett & beyond: first report: Summary: July 2009*, by the Independent Commission on Funding and Finance for Wales [the Holtham Commission], ISBN 9780750451666.

*Funding devolved government in Wales: Barnett & beyond: first report: July 2009*, by the Independent Commission on Funding and Finance for Wales [the Holtham Commission], ISBN 9780750451659.

The Commission looked at the pros and cons of the present formula-based approach to the distribution of public expenditure resources to the Welsh Government. This report identifies possible alternative funding mechanisms including the scope for Wales to have tax-varying powers as well as greater powers to borrow.

*Gender and political processes in the context of devolution: research findings*, by N Charles, Economic and Social Research Council.

The National Assembly for Wales has had gender parity or near parity among its elected representatives since its inception. This contrasts with local government in Wales, where women constitute on average 21.8 per cent of councillors, and with Westminster, where women constitute 19.5 per cent of Welsh MPs. These circumstances provide a unique opportunity to investigate the ways in which a differently gendered legislature operates and whether this has an effect on the gendering of political processes and participation at other levels of government.

*Has devolution worked? The verdict from policy makers and the public*, ed. by J Curtice and B Seyd, Manchester University Press, £17.95, ISBN 9780719075599.

Devolution to Scotland and Wales represented the most fundamental reform of the British state for almost a century. Ten years on, how successful has the reform been? Drawing on the views of citizens, elected representatives and interest groups in Scotland and Wales, this book establishes a unique picture of where devolution in Britain stands today.

*National identity, nationalism and constitutional change*, ed. by F Bechhofer, and D McCrone, Palgrave Macmillian, £50, ISBN 9780230244117.

This book investigates how devolution has brought a new focus on the future of Britain and the nature of "Britishness".

*Putting Wales in the driving seat: legislative opportunities for the National Assembly as a result of implementing Part 4 of the 2006 Wales Act*, by the Institute of Welsh Affairs, £10, ISBN 9781904773443.

This report, commissioned by the All Wales Convention, explores what legislative opportunities would accrue to Wales as a result of moving to Part 4 of the Government of Wales Act 2006, following a referendum.

*The impact of devolution on social policy*, by D Birrell, Policy Press, £25.99, ISBN 9781847422255.

With devolved administrations in Scotland, Wales and Northern Ireland, this book makes a comprehensive assessment of the impact of devolution on social policy. It provides a study of developments in the major areas of social policy and a full comparison between Scotland, Wales and Northern Ireland.

*The New British Constitution*, by Vernon Bogdanor, Hart Publishing, £17.95, ISBN 9781841136714.

The last decade has seen radical changes in the way Britain is governed. Reforms such as the Human Rights Act 1998 and devolution have led to the replacement of one constitutional order by another. This book analyses Britain's new constitution, asking why the old system was challenged and why it is being replaced.

*The state of the nations 2008: into the third term of devolution in the United Kingdom*, ed. by A Trench, Imprint Academic, £17.95, ISBN 9781845401269.

Following on from *The dynamics of devolution: the state of the nations 2005*, this edition analyses the outcomes of the devolved elections of May 2007 in terms of both the immediate aftermath and longer-term implications. It examines influences on policy-making, finance, the UK Parliament and the resolution of intergovernmental disputes.

*Toward an anthropology of government: democratic transformations and nation building in Wales*, by W R Schumann, Palgrave Macmillan, £52.50, ISBN 9780230617452.

Based on anthropological fieldwork, this book explores the ambiguous outcomes of devolution in Wales.

*Will Britain survive beyond 2020?*, by D Melding, Institute of Welsh Affairs, £12, ISBN 9781904773436.

This collection of essays argues for a comprehensive constitutional settlement which will make devolution a definitive event and not an ongoing process. This will require recognition of the sovereignties of each home nation but also a continuing role for the wider British state. The book concludes with a signature essay: will Britain survive beyond 2020?

*Working paper: replacing Barnett with a needs-based formula: December 2009*, by the Independent Commission on Funding and Finance for Wales [the Holtham Commission].

In their first report, the Commission recommended that the Barnett Formula should be replaced by a needs-based formula. In this working

paper they set out how this could be done, using a methodology derived from funding decisions of the UK Government and the devolved administrations.

# CONSOLIDATED INDEX TO VOLUMES 74 (2006) – 78 (2010)

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