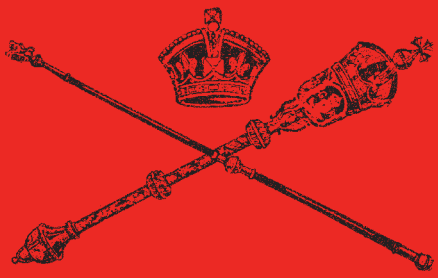

The Table

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IN
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NICOLAS BESLY

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CONTENTS

EDITORIAL

This edition of *The Table* covers a range of developments from across the Commonwealth in 2013.

It starts with an article about the Joint Committee on Parliamentary Privilege by Christopher Johnson, the House of Lords clerk to that joint committee. The joint committee was established following fears—which proved unfounded—that former members who were being prosecuted for misuse of members' allowances might be protected from the criminal law by parliamentary privilege. That led to a government green paper which examined various proposals for rewriting privilege into statute, and perhaps circumscribing it. The outcome of the joint committee turned out to be quite different from its predecessor joint committee on parliamentary privilege, which reported in 1999. Dr Johnson relays the whole story.

The next article is by the Secretary to the National Assembly of South Africa, Masibulele Xaso. The article covers dramatic events surrounding the tabling of a motion of no confidence in the President of South Africa, Jacob Zuma. When the normal bodies that decide on the parliamentary timetable could not reach agreement to table the motion for a particular day, the matter went to court. At issue were the constitutional provisions on motions of no confidence, and whether the constitution required such a motion to be given time. The article covers in depth the court case and its aftermath.

Following that is another masterful article from a regular contributor to *The Table*: Charles Robert, Principal Clerk, Chamber Operations and Procedure, at the Senate of Canada. He is joined by Dara Lithwick, Analyst in Constitutional and Parliamentary Affairs at the Library of the Parliament of Canada, in writing about the development of parliamentary privilege in Australia, Canada, New Zealand and the United Kingdom. Their thesis is that as individual parliaments and democracies have matured over the last century or so they have developed their own approaches to privilege. In some jurisdictions (such as Canada) this has meant balancing privilege against individual citizens' rights, principally those contained in the Canadian Charter of Fundamental Rights. In other countries (such as Australia and the UK) there has been a resurgence in the prominence of privilege, with new recognition of its importance to the functioning of a parliament. The authors style these approaches renewal and restoration, respectively. Their article makes very interesting reading.

The fourth article is by the recently retired Reading Clerk and Clerk of

Outdoor Committees of the House of Lords, Rhodri Walters, CB. He tells a somewhat unhappy story. It concerns a politically highly contentious change to constituency boundaries. A framework for changing constituency boundaries had been set in law in 2011, and was due to be implemented in time for the UK general election in 2015. The opposition were firmly opposed to it and were looking for a way to ensure the boundary review did not happen. The opportunity to do so arose on a bill in 2013 only because the opposition tabled an amendment deemed by the clerks to be irrelevant to the bill. In a legislature with an omnipotent speaker, the amendment would have been ruled out of order and that would be the end of the matter. In the self-regulating House of Lords, where the Lord Speaker has minimal power and the House itself decides what is admissible, it was another story.

The final article is by Marian Johnston, Clerk Assistant and Clerk of Committees of the Prince Edward Island Legislative Assembly. She covers developments following the resignation of the Leader of the Opposition. As in other jurisdictions, the Speaker is charged with recognising the Leader of the Opposition. Problems were caused, though, when opposition Legislative Assembly members elected as their leader someone different to the person elected by the party outside the Assembly. The article covers the many twists in the tale.

In addition to these articles some interesting developments are reported in the miscellaneous notes and elsewhere. The comparative study covers interactions between judges and parliaments, and yields a fascinating mix of common approaches and sharply differing practice. Attention should also be drawn to some notable book reviews.

The editor is, as always, most in debt to all who have contributed to this edition. Contributions to future editions are always welcome. It is hoped that this one proves an enjoyable read.

MEMBERS OF THE SOCIETY

Australia

New South Wales Legislative Council

On 8 February 2013 **Rachel Callinan** was appointed Usher of the Black Rod.

Northwest Territories Legislative Assembly

Tim Mercer, Clerk of the Legislative Assembly, took a one-year leave of absence. **Colette Langlois** was appointed Acting Clerk from 15 August 2013 to 14 August 2014. Mr Langlois was previously the Director of Research, Library and Information Services.

Queensland Legislative Assembly

Kevin Jones, the Sergeant-at-Arms, formally retired from the Parliamentary Service on 5 July 2013 after 21 years of distinguished service. He had enjoyed 12 months pre-retirement leave before his official retirement. Kevin was appointed Sergeant-at-Arms in 2002. Sadly he passed away on 13 August 2013.

Tasmania House of Assembly

Peter Bennison OAM, Deputy Clerk, went on leave in September 2013 prior to retirement (which is effective from 16 July 2014).

Shane Donnelly was promoted to Deputy Clerk on 30 September 2013.

Laura Ross was promoted to Clerk Assistant and Sergeant-at-Arms on 30 September 2013.

Victoria Legislative Assembly

Liz Choat, Deputy Clerk, retired in July 2013. **Bridget Noonan** was promoted to Deputy Clerk in July 2013. **Robert McDonald** was promoted to Assistant Clerk (Procedure) and Serjeant-at-Arms in July 2013.

Western Australia Legislative Council

Malcolm Peacock resigned as Clerk on 16 October 2013. **Nigel Pratt** was appointed Clerk on 27 November 2013.

Michael Baker resigned as Clerk Assistant (Committees) on 10 April 2013. **Dr Colin Huntly** was appointed Clerk Assistant (Committees) on 13 May 2013.

Dr Julia Lawrinson resigned as Usher of the Black Rod on 30 June 2013. **Dr Paul Lobban** was appointed Usher of the Black Rod on 15 October 2013.

Canada

House of Commons

In May 2013 **Richard Fujarczuk** joined the House of Commons as Law Clerk and Parliamentary Counsel. He took over from **Rob Walsh**, who retired in January 2012 after 20 years with the House of Commons. (In February 2014 Mr Fujarczuk resigned as Law Clerk and Parliamentary Counsel for personal and medical reasons.)

British Columbia Legislative Assembly

Robert Vaive, former Clerk Assistant, passed away on 10 August 2013 after a two-year battle with cancer and amyloidosis. Mr Vaive joined the Legislative Assembly of British Columbia in 1994. Before moving to British Columbia he worked at the House of Commons and the Saskatchewan legislature. Mr Vaive retired as Clerk Assistant in January 2013. A memorial service was held

in Victoria on 20 August, followed by a second service in Gatineau, Québec, on 31 August.

E. George MacMinn, OBC, QC, former Clerk of the Legislative Assembly of British Columbia, retired on 1 September, after 56 years with the Legislative Assembly, 18 of those as Clerk and two as Clerk Consultant.

Yukon Legislative Assembly

On 16 September 2013 **Allison Lloyd** took up full-time duties as Clerk of Committees. Before this appointment Ms Lloyd had been a Procedural Clerk at the Senate of Canada (most recently at the Committees Directorate and previously at the Chamber Operations and Procedure Office).

Cyprus House of Representatives

Vasiliki Anastasiadou became Secretary General of the Cyprus House of Representatives in 2013.

Guernsey States of Deliberation

The founding editor of the Guernsey Official Report (Hansard) was **David Robilliard**, who held the post from May 2012 to May 2013, when he moved to become the Secretary to the Bailiff of Guernsey. He was also a Clerk Assistant to the States of Deliberation. In May 2013 **Adrian Nicolle** assumed his roles.

Guyana National Assembly

Lelawattie Coonjah retired as Deputy Clerk of the National Assembly on 10 May 2013.

South Africa

National Assembly

Mohammed Kamal Mansura, the Secretary to the National Assembly of the South African Parliament, retired on 1 March 2013. Mr Mansura was the Secretary to the Assembly from 1 December 2006.

The Assembly appointed **Masibulele Xaso** as the new Secretary to the Assembly with effect from 1 March 2013.

United Kingdom

House of Lords

Lieutenant Colonel Edward Lloyd-Jukes, OBE, the Yeoman Usher of the Black Rod, retired in May 2013. He was made a Lieutenant of the Royal Victorian Order in the Queen's birthday honours of 2013. Edward Lloyd-Jukes became the Yeoman Usher in 2009, having joined the House as Administration Officer in 2004. In 2010–11 Edward Lloyd-Jukes was acting Gentleman Usher

of the Black Rod. In July 2013 he was succeeded as Yeoman Usher by **Brigadier Neil Baverstock, OBE**.

THE JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE

CHRISTOPHER JOHNSON
Clerk, House of Lords[1]

Introduction

The genesis of the latest Joint Committee on Parliamentary Privilege can be traced to the scandal over parliamentary expenses that erupted in 2009. This scandal, which dominated media coverage of Parliament and politics in the run-up to the 2010 general election, ultimately led to three former MPs and one member of the House of Lords seeking to persuade the courts that they were protected by parliamentary privilege from prosecution for false accounting in respect of their expenses claims. That case was ongoing at the time of the 2010 general election, with the result that the Conservatives and Liberal Democrats, in forming a coalition Government in May 2010, made an undertaking, as part of their coalition agreement, to "prevent the possible misuse of parliamentary privilege by MPs accused of serious wrongdoing."[2]

In the event, the United Kingdom Supreme Court ruled in December 2010 that privilege gave no protection to members charged with false accounting,[3] and several members were subsequently prosecuted, convicted and imprisoned. But the Government's commitment remained, and ultimately bore fruit with the publication of a green paper, containing a few draft clauses, in April 2012.[4] A joint committee was then established, to review not just the draft clauses, but parliamentary privilege more widely; it reported in June 2013.[5] The Government response to the joint committee's report was published on 18 December.[6]

This article does not cover all of the joint committee's wide-ranging report. Instead it focuses on three issues: the meaning and scope of privilege; the possible disapplication of privilege to allow for criminal prosecutions; and the

[1] Currently Principal Clerk of the European Union Committee, the author was Clerk of the Journals from 2007 to 2013, in which capacity he was Lords clerk to the Joint Committee on Parliamentary Privilege.

[2] *The Coalition: our programme for government* (May 2010), p 27.

[3] *R v Chaytor and others* [2010] UKSC 52. The case is discussed in *The Table*, volume 79 (2011), pp 165–68. Hereafter referred to as *R v Chaytor*.

[4] *Parliamentary Privilege* (Cm 8318), April 2012.

[5] Report of the Joint Committee on Parliamentary Privilege, session 2013–14 (HL Paper 30, HC 100).

[6] Government Response to the Joint Committee on Parliamentary Privilege (Cm 8771).

protection afforded to media reports of parliamentary proceedings.

The meaning and scope of parliamentary privilege

Underlying all recent analyses of privilege is the recognition of the relationship, occasionally the tension, between legislatures and the courts. Chapter 2 of the joint committee report analyses this relationship, particularly in the context of the recommendation of an earlier joint committee that legislation should be enacted "codifying parliamentary privilege as a whole".[7] In practice legislation has, in all jurisdictions, generally been adopted only in the face of what has been perceived as unwarranted judicial interference in the freedoms of the legislature. This was the case in Australia in the 1980s, when the New South Wales case of *R v Murphy* led to the enactment of the federal Parliamentary Privileges Act 1987. It was also the case in the United Kingdom in the 1830s, when the long-running dispute between the courts and the House of Commons in *Stockdale v Hansard* led to the enactment of the Parliamentary Papers Act 1840.

Yet legislation also carries a risk, since any new statute would quickly be subjected to detailed judicial scrutiny and interpretation. In the words of the then Lord Chief Justice, Lord Judge, "you would end up in interminable discussions and, in court, interminable arguments, about what that really meant … I would leave this well alone."[8] The joint committee accordingly concluded that legislation should be regarded as a "last resort".

The joint committee considered whether there was any evidence that recent decisions by the UK courts had impinged so seriously upon parliamentary privilege as to justify legislation. It concluded that they had not and recommended against comprehensive codification, or indeed any detailed legislation on privilege.

In coming to this conclusion the joint committee endorsed the interpretation of privilege that has evolved in recent judicial case law. In particular, it endorsed the "doctrine of necessity" that was articulated in the 2005 case of *Canada (House of Commons) v Vaid.* In that case the Canadian Supreme Court stated:

> "If the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity—the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly ... must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the

[7] Report of the Joint Committee on Parliamentary Privilege, session 1998–99 (HL Paper 43, HC 214), recommendation 39.

[8] Evidence to the joint committee, quoted at paragraph 40.

> government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency."[9]

This approach was implicitly endorsed by the President of the United Kingdom Supreme Court, Lord Phillips of Worth Matravers, in his judgment in *R v Chaytor*: "In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."

There appears therefore to be a large measure of consensus between the joint committee and the courts in the United Kingdom and Canada: certain matters (proceedings that take place in the House or in committees) are "authoritatively established" as enjoying full parliamentary privilege, not least by virtue of Article 9 of the Bill of Rights 1689. In considering whether matters not forming part of those proceedings are privileged, it is necessary to consider the nature of their connection to those proceedings. In the words of the joint committee, "Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament's sole jurisdiction or 'exclusive cognisance'."

It is notable, though beyond the scope of this article, that the New Zealand Parliament has recently adopted a markedly different approach. Section 10(1) of the Parliamentary Privilege Act 2014, enacted on 7 August 2014, states that the term "proceedings in Parliament", contained in Article 9 of the Bill of Rights, means "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee." The term "incidental to", used without qualification, arguably extends privilege beyond what successive joint committees (or the Canadian and UK courts) have envisaged.[10] The New Zealand Act goes on to reject the use by the courts of any "necessity test" in interpreting the new definition:

> "(4) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted to be used.
> (5) **Necessity test** includes, but is not limited to, a test based on or involving whether the words or acts are or may be (absolutely, or to any lesser degree

[9] *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, paragraph 4.

[10] The point was addressed in terms by the 1998–99 Joint Committee, which stated that the term 'incidental to' "may be too loose". It proposed instead the term "necessarily incidental to"—thereby impliedly incorporating a necessity test (paragraphs 128–129).

or standard) necessary for transaction of the business."

Thus it seems that there is now a marked divergence of view between Commonwealth parliaments on the meaning and scope of parliamentary privilege.

Disapplication of Article 9 of the Bill of Rights

The excitement of 2009 and 2010—when the possibility that parliamentary privilege might enable parliamentarians to evade justice was regularly in the news—quickly subsided once the Supreme Court, in its judgment on *R v Chaytor*, finally settled the issue of privilege and expenses claims. It was thus something of a surprise that the green paper included a draft clause which would have allowed the prosecuting authorities, without reference to Parliament, to disapply Article 9 of the Bill of Rights 1689 (the statutory basis for freedom of speech in Parliament in the United Kingdom) in such a way as to allow evidence relating to proceedings in Parliament to be admitted as evidence in criminal trials. It is worth dwelling on this proposal—by far the most radical, indeed alarming, in the green paper.

The Supreme Court in *R v Chaytor* restated, with qualifications, a long-standing distinction, first articulated in the 1880s, between "ordinary crimes", over which neither House claims exclusive cognisance, and offences committed by virtue of things said in the course of debate. Lord Phillips of Worth Matravers, the President of the Supreme Court, explained the distinction:

> "In this context the expression 'ordinary crime' occurs in the judgment of Stephen J in *Bradlaugh v Gossett* (1884) 12 QBD 271, 283, where he said: 'I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.' Although his use of the expression has been criticised, Stephen J was clearly drawing a distinction between an 'ordinary crime' (such as theft) and a crime (such as sedition) which a Member of Parliament committed by saying something in the exercise of his freedom of speech in the House. What the Member said in the House would fall within the exclusive cognizance [*sic*] of the House and would be protected by article 9 of the Bill of Rights."[11]

In the context of the particular case, the Supreme Court concluded that the offence of false accounting, even if committed in the process of claiming expenses under a scheme established by resolution of the House, was an "ordinary crime". Moreover, Lord Phillips noted that the management of the expenses scheme was essentially an administrative activity, and that Parliament

[11] *R v Chaytor*, paragraph 113.

had "to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses."[12] In coming to this conclusion, he implicitly endorsed the practice adopted by both Houses, over several years leading up to the expenses scandal, of disclosing expenses claims in response to requests under the Freedom of Information Act 2000, rather than refusing to disclose such claims in accordance with section 34 of the Act, on the basis that such refusal was necessary to avoid "an infringement of the privileges of either House".

Lord Phillips, in his summary of Stephen J's concept of an "ordinary crime", used examples from opposite ends of the spectrum: on the one hand a crime such as theft which, wherever committed, could not conceivably form part of a parliamentary proceeding; and, at the other extreme, a crime existing only by virtue of words spoken in debate (such as sedition). Between these two extremes is an extensive middle ground—that is to say, a scenario in which a member commits an "ordinary crime" (for example, accepting a bribe) and then makes statements or performs actions in the course of proceedings that are either part of the crime itself (such as tabling a question in return for payment) or which provide evidence that the crime has occurred. This hypothetical scenario was not considered in *R v Chaytor* and was not relevant to the facts of that case, but it provided fertile ground for the Government.

There has been particular concern in recent years about corruption and bribery offences: until 2010 there was uncertainty over whether the two Houses and their members fell within the scope of the Prevention of Corruption Acts 1889–1916. The last Joint Committee on Parliamentary Privilege, which reported in 1999, recommended that members of both Houses should be brought explicitly within the criminal law of bribery. The joint committee further recommended that evidence relating to an offence committed or alleged to be committed under the proposed new offence should be admissible notwithstanding Article 9. These recommendations were made in the context of an overarching recommendation that "There should be a Parliamentary Privileges Act, bringing together all the changes in the law referred to above, and codifying parliamentary privilege as a whole."

While the 1999 joint committee's recommendation for a comprehensive Parliamentary Privileges Act was largely ignored, its comments on corruption offences opened the door to attempts by the Government to waive parliamentary privilege in order to facilitate prosecutions in this area. These attempts, which were made in the Draft Corruption Bill of 2003 and the Draft Bribery Bill of 2009, elided two distinct concerns: first, the scope of the offence of bribery,

[12] *Ibid.*, paragraph 89.

and the case for it being explicitly extended to members of the legislature; and secondly, the admissibility of evidence to support prosecutions for such offences.

In respect of the first of these concerns, there was general agreement that members should be liable for prosecution in respect of corruption or bribery. This was ultimately achieved in the Bribery Act 2010, which extends to "any function of a public nature", where the person performing that function is expected to perform that function impartially or in good faith.

But in respect of the admissibility of evidence, in particular that subject to parliamentary privilege, both pre-legislative joint committees identified problems in the Government's piecemeal approach. The Joint Committee on the Draft Corruption Bill recommended that the issue should be addressed in the round, by means of a parliamentary privilege bill, and that any waiver of Article 9 should be limited to words spoken or acts performed in the course of proceedings by the defendant in any criminal prosecution.[13] The Joint Committee on the Draft Bribery Bill went further, recommending the removal of the relevant clause from the draft bill, and concluding:

> "Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so. This issue was examined in considerable detail by the 1999 Joint Committee on Parliamentary Privilege, which concluded that a Parliamentary Privileges Act was required. We believe that, should the Government deem it necessary, such an act would be the most appropriate place to address the potential evidential problems in relation to bribery offences."[14]

In coming to this conclusion the Joint Committee may have been influenced by the forthright and, given the circumstances, courageous oral evidence given by the then Clerk of the House of Commons, Dr (now Sir) Malcolm Jack:

> "**Q463 Baroness Whitaker:** Just so I can get it clear because there is a lot of history, now it is Dr Jack's contention, is it, that Members of Parliament should not be like other people and have what they say used in court proceedings against them? I do not know whether they would be unique in that but it would be pretty unusual. I can only think of perhaps confession to a priest or a doctor's surgery, but is that your view, that Members of Parliament should not be able to be tried using as evidence the words they use in Parliament?
>
> **Dr Jack:** Yes that is my view and not only Members of Parliament but

[13] Report of the Joint Committee on the Draft Corruption Bill, session 2002–03 (HL Paper 157, HC 705).

[14] Report of the Joint Committee on the Draft Bribery Bill, session 2008–09 (HL Paper 115, HC 430), paragraph 228.

witnesses and anyone else who is involved.

Q464 Baroness Whitaker: For criminal offences?

Dr Jack: For criminal offences or for any offences.

Q465 Baroness Whitaker: Any criminal offence, bribery, murder?

Dr Jack: Yes, that is my view."

There is of course a tension between the public interest in bringing to justice those accused of criminal offences, and the public interest in the absolute protection afforded to freedom of speech in Parliament. Malcolm Jack's evidence was a clear affirmation of the pre-eminence of the public interest in freedom of speech. The joint committees already mentioned were more qualified in their judgements, but were explicit in recommending that any attempt to re-balance the equation should be undertaken in the context of an holistic approach to privilege.

The Government's green paper, in contrast, favoured the public interest in bringing to justice those accused of criminal offences. The Government's draft clauses went wider than any previously considered, essentially revoking Article 9 in respect of criminal prosecutions. Draft clause 1(1) stated: "No enactment or rule of law preventing the freedom of speech and debates or proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for an offence."

At the same time, the Government proposed the exclusion of those offences which could be described as "speech offences"—offences which "can be committed by speech or the dissemination of information", such as the use of words or threatening behaviour intended to stir up racial or religious hatred.

Several objections were raised to this draft clause. The Clerk of the Parliaments pointed out that there was no suggestion that liability might be limited to the person actually speaking, with the result that members reporting facts related to them by constituents in the course of a debate (for instance, on drugs policy) could inadvertently expose those constituents or others to criminal prosecution. Speaker's Counsel suggested that, as the draft clause placed no limitation upon subsequent use by prosecutors of any statement made in the course of parliamentary proceedings, any such statement could, retrospectively and without warning, be treated as a confession: the proposal would thus put "every member, in effect, under caution". The joint committee noted that members of Parliament in the UK enjoy no personal immunity from prosecution (as is the case in many non-Westminster style jurisdictions) and that the aim of Article 9 is to protect members' parliamentary work and the functioning of the

legislature, rather than the individual member.[15]

The authority to waive Article 9, under the draft clauses, would have been vested in the relevant prosecuting authority—typically the Director of Public Prosecutions in England and Wales. While the prosecuting authority would have been required to have regard to "the need to protect the freedom of speech in Parliament", alongside "the circumstances of the case, including the seriousness of the alleged offence", it is not hard to envisage circumstances in which a prosecuting authority would give very different relative weight to these two factors to that given by the parliamentary authorities. Yet the draft clauses did not provide for any right of appeal by either House against the decision of the prosecuting authority, nor for any exercise of discretion by the judge trying the case.

In summary, the evidence received by the joint committee was clear that the Government's proposal would, in the words of the Clerk of the Parliaments, "have a dramatic effect on the relationship between parliamentarians and the public, as well as on the quality of debate in Parliament." Moreover, the Government was unable to provide a single example of a prosecution which failed, or was not brought, because of the protection afforded to proceedings in Parliament. The joint committee concluded, "It is not in the public interest to curtail [freedom of speech and debate], thereby damaging the quality of debate in Parliament, without compelling evidence that such curtailment is absolutely necessary", and accordingly expressed firm opposition to the Government's draft clauses.

Unexpectedly, the Government abandoned its own draft clauses even before the joint committee's report was published, with the minister conceding that "we don't currently believe that the evidence supports a disapplication of privilege". The formal Government response echoed this comment, accepting the joint committee's conclusion without qualification—a somewhat anticlimactic end to almost 15 years of debate between Parliament and Government. It is to be hoped that a line has now been drawn under this issue.

Reporting of parliamentary proceedings

Neither parliamentary publications (such as Hansard) nor reports or summaries of such publications by others enjoy the protection of parliamentary privilege in the United Kingdom. Instead they enjoy partial statutory immunity under the Parliamentary Papers Act 1840. Under that Act "any extract or abstract" of a document published by authority of either House enjoys immunity, provided that the publisher can show that it has been published "*bonâ fide* and

[15] Joint committee report, paragraph 146.

without malice". It is generally understood that the term "abstract" means a summary or epitome—with the result that media reports of or commentaries on parliamentary proceedings do not generally enjoy any legal protection under the Act.

Instead, such reports enjoy qualified privilege at common law in respect of defamation.[16] In the unlikely case that the whole debate is republished such protection is absolute; if only extracts are published the protection is qualified—that is to say, it is not available if the extracts are shown by the plaintiff to have been published maliciously. This common law protection is reinforced by section 15 of the Defamation Act 1996, under which fair and accurate reports of proceedings in public of a legislature anywhere in the world enjoy qualified protection for defamation purposes.

Outside the field of defamation the position is unclear. In the words of the then Attorney General, Dominic Grieve MP, in a 2011 speech, "it is still an open question as to whether something said in Parliament in breach of a court order may be repeated in the press".[17] Even greater uncertainty arises in the case of media reports (as opposed to verbatim repetition) of words spoken in the course of parliamentary proceedings. This uncertainty could expose reporters and media outlets to legal action in a range of circumstances, extending to breaches not only of court orders but also of the Official Secrets Act 1989.

The joint committee, like the Joint Committees on the Draft Defamation Bill and on Privacy and Injunctions, criticised the gaps and inconsistencies in this patchwork of legal provisions and principles, and recommended a new and comprehensive statutory framework to cover the reporting of parliamentary proceedings.[18] It noted that the legislative framework provided by the 1840 Act had failed to keep pace with modern technology, such as the live streaming of parliamentary proceedings and their immediate re-publication by traditional means and via social media. The joint committee described as "unfortunate" the Government's decision not to respond to the recommendations of the Joint Committee on the Draft Defamation Bill, on the ground that they had "broader implications beyond the law of defamation", and its subsequent rejection of those recommendations, in its green paper on parliamentary privilege, on grounds that related solely to breaches of court injunctions, without any

16 Established in *Wason v Walter* (1868–69) 4 QB 73.

17 Speech to City University School of Journalism, 1 December 2011; see also Sir Malcolm Jack, "Parliamentary privilege: a dignified or efficient part of the constitution?", in *The Table*, vol. 80 (2012), p 58.

18 Joint Committee on the Draft Defamation Bill, session 2010–12 (HL Paper 203, HC 930); Joint Committee on Privacy and Injunctions, session 2010–12 (HL Paper 273, HC 1443).

relevance to defamation law.[19]

At the same time, the joint committee rejected the suggestion of some witnesses representing media organisations that all fair and accurate media reports of parliamentary proceedings should enjoy absolute privilege. The joint committee acknowledged that there was a risk, however remote, that the removal of any requirement that such reports be made without malice could open the way to the "laundering" of defamatory or otherwise unlawful material—the possibility that it could be passed by media organisations to members of one or other House for use in debate, with a view to its ultimate publication under the cloak of privilege. The joint committee instead concluded that a general qualified privilege for reports of parliamentary proceedings, unless they can be proved by the claimant to have been made maliciously, provided a "robust defence of press freedom".

The legislation recommended by the joint committee was based accordingly on the following principles:

- that publications and broadcasts made under the authority of either House should enjoy absolute privilege;
- that the term "broadcast" should be defined broadly, so as to cover all dissemination of images, text or sounds by electronic means, and with provision for this definition to be amended by means of secondary legislation in light of further technological change;
- that qualified privilege should apply to all fair and accurate reports of parliamentary proceedings in the same way as to abstracts and extracts of those proceedings;
- that in all court proceedings in respect of such fair and accurate reports, extracts or abstracts, the claimant or prosecution should be required to prove that the defendant acted maliciously.

The Government response, which appeared in December 2013, was ambivalent. The Government welcomed the joint committee's acceptance that absolute privilege should not apply to reporting of parliamentary proceedings, and that qualified privilege provided sufficient protection. But, notwithstanding the Attorney General's comments on the "open question" of potential legal liability, the Government was "not convinced" by the joint committee's suggestion that the current legal framework significantly inhibited press reporting of Parliament. Nevertheless, the Government offered a commitment to "consider whether wholesale repeal of the 1840 Act, as recommended by the committee, or amendment, would be the best approach to modernise the law in

[19] Government Response to the Report of the Joint Committee on the Draft Defamation Bill (Cm 8295), paragraphs 93 and 94; *Parliamentary Privilege* (Cm 8318), paragraph 311.

this area".

Following publication of the Government response a backbench member of the House of Lords, Lord Lester of Herne Hill, introduced a private member's bill to give effect to the joint committee's recommendations. However, the timing of the bill's introduction, near the end of the 2013–14 session, meant that there was no time for a second reading debate, which would have allowed for further probing of the Government's position. No equivalent bill was introduced at the start of the 2014–15 session, so at the time of writing, and notwithstanding the half-open door left by the Government, there appears to be little immediate prospect of progress in this area.

MOTION OF NO CONFIDENCE IN THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

MASIBULELE XASO
Secretary to the National Assembly of South Africa

Background

On 8 November 2012 the Leader of the Opposition, Ms L D Mazibuko, mandated by eight of the 12 opposition parties in the National Assembly, moved a draft resolution that the House, under section 102(2) of the Constitution 1996, resolves that it has no confidence in President Jacob Zuma on the grounds that under his leadership the justice system has been politicised and weakened; corruption has spiralled out of control; unemployment continues to increase; the economy is weakening; and the right of access to quality education has been violated.

The effect of section 102(2) is that, should the draft resolution be supported by a majority of members of the Assembly, the President, other members of the Cabinet and any deputy ministers must resign.

The motion was placed on the order paper for 9 November 2012, pending programming by the National Assembly Programme Committee (NAPC). Before it went to the NAPC the matter was discussed in the multiparty Whips' Forum on 14 November, but no consensus could be reached on a date for debating the motion.

The NAPC manages the business programme of the Assembly. It is chaired by the Speaker and consists of the presiding officers, the Leader of Government Business and whips of all parties, including the chief whip of the majority party. It meets weekly and, among other things, decides on the short and medium-term programme of the Assembly. Decisions of the NAPC are reached by consensus.

The NAPC met on 15 November and considered the motion of no confidence proposed by the Leader of the Opposition. The committee could not reach consensus on the scheduling of the motion, so the motion could not be programmed for debate.

Later that day, legal representatives of the Leader of the Opposition and the political parties supporting her wrote to the Speaker demanding that he invoked rule 2(1) of the Assembly Rules. Rule 2 is titled "Unforeseen eventualities" and its sub-rule (1) provides that the Speaker may give a ruling or frame a rule in respect of any eventuality for which the Assembly Rules do not provide. The legal representatives further requested that, should the Speaker consider that his power under rule 2(1) was not the appropriate power, he should confirm

that he would take whatever steps were appropriate and necessary to ensure that their clients' notice was scheduled for debate on or before 22 November 2012—the last sitting day of the session. Exchanges of correspondence between attorneys from both sides followed.

High Court application

Notwithstanding this correspondence, Ms Mazibuko made an application to the Western Cape High Court, Cape Town, on 16 November 2012, requesting that the court direct the Speaker to take whatever steps were necessary to ensure that the motion of no confidence in the President of the Republic of South Africa was scheduled for debate and a vote in the Assembly on or before 22 November. It was later apparent from the court's judgment that Ms Mazibuko was concerned that the majority party (the African National Congress), the Speaker and the chief whip of the majority party were intent on frustrating the conduct of the debate. In her view, the Speaker and the chief whip of the majority party had set up what amounted to a series of insurmountable hurdles to debate the motion.

In his analysis of the case Mr Justice Davis said that the questions that the application raised were:

- whether the Assembly had a constitutional obligation to ensure that a motion of no confidence was debated in the House when so tabled; and, in this case, where it was initiated by a minority party or parties;
- if there was an obligation, whether the debate was to be treated as a matter of sufficient urgency so that it could not be postponed for an unreasonably lengthy period;
- if so, whether the rules of the Assembly provided for the vindication of this right enjoined by the party proposing the motion;
- if not, whether the first respondent (the Speaker) had a residual power to schedule the debate, no matter the views of the majority party.

In delivering judgment on 22 November, the court found:

- Ms Mazibuko had a right to introduce a motion of no confidence;
- a motion of no confidence should be treated as a matter of urgency;
- time should have been found to ensure that debate took place expeditiously;
- rules should be created to ensure that the Assembly, rather than the courts, decides when to debate the motion; and
- a specific rule was important, as a result of the express provision in the constitution for a motion of no confidence.

Mr Justice Davis held that a motion of no confidence found express provision in the constitution and must be debated. However, the judge held that it was not up to the High Court to dictate when exactly the motion of no confidence should be debated. He held that rules should deal with deadlocks in the NAPC

and that Parliament may have failed its constitutional obligation by omitting to provide such a rule. The judge ruled that the Constitutional Court had sole jurisdiction to determine whether the absence of a rule which caters for deadlocks in the NAPC meant that the principle of constitutional compatibility had not been met; he also wondered whether the matter should be sent back to Parliament for consideration of a rule which would ensure that the difficulties that he encountered in this case should not recur. He concluded that the absence of such a rule was a problem, although not one that the High Court could fix.

Ms Mazibuko's application requesting that the court direct the Speaker to take whatever steps were necessary to ensure that a motion of no confidence in the President be scheduled for debate and a vote in the Assembly on or before 22 November was dismissed.

Constitutional Court appeal

On 23 November Ms Mazibuko appealed to the Constitutional Court against the decision of the Western Cape High Court. She applied that the case be heard as a matter of urgency. On 30 November the Constitutional Court refused the application to set down the case to be heard as a matter of urgency. Instead, the matter was scheduled for hearing on 28 March 2013. The court ordered the Speaker to file a report with its registrar by 14 March 2013 on progress to ensuring that motions of no confidence are appropriately provided for in the Assembly's rules.

On 20 March 2013 the Assembly Rules Committee met to have a final discussion on measures to provide for motions of no confidence in the Assembly's rules. As parties could not reach consensus on the matter, the Deputy Speaker informed the committee that, in the absence of consensus amongst parties, the document before the committee containing proposed rules would be submitted to the court as the input from the Speaker.

The Constitutional Court heard the matter on 28 March 2013 and ruled on a number of issues including:

- whether the Speaker had residual power under rule 2(1) to "give a ruling or frame a rule in respect of any eventuality for which these rules do not provide";
- whether the rules of the Assembly were inconsistent with section 102(2) of the constitution to the extent that the rules did not provide for a political party represented in, or a member of, the Assembly to enforce the right to have a motion of no confidence in the President scheduled for a debate and voted on in the Assembly within a reasonable time, or at all; and
- whether a motion of no confidence was inherently urgent.

Constitutional Court judgment

In delivering judgment on 27 August 2013 the court found as follows.

On whether the Speaker had residual power under rule 2(1) the court found:

- The importance of a motion of no confidence to the proper functioning of South Africa's constitutional democracy could not be gainsaid. The primary purpose of a motion of no confidence was to ensure that the President and the national executive were accountable to the Assembly. Thus a motion of no confidence played an important role in giving effect to the checks and balances element of the separation of powers doctrine.
- Rule 2(1) did not apply as it was meant to cover matters not dealt with in the rules. Setting and scheduling "any motion" in the Assembly was regulated extensively by rules 187 to 190, which confirm that the task of scheduling motions rested with the Programme Committee. Nothing in the rules justified the inference that the power to set and schedule a motion devolved on the Speaker when the Programme Committee could not decide on a matter within its remit.
- Rule 2(1) was permissive and not peremptory. The residual power of the Speaker was not meant to override the powers and duties of the committees nor to usurp a role that the rules entrusted to a committee.
- The Speaker, acting alone, had no residual power to schedule a motion of no confidence in the President for debate and vote in the Assembly.

On whether the rules of the Assembly were inconsistent with section 102(2) of the constitution, the court ruled:

- The constitution required the Assembly to have a procedure or process which would permit its members to deliberate and vote on a motion of no confidence in the President. In order for members of the Assembly to vote on a motion, the rules of the Assembly must permit a motion of no confidence in the President to be formulated, brought to the notice of members, tabled for discussion and voted on in the Assembly. Section 102(2) was silent on the source or origin of the motion of no confidence and, given the text and purpose of the provision, any member of the Assembly had the right to formulate a motion of no confidence and request that it be debated and voted on in the Assembly.
- The constitution did not set a time for or preconditions on when the Assembly may vote on a motion of no confidence in the President. The ongoing possibility of a motion of no confidence against the President and the Cabinet was meant to keep the President accountable to the Assembly which elected him. A motion of this kind was perhaps the most important mechanism that may be employed by Parliament to hold the executive to account.
- The right to initiate a motion of no confidence was accorded to every

member of the Assembly. This entitlement flowed from section 102(2) and its exercise may be regulated by the Assembly—but the Assembly's rules may not deny, frustrate, unreasonably delay or postpone exercise of the right.

- When a member of a political party in the Assembly, acting alone or in concert with other members, tabled a motion of no confidence under section 102(2) in accordance with the rules, the motion deserved the serious and prompt attention of the responsible committee or committees of the Assembly and, in the last resort, of the Assembly itself. The responsible committee of the Assembly must take steps that ensure that the motion was tabled and voted on without unreasonable delay.
- The constitutional entitlement to move a motion of no confidence in the President could not be left to the whim of the majority or minority in the Programme Committee nor any other committee of the Assembly. It would be inimical to the purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that committee. It was equally unacceptable that a minority in the committee may render the motion stillborn when decisions were made by consensus.
- Lobbying, bargaining and negotiating amongst political parties in the Assembly was a vital feature of advancing the business and mandate of Parliament conferred by chapter 4 of the constitution. However, none of these processes should unjustifiably stand in the way of, or render nugatory, a constitutional prescript or entitlement. That was so because the constitution was supreme; all law and conduct must be consistent with it. The court could not hold that an entitlement granted by the constitution was available only at the discretion of the majority or minority of members serving on the Programme Committee or any other committee of the Assembly. A vote on a motion of no confidence in the President must occur in the Assembly itself.
- Reading the rules as a whole revealed that there was a lacuna in the rules regulating the decision-making and deadlock-breaking mechanism of the Programme Committee charged with arranging the programme of the Assembly. To the extent that the rules regulating the Programme Committee did not protect or advance (or may frustrate) the rights of the applicant and other members of the Assembly in scheduling, debating and voting on a motion of no confidence as contemplated in section 102(2), they were inconsistent with section 102(2) and, to that extent, invalid.

On whether a motion of no confidence was inherently urgent, the court ruled:

- A motion of no confidence must be accorded priority over other motions and business by being scheduled, debated and voted on within a reasonable

time, given the programme of the Assembly.

- Once sponsored in a manner prescribed by the rules, the Assembly must take prompt and reasonable steps to ensure that the motion was scheduled, debated and voted on without undue delay.

The court accordingly ruled that the applicant was entitled to a declaratory order that chapter 12 of the rules was inconsistent with section 102(2) of the constitution to the extent that it failed to make provision for the unhindered exercise by a member of the Assembly, acting alone or in concert with other members, of the right to have the Assembly schedule, deliberate and vote on a motion of no confidence in the President. The court suspended the declaration of invalidity for six months to give the Assembly the opportunity to remedy the defect in chapter 12 of the rules.

Remedial action by National Assembly following Constitutional Court judgment

On 25 February 2014 the National Assembly gave effect to the ruling by the Constitutional Court by adopting a new rule dealing with motions of no confidence under section 102 of the constitution.

New rule 102A reads:

"**102A: Motions of no confidence in terms of section 102 of the Constitution**

(1) A member may propose that a motion of no confidence in the Cabinet or the President in terms of section 102 be placed on the order paper.

(2) The Speaker must accord such motion of no confidence due priority and before scheduling it must consult with the Leader of Government Business and the Chief Whip of the Majority Party.

(3) The motion must comply, to the satisfaction of the Speaker, with the prescripts of any relevant law or any relevant rules and orders of the House and directives and guidelines recommended by the Rules Committee and approved by the House, before being placed on the order paper, and must include the grounds on which the proposed vote of no confidence is based.

(4) The Speaker may request an amendment of or in any other manner deal with a notice of a no confidence motion which contravenes the law, rules and orders of the House or directives and guidelines approved by the House.

(5) After proper consultation and once the Speaker is satisfied that the motion of no confidence complies with the aforementioned prescribed law, rules, orders, directives or guidelines of the House, the Speaker must ensure that the motion of no confidence is scheduled, debated and voted on within a reasonable period of time given the programme of the Assembly.

(6) The debate on a motion of no confidence may not exceed the time allocated for it by the Speaker, after aforesaid consultation process.
(7) If a motion of no confidence cannot reasonably be scheduled by the last sitting day of an annual session, it must be scheduled for consideration as soon as possible in the next annual session.
(8) Rules 95, 97 and 101 do not apply to motions of no confidence in terms of this rule."

RENEWAL AND RESTORATION: CONTEMPORARY TRENDS IN THE EVOLUTION OF PARLIAMENTARY PRIVILEGE

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INTRODUCTION: EVOLUTION AND PARLIAMENTARY PRIVILEGE

Ever since the time of Charles Darwin scientists have studied evolution and how species adapt over time to changing conditions to better ensure their survival. As part of this process of adaption, it is not uncommon for species to develop distinct traits to meet the requirements of specific local environments. A similar phenomenon seems to be occurring with certain parliaments of the Commonwealth. They too are facing pressures to adapt the conduct of parliamentary affairs in response to changes in their operating climate. In their case, adaption over time to changing conditions is not so much to ensure their survival, but to demonstrate their continuing relevance as democratic institutions. The causes of these changes are open to question, but a good case can be made that a principal agent is rights-based law, which focuses on ensuring the dignity and rights of every individual. This legal orientation generates pressures to adapt and modernise the work of all Commonwealth parliaments. This includes accommodating greater demands for transparency and accountability, and greater engagement with the electorate. The evidence of this pressure is almost indisputable and there are indications that different Commonwealth parliaments are seeking to adapt to better accommodate their specific environments.

One common, core feature that is being affected by this modernisation is parliamentary privilege. The basic purpose of privilege is to allow parliaments and their members to carry out their functions freely. Though a part of the law, parliamentary privilege provides an exemption from certain ordinary laws; it is this aspect of immunity that is creating some conflict with the expectations and norms of rights-based law. Recent developments in the parliaments of the

* All views expressed in this article are those of the authors, who would like to thank Jonathan Shanks and Ronald Lieberman for their assistance in completing this article.

United Kingdom and New Zealand have provoked renewed questions about the necessity and scope of different privileges that traditionally protect these parliaments from interference. These questions challenge the extent of these exemptions from the general law and the limits of control over parliamentary proceedings. New Zealand, following the example of Australia, has recently codified privilege in response to a court decision that limited the scope of protection of free speech. The United Kingdom Parliament, while seeking to recover from the MPs' expenses scandal, remained resistant to any codification of privilege, despite a recommendation 15 years earlier in a report of a much-lauded joint committee on privilege. For its part, Canada's Parliament has yet explicitly to consider the implications of several Supreme Court decisions on the relationship between privilege and rights.

The different approaches in these jurisdictions suggest that parliamentary privilege is adapting, albeit sometimes subtly, to suit specific parliamentary environments. This process of modernisation is leading to a more deliberate acclimatisation of parliamentary privilege to the legal-political culture of the parliament concerned. This represents a shift in the long history of a stable, widely accepted concept of privilege prevalent throughout the Commonwealth. It is worth exploring.

On renewal and restoration

At least two main evolutionary trends have become evident in the contemporary consideration of parliamentary privilege in the United Kingdom, Australia, New Zealand and Canada. These two trends can be characterised as renewal—a more explicit approach to accommodate individual rights with parliamentary privilege—and restoration—a more implicit approach that places greater emphasis on the protection of privilege in sustaining the work of Parliament.

The "renewal" approach is typified by its reliance on the necessity test, which attempts to give fresh life to parliamentary privilege by evaluating it in a rights-based context to determine what elements of parliamentary privilege continue to be required for Parliament to function appropriately. This approach was hinted at by parliamentary committees studying privilege in the United Kingdom in the 1960s and 1970s.[1] It became much more explicit in the report of the Joint Committee on Parliamentary Privilege, published in 1999.[2] As

[1] United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, "Report from the Select Committee on Parliamentary Privilege" (1 December 1967); United Kingdom, House of Commons, Committee of Privileges, 3rd report, "Recommendations of the Select Committee on Parliamentary Privilege" (14 June 1977).

[2] United Kingdom, Parliament, Joint Committee on Parliamentary Privilege, "Report and Proceedings of the Committee" (1998–99, HL Paper 43, HC 214).

explained in the report, necessity was the basis for determining the worth of any claimed privilege. It was the same necessity that the Supreme Court of Canada used to test the scope of a privilege in its 2005 decision in *House of Commons v Vaid.*[3] Courts in New Zealand have also used the necessity test to frame the relationship between individual rights and parliamentary privilege.[4] In the necessity test the onus is on the party claiming the privilege to demonstrate its application and ongoing import, rather than on the party challenging the privilege.

On the other hand, the "restoration" perspective has attempted to reframe traditional elements of privilege to fit a contemporary context. The trend towards restoration has been typified most recently by statutes in Australia[5] and New Zealand[6] that have explicitly incorporated an expansive definition of article 9 of the Bill of Rights 1689, in order to ensure that Parliament can function without the risk of litigation creating a "chilling effect" on the flow of information to Parliament. Article 9, originally intended to protect Parliament from the Crown, states, "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[7] As discussed later, the statutes in Australia and New Zealand repurposed article 9 and enlarged its scope to address modern circumstances. This restoration of a more traditional understanding of privilege was in response to two court judgments, collectively cited as *R v Murphy.*[8] The broad interpretation of article 9 in the Australian and New Zealand statutes seems to shift the onus onto the party challenging the application of the privilege to demonstrate why the privilege should not apply. This is the subtle yet significant difference between the renewal and restoration approaches to interpreting privilege.

It is too early to determine the ultimate effect that the contending perspectives of renewal and restoration will have on the evolution of parliamentary privilege. Both are responses to the contemporary rights-based legal systems in which the parliaments of the United Kingdom, Australia, New Zealand and Canada operate today. While it is likely that the development of parliamentary privilege in these jurisdictions will result in variants of the exercise of privilege framed by one approach or the other, based on local differences, they nonetheless continue to share a common heritage and common purpose.

3 *Canada (House of Commons) v Vaid* 2005 SCC 30.
4 *Attorney-General v Leigh* 1011 NZSC 106.
5 Parliamentary Privileges Act 1987 (Australia).
6 Parliamentary Privilege Act 2014 (New Zealand).
7 1 Will and Mary, sess. 2, c. 2 (1689).
8 *R v Murphy* (1986) 5 NSWLR 18.

PARLIAMENTARY PRIVILEGE: ORIGINS

Parliament v the Crown

At the end of the 17th century Parliament triumphed in its dispute for power with the Crown and its royally controlled courts. Through article 9 of the Bill of Rights 1689, Parliament confirmed the core privileges of freedom of speech for itself and its members, and absolute control over its proceedings, which were not to be questioned or impeached in any court or place outside of Parliament. The enactment of the Bill of Rights heralded the development of responsible government in the 18th century. This remarkable achievement also provided a model of parliamentary government that was sought by virtually all of the colonies established by Britain during the age of empire. From early days, colonial legislatures insisted on having the same privileges possessed by Westminster.[9] With the protection of privilege, they wrested authority from the governor and established control over supply. With this success, these privileges became a central feature of colonial assemblies as they developed their capacity for self-government and as the colonies themselves gradually obtained sovereignty.

Privilege in the colonial legislatures

Originally, colonial legislatures sought to claim the same privileges as the British Parliament as a means of establishing their importance and status within the structure of colonial government. By linking themselves to Westminster through a claim to parliamentary privilege, colonial legislatures could associate themselves with the substantive role that the British Parliament had established for itself during the Glorious Revolution.

The possession of parliamentary privilege by colonial legislatures came mainly through common law. It was accepted, sometimes begrudgingly, by governors as the inevitable consequence of the growing role of the legislature, whose members represented the people, passed bills, voted supply and insisted on the right to hold the government to account. Once acknowledged, the common law allowed legislatures the right to claim the privileges exercised by Westminster, save the power to punish for contempt. However, as Britain developed its ability to manage an empire it sometimes offered to its more developed colonies an explicit grant of the full range of privilege, including that of contempt. This happened with several Australian colonies in the mid-19th century.[10] Canada

[9] Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1943); *Enid Campbell, Parliamentary Privilege in Australia* (Victoria: Melbourne University Press, 1966).

[10] Enid Campbell, *ibid.*, pp 23 25.

also benefited from this offer at the time of Confederation in 1867.[11] It was subsequently provided to the Parliament of the Australian Commonwealth in 1901 and to Ireland in the third attempt at home rule in 1914.[12]

Uniformity throughout the colonies

By strictly adhering to the British model, a standardised concept of parliamentary privilege was assured among all colonial legislatures, whether it was founded in common law or by express grant. With respect to those legislatures expressly granted privilege, there was usually a provision that stated the colonial legislature could not exceed Westminster in the privileges it claimed or exercised; they were generally bound by the parameters of the privileges of Westminster. When privilege was founded in common law and the legislature was allowed to amend its constitution, the expectation seemed to be that these privileges would conform to the British model and be limited by it.

This uniformity evident throughout the colonies was reinforced by other factors that exerted a strong determinative influence for generations. One was the single legal system, with its common appellate court structure. Though the colonies had the right to make their own laws for local purposes, these were subject to disallowance by or referral to Britain. During this phase there was authority to assert British law over colonial law in cases of incompatibility, under the Colonial Laws Validity Act 1865.[13] This was in addition to the common law which was applied by the courts in Britain and throughout the colonies. All this reinforced the British identity of the law, creating a network of integrated relationships between Britain and the colonies. Parliamentary privilege was part of that law.

Equally significant, appeals from colonial courts were subject to review by the British Judicial Committee of the Privy Council (JCPC). This added to the unitary nature of the legal system.[14] Even as the colonies acquired full autonomy and sovereignty, appeals to the JCPC continued for some time as the ultimate court of adjudication. Appeals to the JCPC were not abolished in Canada until 1949, in Australia until 1968 and in New Zealand until 2003. As a result, any decision made by the JCPC about privilege had potential application throughout the Commonwealth. Furthermore, because of this common judicial

[11] Constitution Act 1867 (UK), 30 & 31 Vict. c. 3, s. 18.

[12] *An Act to constitute the Commonwealth of Australia*, s. 49; Government of Ireland Act 1914, 4 & 5 Geo. 5, c. 90, s. 12(1).

[13] C. 23.

[14] See, for example, Louis Blom-Cooper, Brice Dickson and Gavin Drewry, eds, *The Judicial House of Lords 1876–2009* (Oxford: University Press, 2009), chapter 19, "The Old Commonwealth", at 339–75.

framework, decisions made by other courts in the Commonwealth could exert an influence in other jurisdictions. The cross-fertilisation of jurisprudence continues to influence much of the understanding of the basic concepts of modern privilege.[15]

Erskine May's treatise: the standard resource

Another major contributor to fostering and maintaining a uniform understanding of privilege was the pervasive and enduring reliance on the pre-eminent authority on parliamentary practice, Erskine May's *Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, first published in 1844 and now in its 24th edition.[16] Though written explicitly for the Parliament at Westminster, it was faithfully used as a procedural manual by all colonial legislatures—national, state and provincial—for many years and it remains an important procedural resource, especially on privilege. Indeed, the definition of parliamentary privilege dating from the 14th edition of Erskine May, published in 1946, has become the standard and is copied in procedural texts across the Commonwealth.[17]

Privilege, general law and the courts: Stockdale v Hansard

The first edition of Erskine May appeared when the controversy over the 1839 decision of *Stockdale v Hansard* was fresh.[18] In this case, the court purported to determine the extent of a disputed privilege. The printers of the House of Commons, Messrs Hansard, had printed by order of the House a report prepared by the inspector of prisons which contained what Mr Stockdale alleged was a libel. The court ultimately held that while parliamentary privilege protected papers printed by order of the House for the use of its members, this protection did not extend to papers sold outside the House to the public. The importance of the decision extended beyond the specifics of the case. It substantiated the authority of the court to determine the scope of any privilege

15 See, for example, *Prebble v Television New Zealand Ltd* [1995] 1 A.C. 321.

16 Erskine May, *A Treatise Upon The Law, Privileges, Proceedings and Usage of Parliament* (London: Charles Knight & Co, 1844). Sir Malcolm Jack, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed. (London: LexisNexis, 2011).

17 May was ousted in Canada as the primary authority at federal level only in 2000 by the publication of *House of Commons Procedure and Practice*. The Canadian experience is similar to that of other Commonwealth jurisdictions. Many now have published manuals. These became necessary to reflect better their distinct practices that emerged in response to their political needs and culture. Australia saw Erskine May supplemented in the Commonwealth Parliament by *Odgers' Australian Senate Practice*, first printed in 1953, and by *House of Representatives Practice*, first published in 1981. New Zealand produced *Parliamentary Practice in New Zealand* in 1985.

18 *Stockdale v Hansard* (1839) 9 Ad. & E. 1, 112 E.R. 1112.

and, equally important, it established the role of the court in assessing a disputed privilege on the basis of its necessity.

The effect of *Stockdale v Hansard* was profound and long lasting. The controversy surrounding the Stockdale decisions seemed to confirm the House of Commons' suspicions of the court's potential overreach. The decision was seen by the House of Commons as a direct challenge to its authority. The judgment appeared to undermine parliamentary supremacy by ignoring the declared position of the House of Commons as expressed through resolutions. As a compromise to get out of a difficult situation, Westminster passed the Parliamentary Papers Act 1840, which established in statute the protection of reports and papers published by authority of Parliament from any liability without addressing the basic problem of the claim of jurisdiction by the courts which the Commons disputed.

To codify or not to codify? Original considerations

Erskine May himself was troubled by the fallout from *Stockdale v Hansard* and grappled with how best to avoid potential conflict or to reconcile the different positions of Parliament and the courts. Despite the risk that codification of parliamentary privilege could potentially limit it or make it inflexible, yet still subject to court review, Erskine May ultimately accepted that codification could reduce the risk of more confrontations and maintain Parliament's vital interests. In his opinion, a comprehensive codification could be used by Parliament to instruct the courts, as was done by enacting the Parliamentary Papers Act 1840. Codification was never adopted by Westminster and, despite the enormous influence of Erskine May, no colonial legislature took concrete steps to codify its privileges until much later.

The proposal to codify parliamentary privilege found in Erskine May's treatise was abandoned in 1946 with the publication of the 14th edition, edited by Gilbert Campion, the Erskine May of his time.[19] The history and analysis of privilege in the 14th edition exceeded anything in scope and depth that had been written in any of the earlier editions. Unlike Erskine May, Campion readily admitted the role of the courts in setting the scope of privilege, while Parliament controlled its exercise. Following an extensive account of the history of the rivalry between the House of Commons and the courts, Campion concluded that the position of the Commons as expressed in the Stockdale case was "untenable" and the basis of its arguments "fallacious".[20] Indeed, as he saw the issue, it was beyond dispute that the law of Parliament was part of the general

[19] Sir Gilbert Campion, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 14th ed. (London: Butterworth & Co, 1946).

[20] *Ibid*. at 170.

law, that its principles were knowable to judges, and that it was the duty of common law courts to define its limits. Furthermore, Campion acknowledged, it was the task of the courts to define the limited sphere of the absolute and exclusive jurisdiction of the Commons and to state the principles on which it was based.[21] Given that the House of Commons had not refused to submit its privileges to the courts for more than 100 years, Campion concluded that it had given practical recognition to the courts' jurisdiction over the existence and extent of its privileges. The quid pro quo of this settlement was that courts had consistently refused to interfere in the application by the House of its recognised privileges.[22]

Based on this detente, Campion dropped the suggestion long advocated by Erskine May to codify privilege. However, some 40 years after Campion's 14th edition of the Treatise, the concerns raised by Erskine May in response to *Stockdale v Hansard* would re-emerge far from Westminster. In response to controversial court judgments about aspects of privilege,[23] the Australian Commonwealth Parliament was prompted to enact legislation in 1987 codifying its understanding of parliamentary privilege.[24] This sequence of an adverse court decision followed by a corrective response by Parliament was repeated in 2014 in New Zealand.[25] This contrasts with what happened in the United Kingdom following the expenses scandal in 2009 involving several MPs and peers. In light of a judgment of the British Supreme Court, as explained below, both the government and Parliament, being satisfied with the court's analysis of privilege, concluded that codification was unnecessary.[26]

PARLIAMENTARY PRIVILEGE: TOWARDS A CONTEMPORARY EVOLUTION

Decolonisation and differentiation

Campion's 14th edition of Erskine May coincided with several important developments after World War II. The process of decolonisation that started with the Statute of Westminster of 1931 accelerated after 1945 and spread to all corners of the Commonwealth. It began with the independence of India and Pakistan and, carried by the winds of change, soon reached other British

[21] *Ibid*. at 170.

[22] *Ibid*. at 175.

[23] *R v Murphy*, *supra* note 8.

[24] Australia, Parliamentary Privileges Act 1987, Act No. 21 of 1987, as amended.

[25] New Zealand, Parliamentary Privilege Act 2014, 2014 No 58, assented to 7 August 2014. Per section 2 of the Act, it came into force on the day it received Royal Assent.

[26] See the 2012 UK Government green paper, *infra* note 62, as well as the 2013 joint committee report, *infra* note 64.

colonies in Asia, the middle east, Africa and the Caribbean. The emergence of the modern Commonwealth as an association of free nations having a shared history with Britain and a similar structure of government ensured that the parliamentary system would continue to provide a basic template which included parliamentary privilege. At the same time, independence invited the possibility of variation and divergence as concepts and practices adapted to match the evolving political and legal culture of each member nation. This was particularly true for countries like Australia, Canada and New Zealand—the senior dominions.

Towards a rights-based approach

Independence and self-determination were part of the growing importance of rights-based law that came to exercise significant influence on parliaments. The recognition of rights-based law at the international level dates from the Charter of the United Nations of 1945,[27] which was succeeded by the Universal Declaration of Human Rights adopted by the United Nations in 1948.[28] These were followed by other agreements of a similar nature, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.[29] Beyond these international agreements, civil and human rights legislation was incorporated more directly into many national legal systems. In Canada, at the national level, it began with the Canadian Bill of Rights in 1960,[30] further supported through the Canadian Human Rights Act in 1977[31] and, finally, the Canadian Charter of Rights and Freedoms in 1982.[32] Australia enacted legislation prohibiting various forms of discrimination in the 1970s,[33] enforced by the Human Rights Commission established in 1986. New Zealand adopted a Human Rights Act in 1993 and Britain did the same in 1998.[34] The range

[27] Charter of the United Nations, 26 June 1945, Can TS 1945 No 7.

[28] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (10 December 1948).

[29] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[30] Canadian Bill of Rights (S.C. 1960, c. 44).

[31] Canadian Human Rights Act, original citation: (S.C. 1976–77, c. 33, s. 1); current citation: (R.S.C. 1985, c. H-6).

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

[33] For example, the Racial Discrimination Act 1975 (Act No. 52 of 1975 as amended), the Sex Discrimination Act 1984 (Act No. 4 of 1984 as amended), the Australian Human Rights Commission Act 1986 (Act No. 125 of 1986 as amended), the Disability Discrimination Act 1992 (Act No. 135 of 1992 as amended) and the Age Discrimination Act 2004 (Act No. 68 of 2004).

[34] New Zealand Human Rights Act 1993 (see also the Bill of Rights Act 1990); United Kingdom, Human Rights Act 1998 (c. 42).

and force of these measures are not identical in each country, though there is considerable overlap. Despite its strong history of respect for rights, New Zealand's Human Rights Act is not entrenched into the country's constitutional framework. This is basically the same situation in Britain and Australia. In Canada, the courts have recognised the quasi-constitutional status of the Canadian Human Rights Act[35] and the Charter has undoubted constitutional weight, being an integral part of the Constitution Act 1982.

Parliament as a public space

The development of a rights-based orientation in law which enhanced the status of individuals was accompanied by a shift in the work of parliamentarians to include greater involvement with and on behalf of their constituents. This phenomenon was common in much of the Commonwealth and became apparent early on among the more developed nations possessing more resources. In addition to dealing with legislation seeking materially to improve the lives of fellow citizens, to enhance fundamental equality and to tackle unwarranted discrimination, parliamentarians increasingly acted as ombudsmen and agents for their constituents. An associated aspect of this was the view that Parliament itself, once seen primarily as a secretive or semi-private "grand inquest of the nation", should be more publicly visible as the people's forum. This was achieved by different means, including greater participation of non-parliamentarians in committee work (primarily as witnesses), broadcasting of deliberations (first through radio, then television and most recently social media) and by various efforts at outreach.

Rights and the courts

While these changes were occurring in parliaments in varying degrees across the Commonwealth, courts were becoming generally more prominent. If Parliament was the forum for legislation to enhance rights, courts provided the venue to test the success or limits of those parliamentary efforts. The relationship between Parliament and the courts, each operating in their distinct spheres, is intended to be complementary. Parliament enacts the law and the courts interpret the law. Each performs a necessary function that, in proper balance, better ensures the promotion and protection of citizens' rights and the general welfare of the nation. Conflicts between the two branches of government are usually avoided through observance of institutional comity. However, when conflicts arise between Parliament and the courts, the relative position of each, which depends on their constitutional status, becomes important. In the United

[35] See, for example, *Vaid*, *supra* note 3 at para 12.

Kingdom and New Zealand, neither of which has a formal written constitution, under the doctrine of parliamentary supremacy Parliament has authority to override judgments of the courts. The situation is not as clear in Australia or Canada, which each has a written constitution to deal with a federated state.[36]

Though not directly related to parliamentary privilege, these developments in rights-based law exerted an undeniable influence on the modern appreciation of privilege. This influence is detectable in the reports of parliamentary committees on privilege, as well as through rulings of courts which addressed the subject on the basis of necessity or the extent of article 9 of the Bill of Rights. As suggested above, the trend towards modernising privilege has followed two paths, of restoration, relying on article 9, and renewal, using the necessity test. The effect of both these trends has been to narrow gradually and incrementally, if unevenly, the scope of parliamentary privilege.[37] This inclination to restrict parliamentary privilege to what is more than less compatible with modern expectations in a rights-based legal culture becomes clearer when viewed retrospectively—by looking back at the overall direction of reports issued by different parliaments on privilege during the last 40 years and by assessing relevant court judgments in that time.

RENEWAL AND RESTORATION: ADAPTATIONS OF PARLIAMENTARY PRIVILEGE

An awareness of the need to adjust parliamentary privilege to accommodate a contemporary environment could be seen from reports on the subject produced by select committees at Westminster, where four major inquiries on privilege have been conducted since 1967, as well as in jurisprudential and legislative developments in Australia, Canada and New Zealand. In Australia and New Zealand parliaments have attempted to restore, through legislation, robust assertions of privilege in the face of court decisions. In Canada, on the other hand, the Supreme Court's attempts to encourage the renewal of parliamentary privilege by evaluating the necessity of various claims of privilege from a rights-based perspective seem to be generally accepted, though the Canadian Parliament has yet comprehensively to review parliamentary privilege in the wake of these decisions.

[36] In Canada courts must also adjudicate on and enforce the Canadian Charter of Rights and Freedoms, part of the constitution of Canada.

[37] Y. Tew, "No longer a privileged few: expense claims, prosecution and parliamentary privilege" (2011) 70(2) *The Cambridge Law Journal* 282.

1967: first parliamentary attempt to harmonise privilege and contemporary rights

The 1967 report of the UK House of Commons Select Committee on Parliamentary Privilege was ground-breaking; it was the first serious attempt to assess privilege comprehensively in a contemporary setting. The remit of the committee was "to review the law of parliamentary privileges … and the procedures by which cases of privilege are raised and dealt with ... and to report whether any changes in the law of privilege and the practice of the House are desirable".[38] The committee sought to relate privilege to the basic requirements of a modern legislature by asking what is justifiable to provide it with reasonable levels of protection and immunity. Among its recommendations, the committee proposed: that the misunderstood expression "parliamentary privilege" should be replaced with "rights and immunities"; that the penal jurisdiction of the House should be exercised as sparingly as possible; that legislation should be introduced to clarify the scope of absolute and qualified privilege as a defence; and that procedures for dealing with complaints of contempt should be reformed to allow a fairer process, including possible representation by counsel.[39]

Many of the recommendations in the 1967 report were reiterated a decade later by the new Select Committee of Privileges in its report of 1977; this time most were adopted. However, these efforts were not enough. As discussed below, in 1999 a joint committee was appointed with a mandate to go further.

1987: Australia codifies privilege

Partly in response to the 1967 and 1977 UK reports on privilege, in 1982 the Australian House of Representatives resolved to appoint a joint committee to review and report on whether any changes were desirable in respect of the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives. In its 1984 report,[40] the joint committee issued a comprehensive list of recommendations that it proposed to implement through legislation, amendments to standing orders and new resolutions in each House. The joint committee's report indicated that the purpose of legislation would not be to codify privilege *per se*, as that would forfeit flexibility in order to achieve certainty. Rather, the report sought a middle ground whereby elements of privilege would be confirmed or clarified in statute.

[38] United Kingdom, House of Commons, *Report from the Select Committee on Parliamentary Privilege, Together with the Proceedings of the Committee, Minutes of Evidence Taken Before the Select Committee on Parliamentary Privilege in Session 1966–67, and Appendices*, 1 December 1967 at v.

[39] *Ibid*. at xlix.

[40] Select Committee on Parliamentary Privilege, *Final report*, Parliamentary Paper No. 219/1984, 3 October 1984.

Not long after the joint committee's report was published, the Supreme Court of New South Wales issued two judgments (in 1985 and 1986), collectively referred to as *R v Murphy*,[41] which narrowed the understanding of the privilege of freedom of speech guaranteed by article 9. The court decided that statements made in parliamentary proceedings could be used by a court in certain circumstances, because it would not result in the member of Parliament or committee witness being subject to legal consequences for what they said in Parliament. Hunt J's rationale in *R v Murphy* was to ensure that the privilege of freedom of speech did not unduly limit the ability of the courts to refer to what was said in Parliament.

However, in a reaction harking back to *Stockdale v Hansard* and the Parliamentary Papers Act 1840, the Australian Parliament rejected the narrow approach to article 9 in *R v Murphy* and opted to restore its more expansive interpretation via legislation: the Parliamentary Privileges Act 1987.[42] This Act also implemented most of the joint committee's recommendations from 1984. In addition, in 1988 the Australian Senate passed resolutions on other elements of privilege. Of most interest was the 1988 Senate resolution according citizens a "right to reply".[43] This "right to reply" enables citizens to respond, in the parliamentary record, to comments made about them in the Senate or the House of Representatives. While this "right" has since been criticised as being too slow to activate and too dependent on the discretion of the Speaker, it nonetheless reflects the Australian Parliament's recognition that parliamentarians' speech can have adverse effects on members of the public, and that contemporary norms require that those damaged by speech in Parliament should have redress. It is possible that this development will remain particular to Australia—a localised response to an issue which has been raised in other parliaments in the Commonwealth.

41 The first judgment is unreported. The citation for the second decision is (1986) 5 NSWLR 18. Hunt J argued: "Freedom of speech in Parliament is not now, nor was it in 1901 or even in 1688, so sensitive a flower that, although the accuracy and the honesty of what is said by members of Parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law. It is only where legal consequences are to be visited upon such members or witnesses for what was said or done by them in Parliament that they can be prevented by challenges in the courts of law from exercising their freedom of speech in Parliament." He continued, "I cannot accept that any parliament—even one in 1688—would seriously have intended parties to curial proceedings to be disadvantaged in this way by denying to them that ordinary incident of litigation simply because the witness whose credit is attacked, and who will suffer no greater embarrassment than any other witness, had previously given evidence to a parliamentary committee."

42 Australia, Parliamentary Privileges Act 1987, supra note 24. For a contrary assessment see Geoffrey Marshall, "Impugning Parliamentary Impunity", *Public Law* (Winter 1994), 509–13.

43 The Australian House of Representatives adopted a similar resolution in 1997.

1999 UK joint committee report: "necessity" as the means to renew privilege

Following developments in Australia, and more than 20 years after it last considered privilege, the UK's joint committee published in 1999 what became a seminal report on parliamentary privilege. More explicitly than the 1967 committee, this joint committee explained that its approach was guided by the need to match "parliamentary privilege to the current requirements of Parliament and present-day standards of fairness and reasonableness."[44] Its goal was to renew parliamentary privilege by assessing the essential protection required by Parliament and its members to carry out their responsibilities in a modern setting. The joint committee framed its approach to privilege in terms of necessity, asking "whether each particular right or immunity currently existing is necessary today, in its present form, for the effective functioning of Parliament."[45] It further emphasised that "Parliament should be vigilant to retain rights and immunities which pass this test, so that it keeps the protection it needs. Parliament should be equally vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today's conditions."[46] With respect to article 9, the joint committee took an approach that would not undermine its essential protection, but was cautious not to extend its protection beyond what was reasonable in a contemporary setting.[47]

The joint committee reflected on the relationship between Parliament and the courts in interpreting parliamentary privilege, noting how Parliament should proactively define what privileges are necessary:

> "There is merit, in the particularly important areas of parliamentary privilege, in making the boundaries reasonably clear before difficulties arise. Nowadays people are increasingly vigorous in their efforts to obtain redress for perceived wrongs. In their court cases they press expansively in areas where the limits of the courts' jurisdiction are not clear. Faced with demarcation problems in this jurisdictional no-man's land, the judges perforce must determine the position of the boundary. If Parliament does not act, the courts may find themselves compelled to do so. Hence some of the recent court decisions mentioned in this report."[48]

As to the protection afforded by "exclusive cognisance", the joint committee stated that it should be confined to activities "directly and closely" related to parliamentary proceedings and that Parliament should no longer be a statute-

44 *Supra* note 2 at para 32.
45 *Ibid*. at para 4.
46 *Ibid*. at para 4.
47 *Ibid*. at paras 113–18.
48 *Ibid*. at para 26.

free zone in matters such as health and safety, and data protection. The report recommended that cases about contempts committed by non-members should be transferred to the courts, with Parliament retaining residual jurisdiction in non-contentious cases. The joint committee proposed that the Parliamentary Papers Act 1840 be updated to limit its protection to those documents that need it. Finally, the joint committee expressed a preference for codification through a parliamentary privileges Act, which it saw as "the natural next step in a modern presentation of parliamentary privilege."[49] The joint committee thought that a "code would assist non-members as well as members, because it would enable the ordinary citizen to have access to the privileges of his member of Parliament."[50]

Despite widespread praise of the 1999 report,[51] no action was taken by Westminster to implement any important part of it.

The 2005 Supreme Court of Canada decision in *Vaid*

The Supreme Court of Canada followed the 1999 joint committee report with an analysis of necessity and its importance to parliamentary privilege. This was made explicit in the 2005 decision in *Vaid*, which followed the approach taken by the court in two earlier decisions. These three cases were decided by the Supreme Court after the adoption of the Charter of Rights and Freedoms as part of the national constitution in 1982. Each challenges the traditional understanding of privilege, based on a claim to rights guaranteed by the Charter. In the end, the Supreme Court determined that privilege and Charter rights have equal constitutional weight and that one cannot trump the other. In its judgments in these cases the court refined its appreciation of the balanced relationship between privilege and the Charter. This was particularly so in the third decision: *Vaid*.

The first Charter-era judgment was *New Brunswick Broadcasting*, given in 1993.[52] It established beyond doubt the constitutional status of privilege in the country's legal structure. The judgment went on to determine that the Charter guarantee of "freedom of the press and other media of communication" did not override the inherent privilege possessed by the Nova Scotia House of Assembly to control its proceedings. Accordingly, the Assembly had the right to limit media access through cameras to the deliberations of the Assembly. This

[49] *Ibid.* at para 385.

[50] *Ibid.*

[51] Gareth Griffith, *Parliamentary Privilege: the continuing debate*, New South Wales Parliamentary Research Service, Background Paper No 2/2014, March 2014, p 1.

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

decision was founded on the principle that one part of the constitution cannot override another part of it.

The second ruling on privilege was a case about a former member of the New Brunswick Assembly who had been expelled for election fraud.[53] The court decided that the right to stand for re-election and to exercise the right to vote could be constrained, despite the Charter, where the restrictions could be justified as preserving the integrity of the Legislative Assembly and the electoral process. In a concurring ruling, Justice McLachlin (now the Chief Justice) offered a further justification for the court's role in reviewing claims of privilege: "To prevent abuses in the guise of privilege from trumping Charter interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege."[54] In other words, Justice McLachlin recognised a duty to review claims of privilege to ensure that the court was not being used improperly to curtail rights under the constitution.

The third case, *Vaid*, involved a dispute over the application of the Canadian Human Rights Act to a charge of discrimination and harassment alleged by the former driver of the Speaker of the House of Commons. The Speaker and the House of Commons contended that parliamentary privilege shielded any decisions with respect to employees in the House of Commons from review by any outside body and that the Canadian Human Rights Act did not apply to employees of Parliament. The Supreme Court ruled that the Act applied and that legislatures created by the Constitution Act 1867, including the federal Parliament, were not enclaves beyond the reach of the ordinary law of the land. The importance of the unanimous judgment in *Vaid* does not depend so much on the final outcome as on the analysis of parliamentary privilege. The judgment makes clear that "the historical foundation of every privilege is necessity".[55] The court set out a framework to evaluate claims to privilege. Simply put, any privilege must continue to meet the test of necessity. Its relevance is determined by "whether the category of privilege continues to be necessary to the functioning of the legislative body today."[56] This is measured in part by whether "the sphere of activity for which the privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body ..."[57] Any new claim to privilege must be measured against the test of necessity.

These decisions confirm the role of the courts since *Stockdale v Hansard* in

53 *Harvey v New Brunswick (Attorney General)* [1996] 2 S.C.R. 876.
54 *Ibid*. at para 71.
55 *Vaid*, *supra* note 3 at paras 5, 40.
56 *Ibid*. at para 6.
57 *Ibid*. at para 46.

determining the scope of privilege. However, in a contemporary context, the Supreme Court of Canada recognises the need to accommodate human rights in the exercise of privilege. The court's preference was that individual rights should be infringed to the minimum degree possible. To that end the court noted that, even in areas covered by privilege, it is "within the exclusive competence of the legislative assembly itself to consider compliance with human rights and civil liberties."[58] To date, no Canadian parliament or legislature has taken up this challenge.[59] Since *Vaid* the lower courts have not consistently applied the clear approach adopted by the Supreme Court.[60] Despite this, it is clear that the *Vaid* decision has influenced courts in other jurisdictions, including the United Kingdom and New Zealand.

Towards reconciliation: *R v Chaytor* and its aftermath in the UK

The 2010 UK Supreme Court case of *R v Chaytor and others*[61] concerned the trials of three former Members of Parliament for false accounting in relation to parliamentary expenses. The three MPs unsuccessfully argued that their expense claims were covered by parliamentary privilege and could not be the basis for criminal charges. The court was asked to look at the immunity provided through "freedom of speech and debates" and "proceedings in Parliament" as well as the doctrine of exclusive cognisance—the control by Parliament of its internal affairs. Writing the main opinion in the case, Lord Phillips of Worth Matravers reviewed the history and rationale of article 9, and how Parliament manages its affairs, through the frame of necessity:

> "The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

[58] *Ibid*. at para 30.

[59] As has been argued, such a review by Parliament would be useful as it would provide the courts with the perspective of parliamentarians. See Marc-André Roy, « Le Parlement, les tribunaux et la Charte canadienne des droits et liberté: vers un modèle de privilège parlementaire adapté au xxi-ème siècle » *Les Cahiers de Droit*, (2014) vol 55, no. 2, juin 2014, p 489.

[60] See, for example, Charles Robert, "Falling Short: How a Decision of the Northwest Territories Court of Appeal Allowed a Claim to Privilege to Trump Statute Law" (2011) *The Table,* vol. 79 at 19–36.

[61] *R v Chaytor* [2010] UKSC 52.

> If this approach is adopted, the submission of claim forms for allowances and expenses does not qualify for the protection of privilege. Scrutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech. Indeed it will not inhibit any of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it will inhibit is the making of dishonest claims."

The strength of the *Chaytor* judgment is how it evaluated the history and meaning of article 9 and exclusive cognisance, as well as necessity, in examining the boundaries of Parliament's rights and immunities. The court held that, where there is a close relationship to the core or essential business of Parliament, the protection of article 9 is absolute and will not be questioned by the courts. Absent this specific and narrow purpose, however, article 9 does not provide immunity from the law—this was the finding with respect to the expense claims. Parliament's power of exclusive cognisance is not absolute, and is more easily subject to waiver and court review.

In April 2012, following *Chaytor*, the UK Government issued a first-ever green paper on parliamentary privilege.[62] The green paper expressed satisfaction with how the court in *Chaytor* applied necessity to clarify the boundaries of privilege, which was in accordance with the 1999 joint committee report. The green paper remained sensitive to the need to preserve the protection of article 9 and agreed with the Supreme Court that article 9, as well as exclusive cognisance, applies only to Parliament's core functions. Based on this analysis, the green paper concluded that there was no longer a compelling case for comprehensive codification of privilege in statute.[63]

Prompted by the green paper, in July 2013 another Joint Committee on Parliamentary Privilege published a report which endorsed a number of the green paper's observations.[64] Notably, the joint committee reaffirmed necessity as the basis for parliamentary privilege and endorsed the approach taken by the

[62] HM Government (UK), *Parliamentary Privilege*, Cm 8318, April 2012.

[63] See paragraphs 216 and 217 of the green paper:

> "In light of the *Chaytor* judgment, the line likely to be taken by the courts in future appears to be reasonably clear. Courts remain respectful of parliamentary privilege and exclusive cognisance; but statute law and the courts' jurisdiction will only be excluded if the activities in question are core to Parliament's functions as a legislative and deliberative body.
>
> This approach is similar to that taken by the joint committee in 1999, and is consistent with the position generally taken in practice by each House of Parliament. The Government therefore regards the current state of the law as satisfactory, and does not believe there is a need to bring forward draft legislation at this time."

[64] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013–14, HL Paper 30, HC 100).

Supreme Court of Canada in *Vaid*.[65]

In December 2013 the Government published its response to the joint committee's report, indicating that it "agrees with the committee that there is no strong case for a comprehensive codification of parliamentary privilege. However, as rightly recognised in the report, this does not mean that steps cannot be taken both by Parliament and by Government to clarify the application of privilege where appropriate."[66]

New Zealand

In *Attorney-General v Leigh*[67] the Supreme Court of New Zealand addressed the relationship between the freedom of speech protection of article 9 and any liability in defamation under the Defamation Act. The Supreme Court upheld lower court decisions which determined that a public servant assisting a minister to answer questions in the House of Representatives is not entitled to absolute protection under article 9. The Supreme Court sought to establish a balance, recognising the need to protect the genuine interests of Parliament without jeopardising legitimate access of others to the law. In assessing the case, the court accepted the absolute privilege of the minister to speak freely in the House of Representatives but limited this privilege to the minister alone. Using the necessity test, the court determined that the protection of qualified privilege was sufficient to safeguard the activities of the minister's departmental officials in preparing written and oral information to assist the minister in making an informed statement in Parliament. This qualified privilege did not forfeit the right of anyone to have the proper benefit of the law in an action for defamation, but to succeed such an action required evidence of deliberate malice; in this way it provided adequate protection to the departmental staff.

In response to this judgment, the New Zealand Parliament enacted the Parliamentary Privilege Act 2014, which restored an expansive interpretation of article 9. New Zealand's objective was effectively to overturn the ruling of the Supreme Court, which it considered too restrictive. It wanted to rebalance the relationship between Parliament and the courts, as happened in Australia following codification in 1987. This is significantly different from the approach of Westminster, which remains hesitant about this course of action.

[65] At para 24: "We endorse the approach adopted in *Vaid*. Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament's sole jurisdiction."

[66] *Government Response to the Joint Committee on Parliamentary Privilege*, Cm 8771, December 2013.

[67] *Supra* note 4.

CONCLUDING OBSERVATIONS

Since the publication of the 14th edition of *Erskine May* in 1946 parliaments and the courts have interpreted parliamentary privilege in a different context. The developments have been part of a larger process of modernisation of parliamentary privilege that began at Westminster with a report on privilege in 1967. The push to update parliamentary privilege was a consequence of rights-based notions of law that arose in the years after World War II. The pressure to modernise privilege eventually involved other parliaments. The courts also grappled with traditional understandings of privilege, dealing with cases founded on rights-based concepts. Parliaments and the courts have sought in their own way to reconcile the claims of privilege with the legal rights that are now a feature of most democracies.

The conflicting views of Parliament's privileges have created tension and disagreement, which has led to varying evolutionary responses in the United Kingdom, Australia, Canada and New Zealand. Two trends are emerging. One seeks renewal by evaluating the relevance of parliamentary privileges in a rights-based context through the frame of necessity. The other seeks to restore the meaning of article 9, by insisting on its robust application in a contemporary setting.

The dynamics of this process involving parliaments and the courts have led to different results in Australia and New Zealand, the UK and Canada. Each has adjusted privilege following disputes based on challenges to its traditional interpretation. These challenges have been raised through reviews undertaken by parliaments or through court decisions, or sometimes both.

This divergence in the understanding of parliamentary privilege can be seen as the natural result of evolution through adaptation to specific legal–political cultures in the countries of the Commonwealth. These differences represent a substantive departure from the position at the outset of the colonial period, which remained for many decades. Only time will determine which adaptations of privilege will survive the political and legal environments which Commonwealth parliaments inhabit in the 21st century. This is a process of evolution that Charles Darwin would have understood.

THE HOUSE OF LORDS AND THE SCUPPERING OF CONSTITUENCY BOUNDARY REFORM

RHODRI WALTERS CB

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In January 2013 the House of Lords effectively scuppered any chance of implementing the constituency boundary changes which were due to be effected in time for the 2015 general election. What follows is a somewhat unedifying account of how that came about.

The coalition government which was formed following the 2010 general election was founded on a shared programme set out in a 32-page document, *The Coalition: our programme for government*. The part of the programme on political reform included a commitment to introduce a bill providing for a referendum on replacing the first past the post system of voting at general elections with an alternative vote system (a change to the electoral system being much desired by the Liberal Democrat party). The bill would also provide for the "creation of fewer and more equal sized constituencies" (a change much desired by the Conservative party). Later that year, the government duly introduced the Parliamentary Voting System and Constituencies Bill, which made provision for the promised referendum on the alternative vote system and, following a review by the Boundary Commissions, for a reduction of the number of House of Commons constituencies by 50, with greater equality in the size of each constituency. Under the bill no constituency could deviate by more than 5% in the size of its electorate from the national electoral quota per constituency.[1]

The Labour party had grounds to fear these provisions on constituency boundaries. In 2010 the average size of electorate in Labour seats was 68,487 compared to 72,412 in Conservative seats. Much of their support lay in smaller urban constituencies, which were likely to be radically affected by the new quota rule. They feared that some 20 seats might be lost to them—the decline of urban population in old industrial centres has been going on for some time—but without a review the precise effect would be unknown.

Labour party opposition to this part of the bill when it arrived in the Lords from the Commons was ferocious. The bill took 17 days in committee of the whole House. The opposition managed to slow down proceedings to such a degree that in desperation the "closure" motion—that the question be now

[1] With the exception of four protected constituencies, which were exempt because of their island statuses.

put—was moved twice in a vain attempt to make progress. (Lords practice was that the "closure" was very rarely moved.) It was only an increasing likelihood that the government would move an unprecedented guillotine motion (thus fundamentally changing Lords procedure) that brought the House to its senses. In the event, and notwithstanding the Lords filibuster, the bill received Royal Assent in 2011 relatively unscathed.[2] The referendum on the alternative vote was held in May 2011 and the proposition for change rejected. Meanwhile, the Boundary Commissions set to work redrawing the constituency map, with the expectation that their final reports would be laid before the Speaker of the House of Commons by October 2013. A draft Order in Council would be laid before Parliament soon thereafter giving effect to the recommendations in the reports.

But events were to take a rather different course. In the last edition of *The Table* Liam Laurence Smyth and I wrote about the parliamentary handling of another of the coalition's political reform policies—House of Lords reform—and in the "postlude" to that article we alluded to the events which are now more fully described.[3]

Although the House of Lords Reform Bill was given a second reading in the Commons by 462 votes to 124 on 10 July 2012, 90 Conservative members had voted against. Moreover the Labour opposition had made it known that they would not support a timetable motion. Proceeding further with the bill without such a motion would have been very time consuming and so on 3 September 2012 the Deputy Prime Minister, Nick Clegg, announced to the Commons that the House of Lords Reform Bill would be withdrawn. At the same time, and over subsequent days, he announced that the Liberal Democrat party would no longer support the boundary changes foreshadowed by the Parliamentary Voting System and Constituencies Act 2011. In refusing to progress the House of Lords Reform Bill further he took the view that the Conservative party had broken the coalition contract: he argued that Lords reform and the constituency changes were part of the same constitutional package and that the coalition was a reciprocal arrangement based on mutual respect; to ensure that the coalition remained in "balance" the Liberal Democrats would vote against the implementing order when it came to be laid in autumn 2013. "The end result is now a foregone conclusion ... The boundary changes will not go through before 2015", he said.

[2] Details of other procedural devices used on the bill were explained in an article by the then Clerk of Public and Private Bills in the Lords, Tom Mohan, in "Coalition government in the Lords—some procedural challenges", *The Table*, volume 79 (2011), pp 5–12.

[3] Liam Laurence Smyth and Rhodri Walters, "Failing better: the House of Lords Reform Bill", *The Table*, volume 81 (2013), pp 18–39.

The result was a serious rift between the coalition parties. The Conservatives argued that passage of a Lords reform bill was not directly linked to the proposals for constituency boundary changes (the link was between boundary changes and the AV referendum). But whatever the political arguments, the arithmetic of Commons voting gave Mr Clegg the whip hand. It is more than likely that the implementing Order in Council would not have been passed had it come to be laid—unless a deal were to be struck within the coalition to appease the Liberal Democrats.

In the event, the Lords were to play an even more direct role, by driving a pre-emptive and fatal stake through the heart of the boundary changes.

The Queen's Speech opening the 2012–13 session included the intention to introduce an Electoral Registration and Administration Bill. The bill was passed by the House of Commons and received in the Lords in late June 2012. Its purposes were to introduce individual electoral registration (a cause supported in principle by all three main parties) and to change the administration of elections. At committee stage, which began on 29 October 2012, Lord Hart of Chilton (Labour) tabled an amendment—amendment 28A, tabled the day before it was due to be considered—which would amend the Parliamentary Voting System and Constituencies Act 2011 to defer the reports of the Boundary Commissions on changes to constituency boundaries until 1 October 2018. His three co-signatories on the amendment were a Liberal Democrat, a Crossbencher and a Plaid Cymru member. The Lords Legislation Office advised that this amendment was not relevant to the bill, in the following terms:

> "The bill has only two purposes—individual electoral registration and the administration and conduct of elections. All the clauses of the bill fit with one or other of these two purposes. The issue of boundaries, like the franchise for elections (for example), is a separate issue not addressed in the bill. While the bill is brought forward in the context of the new boundary arrangements and a political argument might be made that it would be appropriate to delay the Boundary Commissions' work until the new registration provided for in this bill had bedded in, this does not make an amendment to that effect relevant to this bill."

In the Lords, which is self-regulating and where there is no selection of amendments which can weed out amendment which falls outside the scope of a bill, the advice of the clerks on relevance has invariably been followed. Indeed the *Companion to the Standing Orders* states, "it is expected that this advice will be taken." Even if an irrelevant amendment appears on the marshalled list of amendments, the Leader of the House conveys the advice of the Legislation Office to the House when the amendment is reached and asks the House to endorse it because, as the *Companion* explains, "the admissibility of an amendment can ultimately be decided only by the House itself, there being no

authority that can in advance rule an amendment out of order."

Further proceedings in committee were delayed while discussions took place, but the official opposition persisted in taking a different view from the Legislation Office. The Opposition Chief Whip even commissioned advice from a Queen's Counsel in support of the opposition's position that the amendment was relevant. The arguments of those who did not accept the advice that the amendment was not relevant seem to have viewed "relevance" in a completely different way from that traditionally used by the House on the advice of the Legislation Office. They took the view—foreseen in the Legislation Office's advice—that a boundary review, because it had regard to the electoral register, was therefore inextricably bound with and therefore relevant to legislation on electoral registration. And the Boundary Commissions' reports may well have been different had the register been more recent. On the other hand, they did not contemplate that this loose interpretation of the principle of relevance, if applied generally to other bills, would make it possible for all manner of "related" but not necessarily "relevant" issues to be raised on a bill of limited scope.

Lord Hart's amendment was not withdrawn and the committee stage resumed on 14 January 2013. The amendment was moved in spite of the intervention of the then Leader of the House, Lord Hill of Oareford, who said: "We are self-regulating. But our system of self-regulation is based on the very few rules which we have set for ourselves in the *Companion*. It means that only we can enforce our rules: it does not mean that we do not have any." Notwithstanding his advice that the amendment should not be pressed, it was and was agreed to on a vote: 300 Content and 231 Not-Content. Members of the Conservative, Liberal Democrat and Labour parties voted without exception on party lines and—perhaps surprisingly—22 of the 61 Crossbench members who voted and 9 of the 16 "others" who voted also supported the amendment. The bill returned to the Commons[4] where the government were unable to reverse the Lords amendments, faced as they were with the opposition of the Labour and Liberal Democrat parties. The bill received Royal Assent on 31 January 2013 and later that day the Boundary Commission for England announced that it was discontinuing its review; the other Commissions followed suit.

The House of Lords prides itself on its role as a revising chamber. But on this occasion it paraded somewhat different colours: as a highly political chamber in which coalition politicking was capable of carrying all before it.

The effect of retaining the current number of constituencies as presently

[4] On third reading in the Lords amendments drafted by the government correcting technical deficiencies in the original amendment moved by Lord Hart of Chilton were agreed to.

drawn, as opposed to implementing the provisions of the Parliamentary Voting System and Constituencies Act 2011, is likely to have a profound effect on the outcome of the 2015 general election. Some recent academic work illustrates the relative disadvantage under which the Conservative party will enter the next election because of the absence of boundary reform. In a recent article[5] Professor Ron Johnston of Bristol University estimated that if the Boundary Commissions' provisional recommendations (first published in December 2011 and January 2012) had been in place for the 2010 general election, the Conservative lead over Labour in a 600-seat house would have been 68, only two short of an overall majority. If the Commission's revised recommendations (published in autumn 2012 and which took account of written representations and oral hearings) had been in place the Conservative lead over Labour would have been 70, with a small overall majority. So the Conservative party might have gone into the 2015 election with the equivalent of a small majority to defend. Instead, they will now enter the election for another 650-seat house, with a lead over Labour of only 48—20 short of a majority over all other parties. The new boundaries would have benefited the Conservative party greatly compared to those currently in operation, which were established by the Boundary Commissions before the 2010 election.

Of course, the outcome of the 2015 general election will be subject all sorts of different factors—from the ability of the parties to convince electors to vote for them to the weather on polling day. But if, as seems likely, the margins are again close many will view that controversial House of Lords amendment, now embedded in the Electoral Registration and Administration Act 2013, with even greater significance.

As for the House of Lords, almost two years have passed since the controversial tabling and insertion of Lord Hart of Chilton's amendment into the bill, and there is no evidence that the rules on admissibility have been weakened irretrievably. Only time can tell whether this aspect of the House's procedure has taken a new turn.

[5] *Which Map? Which Government? Malapportionment and Gerrymandering, UK-Style*, by Professor Ron Johnston, in Government and Opposition, 2014. The methodology used excludes the Northern Ireland seats (18 under current arrangements and 16 under the proposed redistribution).

THE POSITION OF LEADER OF THE OPPOSITION IN PRINCE EDWARD ISLAND

MARIAN JOHNSTON
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For just under two weeks in February 2013 the five-member Progressive Conservative Official Opposition in the Prince Edward Island Legislative Assembly was in the unusual position of having one of its members elected as Leader of the Official Opposition and another selected as interim party leader. The situation was the cause of much media attention and community comment, and sparked a number of discussions, among them the role of the Speaker in recognising the Leader of the Official Opposition. A resolution was found when the Leader of the Official Opposition resigned from the post, and the interim leader of the party was elected in his stead.

The roots of the story stretch back to 5 December 2012, when Olive Crane, then Leader of the Official Opposition and leader of the Progressive Conservative Association of Prince Edward Island (the Progressive Conservative party), announced at a news conference her intention to resign as leader of the party on 30 January 2013. Her resignation came the same day as poll results showed her leadership did not have the support of Islanders, remaining static at about 20 per cent.

Crane had been Leader of the Official Opposition and leader of the provincial Progressive Conservative party since September 2007, but had been plagued with divisions within the party concerning her leadership. In November 2012 she narrowly survived a vote at the party's annual general meeting to have her leadership reviewed in 2013. A few weeks later she announced her resignation. After Crane's announcement two sitting members of the Legislative Assembly, both members of the Official Opposition caucus, announced their plans to run for the position of interim leader of the provincial Progressive Conservative party. Steven Myers came forward as a contender on 18 January 2013; Hal Perry made a similar announcement on 29 January 2013.

Later that day, Crane announced her resignation as Leader of the Official Opposition at a public meeting in Souris, Prince Edward Island, which had been called to discuss changes to the Employment Insurance Program, a federal government programme which provides temporary financial assistance to unemployed Canadians. The announcement caught many off guard, including Perry who had just publicly affirmed his support for Crane to continue as Leader of the Official Opposition.

On 30 January 2013, the day before the vote to elect an interim party leader,

Perry was elected by members of the Official Opposition caucus to be the new Leader of the Official Opposition. Some observed that the timing was indicative of a split, not only within the party at large, but also within the caucus.

The next day, Perry wrote to the office of the Speaker advising that he had the clear support of the majority of the Official Opposition caucus to be identified as the Leader of the Official Opposition. Based on this communication, Speaker Carolyn Bertram formally recognised him as Leader of the Official Opposition, which was consistent with the customs and practices of the Legislative Assembly of Prince Edward Island, whereby the Speaker has the responsibility of recognising the Leader of the Official Opposition.

Hours later on 31 January, Myers won the election as interim leader of the Progressive Conservative party, defeating Perry, the newly recognised Leader of the Official Opposition, as well as a third candidate.

On 7 February 2013 Myers wrote to Speaker Bertram requesting that he be acknowledged as the Leader of the Official Opposition based on the fact that he had been selected as the interim leader of the provincial Progressive Conservative party and, as such, should receive recognition as the Leader of the Official Opposition. However, the letter did not indicate that he had the support of the majority of the Official Opposition caucus.

There was considerable interest throughout the province in these events, including about the role of the Speaker in relation to the position of Leader of the Official Opposition. In response, Speaker Bertram issued a statement clarifying her position. She said:

> "Members have placed their confidence in me to be their Speaker, and I take this responsibility very seriously. The office of the Official Opposition is a parliamentary office, as opposed to a political party office. As such, the operation and decisions associated with its functioning must remain with the elected members themselves and must operate within the jurisdiction of the Legislative Assembly of Prince Edward Island. I intend to continue to adhere to these principles, as have many honourable Speakers past, and will not become involved in the internal relationship between parliamentary caucus offices and political party offices. These are matters for the consideration of each respective office, and not for the Speaker of the Legislative Assembly."

The matter was resolved when Perry resigned his position as Leader of the Official Opposition on 14 February 2013. The five-member Official Opposition caucus voted in favour of Myers becoming the new Leader of the Official Opposition. Perry was appointed as the Opposition House Leader. Speaker Bertram was notified of the changes, and formally recognised Myers as Leader of the Official Opposition.

Further changes to the Official Opposition caucus occurred in October 2013. On 3 October Perry left to join the Government caucus and sit as a member

of the Liberal Party of Prince Edward Island. On 4 October 2013 Crane was removed from the Official Opposition caucus; she now sits as an Independent Progressive Conservative member. The Official Opposition caucus currently has three members.

MISCELLANEOUS NOTES

AUSTRALIA

Senate

Orders for production of documents

Senate proceedings during 2013 were replete with orders for the production of documents; they are described in the Senate's *Procedural Information Bulletins*.

The Senate has mainly directed orders for production of information to ministers rather than to officials because it is ministers who are ultimately accountable to the Senate and who should bear the burden of any sanction for non-compliance. This practice varies according to the circumstances of each case. For example, information might be required from a statutory officer who is independent of ministerial control. In that case, an order will be directed to the officer rather than a minister.

Highly unusual circumstances surrounded orders seeking details of revenue flowing from the Minerals Resource Rent Tax. It had been expected that the government would publish revenue figures, but the Finance Minister announced that details could not be disclosed because of the confidentiality provisions in the Taxation Administration Act 1953. These provisions originated in the Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010, which limited the information that could be provided by tax officers to the minister, even for the purposes of the minister's participation in proceedings in Parliament. This is one of very few provisions in Commonwealth statute books explicitly limiting the operation of parliamentary privilege.

Fortunately for the cause of accountability, the scope of the limitation is very narrow and does not affect the ability or duty of tax officers to provide information to a parliamentary committee. This outcome was achieved only after the Privileges Committee pointed out that the bill, as originally drafted, made it a criminal offence for tax officers to provide certain information to Parliament, in direct contradiction to the Parliamentary Privileges Act 1987, which protects witnesses against being penalised for giving evidence, and in defiance of a protection that has existed for centuries under the law of parliamentary privilege.[1]

Instead of ordering the minister to produce information which it would have been unlawful for the Tax Office to provide to her, the Senate, on 6 February, ordered the Tax Commissioner to produce the information directly to the

[1] See the committee's 144th report, Bulletin Nos 240 and 242, and *Odgers' Australian Senate Practice*, 13th ed., p 70.

Economics References Committee which would then decide whether to publish it. In agreeing to the order, the Senate noted that the information concerned the tax affairs of companies and would not breach the confidentiality of natural persons. The Senate also noted the public interest in revenue from different taxes being transparently accounted for in order to provide confidence in administration of the tax system (as well as accountability to Parliament). The references committee received and published the information on 8 February, following the Treasurer's announcement of the figure after the receipt of further legal advice apparently now clearing publication of the information.

"Confidence" motions

During the 43rd Parliament there was a minority government in the House of Representatives, an uncommon circumstance in the Australian Parliament which led at times to talk of motions expressing want of confidence in the government. Such talk may have influenced proceedings in the Senate. On 25 February, for instance, the opposition moved a motion censuring the Government for its handling of the mining tax. It was expressed in terms of the Senate having no confidence in the Government's handling of the mining tax but it was not a motion of "no confidence" in the traditional sense. Such a motion can have legal or constitutional consequences only if moved in the House of Representatives, where governments are formed on the basis that they can command a majority of votes in the House. Failure to command a majority on questions of supply and confidence leads to particular consequences.

Motions expressing want of confidence in the government have not been moved in the Senate and motions expressing want of confidence in particular ministers have not been moved there since 1979. Such motions are generally expressed as censuring the government or a particular minister or ministers. An amendment to the motion, moved by the Leader of the Australian Greens, was equally critical of the Government's handling of the mining tax but was expressed in terms of condemnation rather than "no confidence". Neither the amendment nor the substantive question was agreed to.

Similarly, on 21 March, when the opposition in the House of Representatives was unable to secure the absolute majority required for a suspension of standing orders to enable a motion of no confidence to be moved, the opposition in the Senate moved to suspend standing orders to enable a motion to be moved declaring no confidence in the Government's ability to govern itself. The suspension motion was lost and the censure motion did not therefore proceed.

Apology to those affected by forced adoption policies

On 21 March the Leader of the Government in the Senate presented the government response to the report of the Community Affairs References

Committee on forced adoption policies. Among other things, the report recommended a national apology to those affected by the former policies, together with practical measures to address the harm suffered by those people. The apology in the Great Hall of Parliament House and the announcement of practical measures preceded a motion moved in each House embodying the text of the apology. In debate on the motion, senators commended the work of the committee and cited it as an example of the parliamentary process at its best in working on behalf of the community.

Proposals to amend the Constitution

Section 28 of the Constitution provides the means by which the Constitution may be amended:

> "The proposed law for the alteration [of the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."

Two amendment proposals were considered by Parliament in 2013.

Debate concluded on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, a precursor to a proposed constitutional referendum on the issue. Having examined and reported on the bill, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples will continue to work towards encouraging consensus by consulting widely on the specific proposals during the 44th Parliament.

The other proposal, relating to local government, was considered by another joint select committee which, in a divided report, recommended that a referendum on the financial recognition of local government be put to Australian voters at the 2013 federal election.

To that end, the government introduced the Constitution Alteration (Local Government) Bill 2013. There was disagreement about the content of the bill, and consternation about the timing of the proposed referendum, with doubts raised about the likelihood of its succeeding given insufficient time to inform properly voters. Further controversy attended a government decision not to guarantee equal funding of the Yes and No cases for the referendum. Nevertheless, the bill was debated and passed by the Senate under a limitation of time on 24 June.

In the event, the matter was not put before the people in a referendum. On 4 August the Prime Minister advised the Governor-General to issue writs for an election on 7 September. A consequence of the choice of election date was that the proposed referendum could not occur at the same time. While the constitutional minimum time of two months from the passage by both Houses

of the alteration proposal would have elapsed by election day, additional time would have been required, under the Referendum (Machinery Provisions) Act 1984, to accommodate production and distribution of a pamphlet outlining the Yes and No cases.

Neither were arrangements made for the referendum to be held at a later date. From the plain words of the Constitution (quoted above) it would appear that the Houses having passed a bill to alter the Constitution, it must then proceed to a referendum. However, referendum machinery legislation, first enacted in1906, has been interpreted by governments as providing an unlimited discretion not to proceed. This discretion has been exercised on three previous occasions—in 1915, 1965 and 1983—when governments decided not to proceed with referenda due to political circumstances. There appears to be no established conventions on the exercise of this discretion. Indeed, its existence has not been authoritatively established and its propriety has occasionally been questioned in the Senate.

Disallowance and approval of delegated legislation

The normal scrutiny regime for delegated legislation is provided for in the disallowance provisions of the Legislative Instruments Act 2003. Other Act-specific forms of scrutiny of instruments are sometimes agreed for special purposes. For example, on 25 June regulations made under the Australian Charities and Not-for-profits Commission Act 2012 were approved by resolution of the Senate. Under that Act, the regulations come into effect either following an affirmative resolution in each House or after the time for disallowance of the regulations under the Legislative Instruments Act 2003 has passed. The regulations were also the subject of disallowance notices which were subsequently withdrawn on 27 June. Had the disallowance notice remained on the notice paper, the regulations could have been prevented from coming into effect until well into the new Parliament, in the absence of an affirmative resolution.

A number of notices proposing the disallowance of delegated legislation remained on the notice paper when the Senate rose on the final day of the 43rd Parliament. Under the terms of the Legislative Instruments Act 2003, if a notice of disallowance remains unresolved at the conclusion of a Parliament, the relevant instrument is deemed to have been tabled on the first day of the new Parliament, providing a fresh period of 15 sitting days for disallowance action to be initiated.

Casual vacancies

The Commonwealth Parliament was prorogued on 5 August 2013 for a general election of the House of Representatives and half of the Senate on 7 September.

Although the terms of state senators elected on that day do not commence until 1 July 2014, the opening of the new Parliament, on 12 November 2013, included the swearing in of senators elected for the territories and of two senators chosen to fill casual vacancies which had arisen since the Senate last met. Two further vacancies, in the representation of Queensland and New South Wales, led to interesting proceedings in the respective state parliaments.

The Queensland vacancy remained unfilled at the end of the 2013 sittings, with the matter adjourned by the Queensland Parliament pending the outcome of an inquiry by that state's anti-corruption body. Before moving to adjourn the matter, the Premier of Queensland made it clear that the state government accepted both the requirement under section 15 of the Constitution that the vacancy be filled by a member of the same party as the retiring senator and the long-standing convention that the person chosen be the person nominated by that party. The Senate has regularly expressed the view that states are obliged to fill casual vacancies as expeditiously as possible in order to maintain representation of the people of the states as provided by the Constitution.

Interesting questions arose in relation to the vacancies caused by the resignation of Senator Bob Carr after the election. Because he had been elected to a new term commencing on 1 July 2014 he was, in effect, required to lodge a double resignation, from his current term and from his term commencing in 2014. While this has not happened before, the situation is contemplated in *Odgers' Australian Senate Practice* in the case of a senator resigning or becoming subject to a disqualification.

In this case, the President advised the Governor of New South Wales of the double vacancy. Following advice from the Crown Solicitor, the New South Wales Parliament opted to fill only one of the vacancies and Senator O'Neill, who was nominated by her party for both vacancies, was sworn in on 2 December. The implications for Senator O'Neill of possibly ceasing to be a senator on 30 June 2014 before being reappointed to the second vacancy were canvassed in evidence before the Finance and Public Administration Legislation Committee.

Election of senators for Western Australia

The second-ever recount of a Senate election was ordered in relation to the election of senators for Western Australia at the 7 September poll, the first such recount having also occurred in that state in 1980. The recount was apparently granted on the basis of the narrowness of the margin between two parties at a determinative point in the count. The result of the recount indicated a similarly narrow margin, this time favouring the other party. The result was, however, thrown into further doubt by revelations that 1,370 votes included in the initial counts (there are two: an original count on election night and a second count in each division known as the "fresh scrutiny") could not be located for inclusion

in the recount.

Three separate petitions to the High Court sitting as the Court of Disputed Returns were tabled in the Senate, including a petition by the Australian Electoral Commission. The petitions sought the resolution of legal questions as to whether, among other things, the loss of the ballots meant that electors had been "prevented from voting" for the purposes of section 365 of the Commonwealth Electoral Act 1918 and whether the court could make use of the initial counts of the lost ballots in determining whether their loss affected the result of the election, or in determining whether any candidate was duly elected.

Although the matter was not determined at the end of 2013, it was widely expected that the court would conclude that a fresh election would be required.

Legislative disagreements

An unusual aspect of the 43rd Parliament was the almost complete lack of disagreements between the Houses on legislation, no doubt because the negotiations necessary to progress the minority government's agenda in the House also provided a basis for securing majority support in the Senate.

By contrast, the first bill passed by the Senate in the 44th Parliament was the subject of disagreement. The bill sought to increase the Commonwealth's debt ceiling from $300 to $500 billion. The Senate was prepared to accept a limit of only $400 billion and amended the bill accordingly, but the House did not agree to the amendment. The disagreement was resolved when the House accepted the Senate's compromise offer, involving removing the debt ceiling altogether and implementing a range of reporting and accountability measures to enhance the information about government debt made available to Parliament.

Section 53 of the Constitution provides that the Senate may not amend a bill so as to increase any proposed charge or burden on the people. It also provides that a request may be made at any stage. The projected increase in debt, and the need to issue more bonds to cover the debt, involved an increase in the charge or burden on the people within the parameters of the Senate's traditional interpretation of the third paragraph of section 53. Consequently that part of the compromise package was framed as a request while the other elements of the package were framed as amendments.

The major legislative business in the first sitting weeks of the new Parliament was a package of 11 bills, dubbed the carbon tax repeal bills. The government moved a routine procedural motion to enable the bills to be considered together, but this was defeated and they therefore proceeded separately. An opposition motion giving precedence to two of the bills also found support. By the close of the sitting period, the first of the bills had been negatived at the second reading stage, and it was expected others would also be defeated in the new year.

Committees

The final statistics for the 43rd Parliament revealed high levels of committee activity, evidenced by the numbers of inquiries undertaken and reports produced. On the one hand, this is a conclusive demonstration of the value of Senate committee inquiries in contributing to public policy development, review and, in particular, to scrutiny of legislation. On the other hand, overworked committees with overstretched staff cannot produce their best work. An appropriate balance is usually reached by senators serving on committees having finite capacity to undertake multiple inquiries.

In the first sitting weeks of the new Parliament legislation and references committees received 45 new inquiries and three Senate select committees were established. Early indications are that the record levels of reliance by the Senate on its committees, evident in the 42nd and 43rd Parliaments, will continue in the 44th Parliament.

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

Members of Parliament Staff Act 2013

The Members of Parliament Staff Bill 2013 passed both Houses of the New South Wales Parliament on 19 June 2013 and was assented to on 25 June 2013. The bill provided for new arrangements for the employment of the staff of political office holders and the staff who assist members in their electorate and parliamentary duties.

Under the new arrangements, political office holders are authorised to employ their own staff (previously they were employed as special temporary employees of the Department of Premier and Cabinet under the Public Sector Employment and Management Act 2002) and members of Parliament are authorised to employ their own staff (previously they were employed by the relevant presiding officer under the Constitution Act 1902).

The bill also required the presiding officers to determine conditions of employment for members' staff. In accordance with this requirement, on 29 January 2014 the presiding officers approved the Members' Staff Conditions of Employment—Determination.

Update on twinning with the Solomon Islands and Bougainville Parliament

The New South Wales Parliament continues to enjoy a collaborative twinning relationship with the Autonomous Region of Bougainville's House of Representatives and the National Parliament of Solomon Islands. The twinning project, funded by AusAID, aims to strengthen parliamentary democracy by building the capacity of the parliamentary administration in both Houses. Activities include training programmes, staff secondments and attachments,

mentoring and the compilation of procedure, committee and administration manuals and guides.

In September 2013 a Regional Youth Parliament was held in Honiara at the National Parliament of Solomon Islands. The Youth Parliament had the theme *Youth partnership for climate change: think local, act now!* Five year-11 students from New South Wales were selected to take part, together with 20 Solomon Islands students and 10 Autonomous Region of Bougainville students. Unfortunately, the Bougainville students were unable to participate due to problems with processing their travel documents. Nevertheless, the Youth Parliament was a great success and was televised, broadcast on radio and received widespread press coverage in the Solomon Islands. Participants from the two regions formed a strong relationship and developed a firm understanding of parliamentary processes and the role of parliaments in developing legislation.

New South Wales Legislative Assembly

Execution of search warrant on the premises of the former Speaker

On 27 March 2013 officers from the Independent Commission Against Corruption (ICAC) executed search warrants on the home and the electorate office of former Speaker Mr Richard Torbay.

Whilst widely reported in the media after the event, there were concerns as to whether any material removed by ICAC officers related to the proceedings of the House and were therefore subject to a claim of privilege.

The current memorandum of understanding between ICAC and Parliament applies only to the Parliament House offices of members. It is being reviewed.

Early adjournment due to bushfire emergency

Due to a number of bushfires burning across the state and Sydney region on 17 October 2013, the House agreed to adjourn after the conclusion of the 10,000 signature petition debate, in order that members and staff might leave, as necessary, in order to return to their electorates to assist their families and communities.

Any private members' statements not given on account of the early adjournment were given the following sitting week, either during the time provided in the routine of business or at other times by leave of the House.

The time provided for Community Recognition Statements was also extended on 23 October and 24 October 2013, with the agreement of the House.

Citizen's Right of Reply

On 21 November 2013 the Standing Orders and Procedure Committee report entitled *Citizen's Right of Reply—Ms Lea Rosser* was tabled by the Speaker.

The committee's recommendation that Ms Lea Rosser should be given

a response to references made about her in the House by the member for Cessnock, Mr Clayton Barr MP, is the first such recommendation since the procedure was adopted by the House on 27 November 1996.

Later in the sitting of 21 November 2013, Mr Barr gave a private member's statement in which he addressed Ms Rosser's right of reply.

New South Wales Legislative Council

Privileges Committee: inquiries into non-compliance with an order for papers

In the late 1990s three significant court decisions, the so-called *Egan* decisions, confirmed the power of the New South Wales Legislative Council to order the production of state papers from the executive government under the system of responsible government.

The order for papers process has since become a well-used feature of the Legislative Council. Since the last of the *Egan* decisions in 1999, more than 300 orders for papers have been passed by the Council. As far as is known, all of the orders had been complied with by the executive government.

However, in late 2012 serious questions arose as to whether the executive government had fully complied with an order for papers made in 2009 in relation to the Mt Penny mining tenement. The concerns were raised after certain documents were made public by the Independent Commission Against Corruption (ICAC) as part of a separate investigation into Mt Penny. Many documents made public by the ICAC were not amongst the documents provided to the House in 2009.

In March 2013, following receipt of correspondence from the ICAC identifying documents in the ICAC's possession that were not provided to the House in 2009, the House referred the matter to the Privileges Committee. In its initial report of April 2013, the Privileges Committee found that at least 124, if not all, of the documents identified by the ICAC as being absent from the 2009 return to order should, *prima facie*, have been provided to the House. The committee was helped in reaching this finding by advice provided by Mr Bret Walker SC.

This was the first time that the House had before it evidence that an order of the House for the production of state papers had not been fully complied with, as is required by law. The failure to comply with the 2009 Mt Penny order for papers also had profound political implications.

In May 2013, following the Privileges Committee's initial report, the House referred new terms of reference to the Privileges Committee for inquiry into the reasons for the failure to provide documents in 2009, and related matters.

The committee reported in October. The key finding of the committee was that the failure of the executive government to provide the relevant documents

to the House was due to administrative deficiencies with the former Department of Industry and Investment. There was no evidence of malfeasance.

The committee made various recommendations about the operation of the order for papers process.

Procedure Committee: inquiry into consumption of alcohol by members during sitting hours

On 19 June 2013 the New South Wales Legislative Council resolved that the Procedure Committee inquire into and report on the regulation of the consumption of alcohol by members during sitting hours. The reference, initiated by the Greens, followed media comment after a late sitting of the House.

In March 2014 the committee reported that it considered that members must take responsibility for their own behaviour in the House and that the current code of conduct outlining the standards expected of members, together with provision for a mechanism for dealing with the disorderly conduct of members in the House under the standing orders, were appropriate and did not need to be altered.

On tabling the report the President made a statement noting that members' behaviour both in and outside the chamber reflects directly on the dignity and reputation of the Legislative Council. The President drew members' attention to standing order 192, under which a member may be removed from the chamber if he or she conducts himself or herself in a "grossly disorderly manner". The President went on to make clear that grossly disorderly conduct included inappropriate behaviour as a result of intoxication and that any member who displayed such behaviour should expect to be dealt with under the standing order.

Queensland Legislative Assembly

Casual Senate vacancy

In August 2013 a vacancy for a Queensland Senate position became available following the resignation of Senator Barnaby Joyce, who was contesting a seat in the House of Representatives. In accordance with section 15 of the Commonwealth Constitution, the Queensland Parliament must choose a person to hold the place until the expiration of the term. The Queensland standing rules and orders prescribe how the person is chosen to fill the casual vacancy.

The Speaker summoned members to a sitting of the House on 12 September 2013 (a sitting day) for the purposes of electing a new senator. The Premier moved that Barry James O'Sullivan be elected to hold the place in the Senate. However at the time of the Premier's nomination, Mr O'Sullivan was involved in an ongoing Crime and Misconduct Commission (CMC) investigation

regarding electoral bribery. Accordingly, the Premier moved that the debate on the motion be adjourned and that the meeting to elect a senator be adjourned until 17 October 2013. This would allow the CMC time to complete its investigation.

On 17 October the meeting was postponed again until 13 February 2014 as the CMC had still not completed its investigation. On 23 December 2013 the CMC announced that there was no offence of electoral bribery and the relevant parties had been notified of the finding.

On the first sitting day in 2014 (11 February) the motion to elect a senator was resumed and Mr O'Sullivan was duly elected to the position.

Member remuneration and entitlements

On 11 July 2013 the Premier announced the establishment of a tribunal to determine the future remuneration and allowances for state Members of Parliament, as it was no longer tenable for the salaries of members of the Queensland Parliament to be legislatively linked to the salaries of Commonwealth Members of Parliament.

Since 1988 legislation has provided that members be paid $500 per annum less than a federal member of the House of Representatives. This nexus was maintained until October 2010 when the former Premier determined that increases for federal members would not be passed on in full to Queensland members. Instead, salaries were increased by a percentage value. The former Premier made a similar determination in 2011, even though such determinations were contrary to the Parliament of Queensland Act.

By 15 March 2012 Queensland members were being paid $3,761 per annum less than federal members. The difference increased significantly after that date when the Commonwealth Remuneration Tribunal published a new rate of salary for members of the House of Representatives following an extensive review of salaries and entitlements. Many entitlements of members and former members were curtailed as a trade off for higher salary. The Commonwealth tribunal commented in its report that any linkages between state and federal salaries should be severed as they were no longer applicable. By June 2013 the pay differential between federal and Queensland members was around $57,000.

On 1 July 2013 the acting Premier (Deputy Premier) announced that he had received Crown Law advice that the decisions by the former Premier regarding member salary increases were unlawful. The advice also stated that members, including former members, would be entitled to back pay. In a media statement the acting Premier said the government would strongly resist any claims for back pay, but that he had instructed the Clerk of the Parliament to ensure the legislation was complied with immediately. To ensure that the effect would be

cost neutral, he also instructed the clerk "to reduce by 50 per cent the amount of the electorate allowances due to be paid to MPs" and said that "a complete review of all allowances to be paid in the future will begin immediately."

The salary increase was approved by the Governor in Council on 4 July and all current members received a base pay rise of $57,000, payable from 1 July 2013. However, under the Parliament of Queensland Act, additional salary entitlement was payable to certain office holders such as the Speaker, Deputy Speaker, Leader of the House, whips, committee chairs, Premier, Deputy Premier, ministers and assistant ministers. Under the Act, whenever a variation to a member's base salary took effect, any additional salary payable was varied by the same percentage. This meant that the pay rise would be significantly larger than originally stated by the Deputy Premier.

The pay rise attracted much media attention. On his return from leave, the Premier announced that he had "administratively established" an independent remuneration tribunal to commence a review of member remuneration as quickly as possible. This was necessary as the House was still in recess and not due to sit again until 6 August. The tribunal met for the first time on 18 July.

Queensland Independent Remuneration Tribunal

On 6 August 2013 the Premier introduced the Queensland Independent Remuneration Tribunal Bill. The bill was declared urgent upon introduction, to be passed at that week's sitting. The urgency motion was not debated.

The objectives of the Bill were:

- to establish the Queensland Independent Remuneration Tribunal as a statutory authority;
- to break the legislative nexus between the remuneration of federal and state Members of Parliament, and between state Members of Parliament and local government councillors;
- to return salary levels for state members to the levels that applied on 30 June 2013 and ensure no continuing effects on members and former members in relation to salaries, allowances, entitlements and superannuation from the 1 July 2013 salary increase.[2]

The bill was passed by the House on 8 August and received assent on 13 August. In accordance with the commencement clause, the Act was taken to have commenced on 9 August.

Tribunal determinations

In accordance with the Act, the tribunal was required to make its first

[2] Queensland Independent Remuneration Tribunal Bill 2013, explanatory notes.

determination by 15 October. In doing so, it was to consult and consider the views of the Clerk of the Parliament. Under the Act the clerk was required to table the determination.

The tribunal determined that an increase in members' base salary was justified but there was no single appropriate benchmark. Instead it considered a range of factors and benchmarks. The end result was that the base salary would be $148,848, applicable from 1 July 2013. Additional salaries payable to certain office holders would be maintained at the same level pending a review. A number of allowances would be abolished as from 1 January 2014 and the following established instead:

- electorate allowance, to be set on the basis of a combination of electorate population and electorate size, with three bands established ranging from $27,500 to $30,000 to $34,000;
- information and communication allowance of $34,000 per annum;
- general travel entitlement, including motor vehicle allowance.[3]

Allowances are paid on condition that the member accounts for the expenditure to the clerk. The clerk is required to report annually on each member's expenditure.

A second determination was made in November to address taxation issues and minor technical and administrative issues that arose during development of the new *Members' Remuneration Handbook*. This determination also set new rates for the daily travel allowance.

Alleged misuse of parliamentary entitlements and failure to declare an interest

On 6 August 2013 the member for Redlands and chair of the Ethics Committee rose on a matter of privilege. The member apologised to the House following allegations appearing on the front page of *The Courier-Mail* and made by his alleged mistress that he had misused parliamentary entitlements.[4] The member stated that he was standing aside from his committee roles while the matter was considered.

On 7 August 2013 the Leader of the House moved to discharge the member from the Ethics Committee and the Parliamentary Crime and Misconduct Committee. The member's alleged behaviour was the subject of several questions soon after during Question Time. The Deputy Leader of the Opposition tabled

[3] Queensland Independent Remuneration Tribunal, determination 1/2013, 105–07.

[4] "Plonker—Scorned mistress reveals MP's bizarre 'sexting' habits", *The Courier-Mail*, 6 August 2013.

a copy of a letter to the Speaker from the alleged mistress (the complainant).[5]

The clerk considered the complaints, as they fell within the clerk's responsibilities as the Registrar of Members' Interests and as accountable officer.

The first complaint related to alleged failure to declare a "gift" on the Register of Members' Interests. The gift was upgraded travel for the member, his mother and the complainant. The Registrar concluded that the upgraded travel was not required to be declared. Therefore, there were no grounds to refer the matter to the Ethics Committee. The standing orders do not provide a mechanism for the Registrar to report the outcome of such a matter. However, the clerk, as Registrar, wrote to the Speaker advising her of the outcome. On 10 September 2013 the Speaker advised the House that as the complaint letter had been tabled in the House and publicly reported on, "it is both in the public interest and in fairness to the member that the outcome of this particular matter be reported to the House". The Speaker tabled the clerk's letter.[6]

The remaining complaints related to alleged misuse of parliamentary travel entitlements, facilities and information technology. The clerk, as accountable officer, considered these complaints. The clerk also had an obligation to notify the Crime and Misconduct Commission (CMC).[7] The CMC referred the matter back to the clerk to finalise and report back on the outcome. The clerk determined that none of the complaints were substantiated. Like the earlier complaint, the outcome of an internal investigation would not be publicly reported. However, it was appropriate to report to the relevant minister, in this case the Premier. The clerk wrote to the Premier on 20 December 2013 and recommended that it would be fair to the member, and in the public interest, to table the letter. The letter was tabled by the acting Premier on 24 December 2013.[8]

Crime and Misconduct Commission (Administrative Negligence Rectification) Amendment Bill

The bill was introduced by the Attorney General at 1.48 am on 8 March 2013 (which was the 7 March sitting day continuing). Its objective was to "ensure the security of documents relating to the Fitzgerald Commission of Inquiry

[5] Letter from a complainant to Hon Fiona Simpson MP, Speaker, regarding a complaint about the member for Redlands, Mr Peter Dowling MP, 22 July 2013.

[6] Letter from the clerk to the Speaker regarding his investigation of a complaint regarding alleged failure to register interests by the member for Redlands, Mr Peter Dowling MP, 9 September 2013.

[7] Crime and Misconduct Act 2001 (Qld), section 38.

[8] Letter from the Clerk of the Parliament to the Premier (Mr Newman) regarding the outcome of allegations against the member for Redlands, 20 December 2013.

that have been released under the Public Records Act 2002 during the period 1 February 2012 to 5 March 2013."

Media reports earlier in the week had identified that, due to a reclassification error by the Crime and Misconduct Commission (CMC) under the Public Records Act, documents relating to the Fitzgerald Inquiry which may contain sensitive information (including information about confidential sources and protected witnesses) had been accessible and accessed due to the restricted access period for the records having been incorrectly changed from 65 years to 25 years.

The bill was declared urgent upon introduction, to be passed through all remaining stages at that day's sitting. It was passed by the House at 2.46 am. The Attorney General then moved a motion requesting the Parliamentary Crime and Misconduct Committee to inquire into and report on how the CMC incorrectly classified, released and destroyed the Fitzgerald Inquiry documents. The motion was agreed at 3.00 am. (See below for further information.)

Criminal organisation laws

On 15 October 2013 the Attorney General and Minister for Justice introduced the Vicious Lawless Association Disestablishment Bill, the Tattoo Parlours Bill and the Criminal Law (Criminal Organisations Disruption) Amendment Bill. The bills were part of a package of measures aimed at tackling organised crime in Queensland. The legislation followed public incidents on the Gold Coast involving alleged "bikie" members, with the government saying they were "drawing a line in the sand with criminal motorcycle gangs".

Upon introduction, the Attorney General moved to declare the three bills urgent, to enable the bills to be passed in the same sitting week. This meant the bills would not be subject to committee scrutiny. The urgency motion was agreed, although it was opposed by all non-government members. The bills were debated together that evening, with all bills finally passing at 2.50 am the following morning. The bills were assented to on 17 October 2013.

The legislation proposed a range of measures including: providing additional mandatory imprisonment for "vicious lawless associates"; the introduction of a licensing regime for tattoo parlours and tattooists; and the insertion of new offences and aggravating circumstances for existing offences under the Criminal Code to target members of criminal organisations. The legislation also gave additional powers to the Crime and Misconduct Commission. One of the more controversial aspects of the legislation was amendments to the Bail Act so that there is a presumption against bail for criminal motorcycle gang members.

The laws have been the subject of much public discussion between the government and the legal fraternity. On 31 October 2013 Justice Fryberg stayed proceedings in relation to a review of a bail application for an alleged

bikie member.[9] Fryberg J noted comments by Premier Newman about the granting of bail and suggesting that the courts should uphold community expectations. Fryberg J raised concerns about the impact of the comments on the independence of the court. This was immediately followed by an appeal by the Director of Public Prosecutions to the Court of Appeal, resulting in the order being set aside so that the application could be determined.[10]

On 4 November 2013 the Chief Magistrate issued a practice direction that all contested bail applications in relation to participants in criminal organisations were to be heard in court 20, effectively meaning they would be heard by the Chief Magistrate only.[11]

In the meantime, the acting chair of the Crime and Misconduct Commission, Dr Ken Levy, wrote an opinion piece in the local newspaper supporting the laws.[12] Dr Levy was questioned by the Parliamentary Crime and Misconduct Committee about the article, which itself led to an inquiry (see below for further information).

There have been numerous public protests in relation to the laws and there is ongoing speculation that the constitutional validity of the laws may be tested in future.

Criminal Law Amendment (Public Interest Declarations) Amendment Bill

On 16 October 2013 the Attorney General and Minister for Justice introduced the Criminal Law Amendment (Public Interest Declarations) Amendment Bill. The legislation was prompted by a Supreme Court decision in late September 2013 to grant conditional release under a supervision order to a sexual offender, Robert John Fardon. The Attorney General immediately sought to put a stay on the orders in the Court of Appeal. In the meantime, the Attorney General introduced the bill.

The original Dangerous Prisoners (Sexual Offenders) Act 2003 (DP (SO) Act) provided for continuing detention and supervision orders, which would apply to Mr Fardon. The constitutional validity of that legislation was challenged in the High Court, but was held to be valid.[13]

The Attorney General, in introducing the bill, explained that it would "amend the Criminal Law Amendment Act by creating a new continuing detention regime based on a declaration by the Governor in Council". The public interest

9 *R v Brown* [2013] QSC 299.

10 *The Queen v Brown* [2013] QCA 337, delivered 8 November 2013.

11 Magistrates Court, Practice Direction No. 21 of 2013.

12 "Strong anti-gang laws vital to shield the innocent in bikie battle says CMC boss", *The Courier-Mail*, 31 October 2013.

13 *Fardon v Attorney-General (Qld)* [2004] HCA 46.

declaration could be made in relation to persons who were subject to continuing detention orders or supervision orders under the DP (SO) Act. The Governor in Council may make a declaration on the recommendation of the relevant minister—i.e. the Attorney General.

Upon introduction, the Attorney General moved to declare the bill urgent, to be passed in the same sitting week. As such the bill was not subject to committee scrutiny. The majority of non-government members opposed the urgency motion, but it was carried 71–13.

On 17 October 2013 the Leader of the House moved to place time limits on debate on the bill, essentially limiting debate to two hours between 12 midnight and 2 am.

Concerns were raised during the debate about the nature of the bill. The Leader of the Opposition began her speech by stating, "Let me make it very clear from the outset: the opposition will be opposing this bill because it strikes at the very heart of democracy, breaching one of the fundamental tenets of a Westminster government—the doctrine of the separation of powers". Concerns were raised by other non-government members. The opposition voted against the bill on its second reading, and on clause 6.

On 6 December 2013 the Queensland Court of Appeal handed down two decisions about the Criminal Law Amendment (Public Interest Declarations) Amendment Act.[14] The court held that sections 3 and 6 of the Act were invalid as "they would have the consequence that the DP (SO) Act now requires the Supreme Court to exercise powers repugnant to or incompatible with the institutional integrity of the Supreme Court, contrary to its function as a court which exercises judicial power pursuant to Chapter III of the Commonwealth Constitution".

The Attorney General considered appealing to the High Court, but was advised that the government was unlikely to succeed. The government is considering amending existing legislation in the new year.

Committee inquiry: release and destruction of Fitzgerald Inquiry documents

On 5 March 2013 the chair of the Parliamentary Crime and Misconduct Committee (PCMC) was advised by the acting chairperson of the Crime and Misconduct Commission (CMC) that two pressing matters had emerged: the public release of confidential Fitzgerald Inquiry documents; and the destruction of original Fitzgerald Inquiry documents held by the CMC that

[14] *Attorney-General (Qld) v Lawrence* [2013] QCA 364; *Attorney-General (Qld) v Fardon* [2013] QCA 365.

were to be perpetually preserved. (The Fitzgerald Inquiry was a Commission of Inquiry established in 1987 about possible illegal activities and associated police misconduct. Much of the evidence gathered during the inquiry remained confidential, including records of interviews with informants or suspects.)

Upon receiving this advice, the PCMC immediately began an investigation, issuing summonses and hearing *in camera* evidence on 6 and 7 March 2013.

On 8 March 2013, following the urgent passage of the Crime and Misconduct Commission (Administrative Negligence Rectification) Amendment Bill, the House resolved to refer certain matters to the PCMC. The resolution of the House further defined the direction of the committee's investigation and required the committee to report on:

- the incorrect classification of documents transferred from the CMC between 2007 and 2009;
- the CMC's failure to remedy the incorrect classification of the documents in a timely manner;
- destruction of records;
- failure by the CMC to account to the PCMC on the above issues in a timely manner;
- how issues regarding the incorrect classification of documents could be remedied in the longer term.

On 11 March 2013 the Speaker approved the appointment of two senior counsels—one as acting Parliamentary Crime and Misconduct Commissioner and the other as counsel assisting the Commissioner. Senior counsels examined witnesses on behalf of the committee, while committee members could also ask questions. The chair noted that "the format for this inquiry was unprecedented in Queensland and, if not unique, rare in Westminster democracies".

Seven parliamentary staff, including the Clerk of the Parliament, supported the committee in its inquiry. Witnesses were issued summonses to attend and produce evidence. The committee heard evidence in 14 hearings over 12 days. Approximately 42 hours of evidence was taken from 31 witnesses who gave their evidence under oath or affirmation. Many more days were spent in private deliberations. Approximately 10 linear metres of documentary evidence was gathered pursuant to the summonses or by undertakings given to the committee. A large amount of evidence was also provided electronically. A total of 124 exhibits were tendered at the hearings, with 140 documents tabled during the inquiry.

The committee tabled its report on 5 April. It made 22 findings and 24 recommendations. The report was debated in the House on 18 April and 2 May.

Possible misleading of a committee

On 1 November 2013 the acting chairperson of the Crime and Misconduct

Commission (CMC), Dr Ken Levy, provided an answer to a question from the Leader of the Opposition[15] during a public hearing of the Parliamentary Crime and Misconduct Committee (PCMC). The question related to a media article under the acting chairperson's name regarding legislation recently introduced to counter bikie gangs and in particular whether the acting chairperson had had contact with anyone from the government prior to writing the article.

Following the hearing, the acting chairperson wrote to the PCMC to advise that the answer he provided was incorrect. He had since recalled that the government media unit had contacted the CMC media unit in relation to the legislative changes. The PCMC tabled his letter along with a memorandum from a former CMC Commissioner. The committee tabled these documents.

The committee held a private 10-hour hearing on 13 November 2013 in which it met a number of CMC staff, including the acting chairperson. During this hearing the acting chairperson advised that he spoke with the Director of the Government Media Unit to seek advice on a trustworthy journalist.

There was significant media interest in the private hearing of the PCMC. On 20 November 2013 the Attorney General made a statement in the House alleging bias on the part of several PCMC members for public statements calling for the resignation of the acting chairperson prior to the finalisation of any committee proceedings. Later that night, the House:

- noted the statement by the Attorney General about the bias of some members of the Parliamentary Crime and Misconduct Committee;
- authorised and directed that the Attorney General be briefed immediately by the chair of the committee about the committee's response to the issue of bias and the intended progress of the committee's current investigation that may have been affected by the bias raised by the Attorney General; and
- ordered the Attorney General to report back to the House as soon as possible on this matter.

In debating the motion the chair of the PCMC tabled the transcript of the PCMC public hearing on 1 November 2013, a redacted copy of the transcript of the PCMC private hearing on 13 November 2013 and a redacted copy of the transcript of a private hearing with the Director of the Government Media Unit on 18 November 2013.

Later that night, the PCMC chair briefed the Attorney General on the committee's proceedings on the matter and its proposed course of action. Following this briefing, the House noted that—

- the chair of the PCMC had indicated that the PCMC will report that

[15] The Leader of the Opposition was not a substantive member of the committee but was replacing an absent member in accordance with the standing orders.

members of the committee may have been biased;
- in light of that, the PCMC, as currently constituted, could not fairly determine the matter currently before it;
- notwithstanding the PCMC's findings of bias by some of its members, the chair had tabled transcripts taken by the committee and authorised to be released by the committee with no finding or determination made against any person;
- the acting chairperson of the CMC had not been afforded any opportunity to respond or comment on the transcripts tabled;
- the tabling of transcripts in the absence of a response by Dr Levy may be highly prejudicial and may lead to "trial by media";
- no conclusions can or ought to be drawn simply from the tabled transcripts; and
- in order to ensure natural justice and procedural fairness, Dr Levy be afforded the opportunity to respond by statement to be tabled in this House at the earliest opportunity.

On 21 November 2013, the final sitting of the year, the chair sought leave to table a PCMC report of the committee during Government Business. Leave was not granted.

The chair tabled the PCMC report during Private Members' Statements, noting her regret at having to table the report during that business of the House. The chair of the PCMC advised the House that in accordance with standing order 268(1) the committee had resolved to refer the matter of the potential misleading of the committee by Dr Levy to the Ethics Committee.

However, given that the PCMC and the Ethics Committee had five members in common, the PCMC further recommended that the House establish a new select ethics committee to consider the matter.

Later on 21 November 2013 the House noted the recommendations of the PCMC in the tabled report, established a Select Ethics Committee (the order stated that no member with a conflict of interest or previous involvement in the matter under consideration could be nominated) and resolved to discharge the members of the PCMC. The House ordered that, notwithstanding anything in standing orders, the appointment of new members to the PCMC shall be by the Leader of the House and the Leader of the Opposition writing to the clerk with their appointments.

Subsequently, the member for Nicklin, a member of the PCMC, wrote to the Speaker and noted his concern that the motion and the resolution of the House were not in accordance with the Crime and Misconduct Act 2001 in that the Act requires there to be a committee of seven members: three nominated by the Leader of the Opposition and four by the Leader of the House. He considered the motion of the House contrary to that legislative requirement.

The Speaker engaged a Queen's Counsel to advise on the validity of the motion. Counsel's opinion was that the motion was lawful—the motion was the House's management of its members and its committees. The discharge of the members of the PCMC did not contravene the Crime and Misconduct Act 2001 and it was in accordance with the standing orders, which provide that unless otherwise provided the House may appoint and discharge members of a committee. The Act does not provide the method of appointing or discharging members of the PCMC—that is for the House.

Victoria Legislative Assembly

House adjourned by Speaker due to grave disorder

On 14 November 2013 the Speaker of the Legislative Assembly exercised the power in standing order 129 to adjourn the House until 26 November. Standing order 129 states, "In the case of grave disorder, the Speaker may adjourn the House without putting a question, or suspend any sitting for a time to be determined by the Speaker."

The Legislative Assembly comprises 88 members, with the government formed of a Liberal Party/National Party coalition of 45 members. In March 2013 a member of the Parliamentary Liberal Party resigned to become an independent member of Parliament. In November 2013 the independent member indicated that he would not support the Speaker in a confidence motion, if one were moved. The current standing orders of the Legislative Assembly provide no mechanism to raise a no confidence motion in the Speaker other than by the government parties, or by leave so as to bring on general business. Consequently the opposition and the independent member tested the Speaker's authority by means of a failed motion to support the Speaker naming (suspending) a member. On the morning of 14 November 2013 members of the opposition sought to force this vote by disregarding the Speaker's call for order in the House. The Speaker subsequently suspended the sitting at 9.38 am until 11.02 am, and again at 11.04 am until 11.32 am, before adjourning the House under standing order 129 at 11.33 am until 26 November 2013.

Members named and suspended

On 19 September 2013, after suspending the sitting of the House for 18 minutes, the Speaker named the member for Mulgrave, the Leader of the Opposition, who was subsequently suspended for three sitting days with the Speaker exercising his casting vote to support the motion "That the member for Mulgrave be suspended from the service of the house for three days." On 26 November 2013, after suspending the sitting for the House for 36 minutes, the Speaker exercised his casting vote to support the motion "That the member for Bendigo East be suspended from the service of the house for six sitting

days." The Speaker subsequently named the member for Monbulk, who was also suspended for six sitting days.

Western Australia Legislative Assembly

The Speaker permitted an indigenous member to deliver part of her maiden speech in her first language, Gidja, her having given an undertaking that there would be no unparliamentary language in the speech. After the member made a short part of her speech in Gidja, she repeated that part of the speech in English so that it could be reported by Hansard.

CANADA

House of Commons

Several noteworthy events happened in 2013. Some concerned the participation of independent members in the legislative process, while others were rare occurrences of procedural events, such as the granting of Royal Consent to a government bill or of a Royal Recommendation to a private member's bill. Discussions were held on the structure, membership and general functioning of the governing body of the House of Commons: the Board of Internal Economy.

On 31 January 2013 Rob Nicholson (Minister of Justice and Attorney General of Canada) introduced Bill C-53, *An Act to assent to alterations in the law touching the Succession to the Throne*. Mr Nicholson informed the House that His Excellency the Governor General had given in Her Majesty's name the Royal Consent to the bill. Derived from British practice and among the unwritten rules and customs of the House of Commons of Canada, Royal Consent is required for any legislation that affects the prerogatives, hereditary revenues, property or interests of the Crown. It does not signify approval of the substance of the measure, but only that the Crown agrees to remove an obstacle to the progress of the bill so that it may be considered by both Houses and, if passed, ultimately submitted for Royal Assent. On 4 February 2013 Peter Van Loan (Leader of the Government in the House of Commons) sought and obtained unanimous consent to move a motion to deem Bill C-53 adopted at all stages in the House and passed. The motion was agreed and the bill was sent the Senate. On 13 March 2013 the bill received Royal Assent.

On 13 February Bill C-383, *Transboundary Water Protection Act*, was passed in the House. This is only the second time that a private member's bill has received a Royal Recommendation—a message from the Governor General, required for any vote, resolution, address or bill for the appropriation of public revenue. Only a minister can obtain such a recommendation. The other instance occurred in 1994 with Bill C-216, *An Act to amend the Unemployment Insurance Act (jury service)*.

On 7 May, after Bill C-60, *An Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, was referred to the Standing Committee on Finance, the committee adopted a motion inviting five additional standing committees to study certain provisions and to submit their recommendations or suggested amendments to the bill to the Finance Committee. In addition, the committee invited independent members to submit amendments to the bill that they would like the committee to consider. The motion also specified that any amendments proposed by the other committees or independent members would be "deemed to be proposed during the clause-by-clause consideration of Bill C-60". The committee considered 55 amendments, including 14 from independent members, and on 29 May the bill was reported to the House without amendment.

The same day, Nathan Cullen (Skeena—Bulkley Valley) rose in the House on a point of order about the committee having allowed independent members to submit amendments during consideration of the bill. He argued that the committee had surpassed its authority, since only the House can choose committee members and only committee members are allowed to move motions.

On 6 June the Speaker delivered his ruling. He stated that he could not determine that the committee had exceeded its mandate, or that standing order 119, which deals with moving and voting on motions in committees, had been disregarded. He said that the committee had adopted a procedural mechanism to simplify the flow of its work, and while the outcome may not have been exactly as independent members had envisaged, his role as guardian of rights and privileges was to ensure that there was a mechanism in place by which all members could participate in the legislative process; he was satisfied that there was. He concluded by stating that he could not find that the committee had done anything procedurally unacceptable, especially without a report to the House from the committee to the contrary.

On 18 June the Standing Committee on Procedure and House Affairs was instructed by the House to conduct public hearings, including hearing witnesses such as the Auditor General, and the Clerk and the Chief Financial Officer of the House of Commons, and to gather information with a view to replacing the Board of Internal Economy with an independent oversight body. In addition, the committee was asked to propose changes to current legislation and administrative procedures to bring full transparency and accountability to the House of Commons' spending. Finally, the committee was instructed to examine the subject-matter of motions standing in the name of Justin Trudeau (Papineau), dealing with the web posting of expenses and the auditing of the House by the Auditor General. On 2 December 2013 the Standing Committee on Procedure and House Affairs presented its third report on the Board of

Internal Economy (BOIE). The committee could find no reason to alter the structure, membership or general functioning of the BOIE. The committee nonetheless made several recommendations, including that the BOIE further consider how it could enhance the Members' Expenditures Report by providing additional information; that the Auditor General be invited by the BOIE to conduct audits more frequently; that the BOIE, in consultation with the Auditor General, develop publicly available guidelines with respect to audits of House of Commons spending; and that the BOIE continue its practice of making the minutes of its meetings available to the public in a timely manner.

Senate

Suspension of three senators

In the last two weeks of October 2013 the Senate considered the suspension without pay of three senators for the duration of the session. Originally the suspensions were debated as three separate non-government motions, one for each senator.

On 24 October 2013 the Speaker delivered a ruling on a point of order raised earlier in the week about the initial motions for separate suspensions of the senators. It had been argued that the motions were arbitrary, and a violation of basic rights guaranteed under the *Canadian Charter Of Rights And Freedoms*, and that one of the reports on a senator of the Standing Committee on Internal Economy, Budgets and Administration was not properly before the Senate because it had died on the order paper with the prorogation of the previous session before it could be debated and voted on. The Speaker found that proceedings were in keeping with the Senate's authority, rules and practices, and that debate could proceed.

The following week, a point of order was raised on the propriety of a government disposition motion that proposed to limit debate on the original three motions to suspend the senators, which were all moved as non-government business. The Speaker agreed with the point of order and stated that the disposition motion that was before the Senate appeared to cross the boundaries between these two categories of business. He ruled the government disposition motion out of order.

Subsequently, the government introduced a new motion, under government business, for the suspension for all three senators, still without pay, but allowing them to keep their health and insurance benefits. Given the significance of the issue, the Senate held long sittings with many hours of debate and considered a number of amendments. In the end, the government invoked time allocation to bring the matter to a decision.

Although the three suspensions had been included in one government motion, senators were able to vote separately on each suspension. The Speaker

declared that the motion could be treated as a complicated question and that he would allow separate votes on each senator's suspension. He stated that it was appropriate, under rule 1-1(2) of the *Rules of the Senate*, to look to the procedures in the Canadian House of Commons, which had more experience of dividing complex questions.

On 5 November 2013 the government motion to suspend the three senators was agreed. There was some variance in how members voted on each senator's suspension.

Public audio broadcasting of Senate proceedings

The Standing Committee on Internal Economy, Budgets and Administration made an historic decision to authorise the Clerk of the Senate to make the audio broadcast of Senate chamber proceedings publicly available. Beginning on 26 November 2013, audio proceedings of the Senate chamber were made publicly available via ParlVU, the Senate's webcasting service that allows users to access live and archived streams of Senate committee proceedings, and now Senate chamber proceedings.

Publication of Companion to the Rules of the Senate (2nd edition)

In November 2013 the second edition of the *Companion to the Rules of the Senate* was published. The purpose of the *Companion* is to provide additional information about Senate parliamentary procedures, following the structure of the *Rules of the Senate*. Each chapter begins with an overview of its subject matter, explaining the general content. The text of each rule—usually presented separately but with variations where appropriate—is followed by a commentary, related citations and references to Speaker's rulings. While the *Companion* has been prepared as a tool to help understand Senate proceedings, it does not replace the *Rules of the Senate*, Speaker's rulings and decisions of the Senate itself. All of these must be taken into account, together with other works on parliamentary procedure, for the fullest possible understanding of the Senate's practices.

Earlier in the year a series of 12 Senate Procedural Notes was made publicly available. These notes are intended to provide clear and simple explanations on key aspects of how the Senate conducts its business.

British Columbia Legislative Assembly

Provincial general election

A provincial general election was held on 14 May 2013, in accordance with British Columbia's fixed election date legislation, which requires a general election to be held every four years. The Liberal party won a fourth consecutive majority, with 49 out of 85 seats. The New Democratic party formed the official

opposition, with 34 seats. Vicki Huntington was re-elected as an independent member—the first independent to be re-elected in modern BC political history. Dr Andrew Weaver became the province's first member representing the Green party, though due to provisions on party recognition he sits as an independent member.

Although she led the governing party to re-election, the Premier, the Honourable Christy Clark, did not retain her seat in the riding of Vancouver-Point Grey. Cabinet Minister Ben Stewart was re-elected as MLA for the riding of Westside-Kelowna, but resigned his seat on 5 June. A by-election was called on 12 June, which Ms Clark won on 10 July.

New Speaker

The Honourable Linda Reid MLA (Richmond East) was acclaimed Speaker on 26 June. Ms Reid was first elected to the Legislative Assembly in 1991 and is BC's longest-serving female member, as well as the longest-serving member in the present House.

PowerPoint budget presentations in the chamber

In a first for the Legislative Assembly of British Columbia, the Minister of Finance gave a PowerPoint presentation in the chamber on 27 June, when he presented a provincial budget update for 2013–14—as did the Opposition Finance Critic, Mike Farnworth MLA, when he gave the opposition's response to the budget update on 2 July. Four large monitor screens were temporarily mounted to the walls of the chamber to display the slides. Copies of the slides were uploaded to the Legislative Assembly's website.

Committee of Supply

Following a practice that was first used in 2011, the Committee of Supply met in three concurrent sections to debate the Estimates, starting 15 July and finishing the annual review of all ministry estimates on 25 July. The House then adopted the final Supply Act 2013–14 before adjourning for the summer.

This practice builds upon one established in 1993 when the Legislative Assembly adopted a sessional order to authorise the House to divide the Committee of Supply into two sections sitting concurrently to consider supply—section A sitting in the Douglas Fir committee room and section B sitting in the chamber.

Resignation

On 18 September 2013 Official Opposition Leader Adrian Dix announced he would step down as leader of the New Democratic party. His resignation took effect following a leadership convention held in May 2014.

Accountability reforms

The Clerk of the Legislative Assembly, Craig James, and Kate Ryan-Lloyd, the Deputy Clerk and Clerk of Committees, continued to implement a multi-year programme to strengthen the Legislative Assembly's openness, transparency and accountability. The programme follows the Legislative Assembly Management Committee's (LAMC) 2012 commitment to implement recommendations made by the provincial Auditor General to strengthen the Assembly's systems of financial control.

At its first meeting of the 40th Parliament, on 24 September, the LAMC, as part of its commitment to full disclosure of Assembly expenses and liabilities, agreed to the following measures: expanded quarterly reporting of members' travel expenses; quarterly disclosure of members' compensation; a commitment to work towards disclosing members' constituency office expenses. The LAMC also committed to publishing independent, audited financial statements. The information on MLAs' remuneration and expenses is posted on the Legislative Assembly website quarterly.

In March Hilary Woodward was appointed Executive Financial Officer of the Legislative Assembly, a new executive position created to provide leadership in supporting LAMC's financial management commitments. The Executive Financial Officer is responsible for Financial Services, Human Resource Operations, Information Technology and the Legislative Dining Room. Reporting to the Clerk, Ms Woodward is part of the Assembly's Executive Management Committee.

Security threat

A bomb threat to the Parliament Buildings, planned for 1 July during Canada Day celebrations, was foiled with the apprehension of two individuals who had planted pressure-cooker bombs on the grounds of the legislature. The Royal Canadian Mounted Police indicated that the individuals in question had been under surveillance for some time. As a result of the incident a comprehensive review of security and public access to the building and grounds was undertaken.

Orientation sessions

At the start of the 40th Parliament three procedural orientation sessions were held for new members, grouped by party or as independents. Topics included the role of the Speaker, parliamentary decorum and behaviour, a typical day in the House, question period, the financial and budget cycle, and the role, functions and powers of parliamentary committees. There was also an orientation meeting for new members with statutory officers. Senior officials from the eight independent legislative offices provided members with an overview of their mandates and responsibilities.

In addition, there was a combined administrative orientation session for all members and legislative staff.

In a first for the Legislative Assembly, a two-day administrative orientation session for constituency office staff was held in September 2013. The training sessions focused on best practices for financial and operational management of constituency offices in anticipation of internal and external audits in the coming year.

Quebéc National Assembly

Online course comparing the parliamentary systems of Québec and France

In a collaborative effort between the National Assembly of Québec, the National Assembly of France and Université Laval's Research Chair on Democracy and Parliamentary Institutions, the online course "Parlementarisme comparé : Québec-France" was launched in September 2013. Students were introduced to the intricacies of legislative assemblies and parliamentary proceedings in two parliamentary systems that grew out of two different legal traditions: the French system, which is based on written law, and the Québec system, based on the British parliamentary system.

Offered as part of Université Laval's undergraduate programme in political science, the course is addressed to university students and researchers, and to parliamentarians and civil servants—to anyone, in fact, who wants to learn more about the democratic systems of Québec and France.

The course is overseen by Chair-holder and Associate Professor of Political Science at Université Laval, François Gélineau. It was two years in the making and requires the collaboration of specialists from both assemblies and the support of professors from Université Laval and the Institut d'études politiques de Bordeaux. Beginning in September 2013, 22 students were enrolled in the course.

Fixed-date elections

On 14 June 2013 the House adopted the *Act to amend the Election Act for the purpose of establishing fixed-date elections*.[16] Among other things, it provides for a general election to be held on the first Monday in October of the fourth calendar year following the year that includes the last day of the previous legislature. It also amends the *Act respecting the National Assembly*[17] to the effect that a legislature expires on 29 August of the fourth calendar year following the year

[16] S.Q., 2013, c. 13.
[17] CQLR, c. A-23.1.

of the most recent general election.

The Act provides that, where a provincial electoral period overlaps with a federal or municipal electoral period, the legislature expires on the first Monday in April of the fifth calendar year following the year of the last day of the previous legislature, unless this extends the term of the legislature beyond five years.

The Chief Electoral Officer may postpone an election by one week in the event of a major disaster or other serious and unforeseeable situation.

Finally, the Act reiterates the Lieutenant-Governor's right to dissolve the National Assembly before the expiry of a legislature.

Scope of a motion addressed to the Government

At the sitting on 12 February 2013, during the period for motions without notice, the Assembly adopted a motion demanding that the Government cancel certain budget cuts imposed on universities. The next day an opposition member questioned the Minister of Higher Education about how the motion would be acted on. Following this exchange, the House Leader of the Second Opposition Group raised a point of order, maintaining that the motion, since it contained the word "demand", constituted an order of the Assembly and that the Government was therefore required to act on it.

In its ruling, the Chair of the Assembly invoked two fundamental principles that follow the separation of powers between the legislative and executive branches. First, the Assembly may only give an order that lies within the scope of its prerogatives and authority. Second, since the executive is bound only by legislation adopted by Parliament, it is not strictly required to act on a motion adopted by the Assembly.

The separation of state powers confers specific and distinct roles on the executive and legislative branches. In this context, the Assembly plays a key role in overseeing the actions of the executive and has various parliamentary means of doing so. For instance, it may exercise important prerogatives stemming from parliamentary privileges recognised by British-style parliamentary systems—prerogatives that allow it to exercise to the full its legislative role.

In questions of governance, however, the executive is the deciding body, and the Assembly may neither substitute itself in the executive's role as state administrator nor place constraints on the executive's decisions.

Hence, in the case of a motion calling for the Government to act in a specific manner in an area falling within the exclusive jurisdiction of the executive, the jurisprudence has always considered that a strictly political or moral constraint is involved and, in that context, the Assembly is expressing a wish rather than an order—as was the case in this instance.

Confidence of the Assembly in the Government

Upon the introduction of a bill by a minister, the Government House Leader made a declaration informing the Assembly that the Government would consider as a question of confidence the vote on the motion proposing that the bill be brought before the Assembly.

The Official Opposition House Leader requested a directive from the President as to whether the Government could raise an issue of confidence at this stage of the legislative process, when the Assembly had not yet read the bill.

Constitutional conventions recognise various situations where confidence in the Government is generally considered to have been called into question. These situations were codified in the Assembly's standing orders in 2009.

Accordingly, the question of confidence of the Assembly in the Government may be raised only by means of a vote on (1) a want of confidence motion; (2) a motion by the Premier that the Assembly approve the general policy of the Government; (3) a motion by the Minister of Finance that the Assembly approve the budgetary policy of the Government; (4) a motion for the passage of an appropriation bill introduced pursuant to standing order 288; or (5) any other motion that the Premier, or his or her representative, expressly declares a question of confidence in the Government.

The President ruled that the Government had the right to determine whether or not it had the confidence of the House and that it could exercise this right with regard to any motion.

In camera hearings of witnesses

Under a mandate received from the Assembly, a committee called the bodyguard of a former minister for an *in camera* hearing.

The committee chair then received, from a lawyer representing the professional association of bodyguards of the Québec government, a letter containing two main requests: (1) that the former minister release the bodyguard from the oath of discretion he had taken under the Police Act[18] if the committee wished to question him on information obtained in the course of his functions; and (2) that the bodyguard be accompanied by his lawyer at the hearing. Before the committee proceeded further, the committee chair issued a directive on these requests.

The chair affirmed that the oath under which the bodyguard swore not to reveal any information he had obtained in the performance of his duties did not limit the power of the committee to conduct an inquiry or require the witness's appearance. The power of a committee to require that witnesses appear before

[18] CQLR, c. P-13.1.

it follows from the parliamentary privilege to conduct an inquiry and enjoys constitutional status. Given the primacy of constitutional norms, the power of a committee to conduct an inquiry takes precedence over general law.

Under its mandate, the committee could exercise its power to require witnesses to appear before it and give their testimony. In the case of the bodyguard, no general-law provisions, including the oath of discretion in the Police Act, could have the effect of limiting the committee's parliamentary privilege to conduct an inquiry and compel witnesses.

However, for security reasons and to protect the witness's identity, the committee decided that the former minister's bodyguard would be heard *in camera*. In deciding as such, the committee took into account the special nature of his functions and the code of ethics and conduct applicable to him.

Under the *Act respecting the National Assembly*, a person's testimony before the Assembly, a committee or a sub-committee cannot be used against him or her in a court of law, unless the person is being prosecuted for perjury. However, pursuant to a court ruling, this protection is subject to the witness having sworn an oath before giving his or her testimony. Consequently, and given the nature of the questions the bodyguard might be asked, the committee chair strongly recommended that the committee members ask the bodyguard to swear an oath under the *Act respecting the National Assembly*. In this way he would enjoy the immunity provided under the law with regard to his testimony, in the event that any aspect of the secrecy of the *in camera* hearing were to be lifted.

GUYANA NATIONAL ASSEMBLY

Amendments to annual estimates by opposition

The annual estimates of expenditure for 2012–14 were passed by the National Assembly with significant amendments. For 2012 $21 billion less was approved than was requested; in 2013 $32 billion less; and in 2014 $37 billion less.

The Government, through the Hon. Attorney General and Minister of Legal Affairs, challenged in the High Court the constitutionality of the cuts to the budget. The High Court ruled that the National Assembly cannot reduce budgetary allocations; it can only approve or disapprove proposed amounts because the budget is the product of the executive and is the constitutional responsibility of the Minister of Finance.

New technology in committee meetings

Members of the Special Select Committee on the Public Utilities Commission Bill used teleconference facilities provided by the Ministry of Foreign Affairs to enable an expert to participate in the committee's deliberations. In addition,

Members of Parliament, in extenuating circumstances, have participated in meetings of committees via Skype and telephone.

Introduction of mass text messaging

As a means of ensuring that Members of Parliament receive adequate and due notice through every possible means, the Committees Division has recently used mass text messaging to inform and remind members of meetings of committees.

E-Parliament pilot project

In keeping with global paperless trends, the National Assembly has launched an E-Parliament pilot project. The project is scheduled to last for four months and involves a select group of Members of Parliament and members of staff sharing information via electronic means only.

Revamp of Parliament's website

The parliamentary website is in the process of being revamped, which will enable the media and public to, *inter alia*, access information about the National Assembly and view live streaming of sittings of the Assembly.

Parliament Corner

To enhance information sharing, Parliament has acquired a section called "Parliament Corner" in the *Guyana Chronicle and Kaieteur News* newspapers on Sundays. Parliament Corner provides information about the planned activities of Parliament for that week.

Proposal for a youth parliament of the Parliament of Guyana

A proposal has been made for the establishment of a youth parliament. The parliament will: train youths in democratic practices, leadership, negotiation and conflict resolution; help young people execute grassroots democracy initiatives in their communities; educate youths about the basic functions (legislative, financial, scrutiny and appointive) of the National Assembly of Guyana; enable discussion and the generation of ideas, through reports to the National Assembly, on current legislation and policies and their implications for youths; promote broader awareness among young people of community issues and the process of government through which those issues can be addressed; and promote national unity.

INDIA

Rajya Sabha

The following legislation concerning members of Parliament and the electoral system was passed by the Rajya Sabha in 2013.

Parliament (Prevention of Disqualification) Amendment Bill 2013

Article 102 of the constitution provides that a person is disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the government of any state, other than an office declared by Parliament by law not to disqualify its holder. In pursuance of this, the Parliament (Prevention of Disqualification) Act 1959 exempted certain offices, the holding of which does not disqualify the holder. The Act also exempted the chairperson of the National Commission for the Scheduled Castes and Scheduled Tribes from disqualification. With the bifurcation of the National Commission for the Scheduled Castes and Scheduled Tribes by the Constitution (Eighty-ninth Amendment) Act 2003, consequential amendments were required to the Parliament (Prevention of Disqualification) Act 1959 to exclude the chairperson of the National Commission for the Scheduled Castes and the chairperson of the National Commission for the Scheduled Tribes from being disqualified for being chosen as or for being a member of Parliament. As the Constitution (Eight-ninth Amendment) Act 2003 came into force on 19 February 2004, the bill proposed to give effect to the amendment from the same date. The bill was passed by the Rajya Sabha on 22 August 2013 and by the Lok Sabha on 6 September 2013. The bill was assented to by the President of India on 20 September 2013 and became Act No. 28 of 2013.

Representation of the People (Amendment and Validation) Bill 2013

The bill amended the Representation of the People Act 1951 with a view to addressing the situation arising from the Supreme Court's order in *Chief Election Commissioner v Jan Chaukidar and others*. The Supreme Court in its order on 10 July 2013 upheld the order of the High Court of Patna declaring that a person who had no right to vote by virtue of section 62(5) of the 1951 Act was not an elector and therefore not qualified to contest the election to either House of Parliament nor a legislative assembly of a state. In order to address the situation, the bill amended the definition of "disqualified" in section 7(b) of the 1951 Act so as to provide that a member of Parliament or of a state legislature shall be disqualified for being chosen as, or being, a member only if the person is so disqualified under Chapter III of Part II of the said Act. The amendment added to the definition that disqualification has to be due to conviction for certain

offences specified in Chapter III of the Act and there can be no other ground. The amending bill also inserted a proviso to section 62(5) which provides that by reason of the prohibition to vote under the said section, a person whose name has been entered in the electoral roll shall not cease to be an elector. The bill was passed by the Rajya Sabha on 27 August 2013 and by the Lok Sabha on 6 September 2013. The bill was assented to by the President of India on 20 September 2013 and became Act No. 29 of 2013.

Lokpal and Lokayuktas Bill 2013

The term Lokpal/Lokayuktas refers to ombudsman. The bill provided for the establishment of a body of Lokpal for the union and Lokayukta for states to inquire into allegations of corruption against certain public functionaries. The Lokpal shall consist of a chairperson and no more than eight members, of whom 50 per cent shall be judicial members. The chairperson and members of the Lokpal shall be appointed by the President following the recommendations of a selection committee, which shall consist of the Prime Minister, the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Chief Justice of India or a judge of the Supreme Court nominated by him, and an eminent jurist nominated by the President.

The Lokpal shall inquire into any allegation of corruption about the present and former Prime Ministers (with certain safeguards); present and former union ministers; current and former members of Parliament; group A, B, C and D officers and officials of the central government; employees of a body, board, corporation, authority, company, society, trust or autonomous body set up by Act of Parliament, or wholly or partly financed or controlled by the central government; and employees of associations of persons, societies or trusts which are financed by the government and have an annual income above a specified amount, or received donations from any foreign source under the Foreign Contribution (Regulation) Act 2010 in excess of rupees ten lakhs in a year. The bill *inter alia* provides that every state shall set up the Lokayukta—if such a body is not already established—within one year of the commencement of the Act. The bill was passed by both Houses of Parliament in December 2013 and assented to by the President of India on 1 January 2014. It became Act No.1 of 2014.

NEW ZEALAND HOUSE OF REPRESENTATIVES

Election of the Speaker

The Rt Hon. David Carter was elected Speaker on 31 January 2013. This followed the resignation of the former Speaker, Dr The Rt Hon. Lockwood Smith, who ended his parliamentary career to become High Commissioner of New Zealand to the United Kingdom. Prior to his election Mr Carter was a

Cabinet minister, and has been a member of Parliament since 1994. He is from the Canterbury region.

Unusually, a number of members raised points of order with the Clerk when she conducted the election of the Speaker. The Clerk deals with questions of order relating to the election in the same way that a Speaker would, if the Speaker were presiding. Members sought leave for the election to be debatable, and for it to be conducted by way of a secret ballot. The Clerk put the various requests to the House, which denied leave in each case.

Death of sitting member

Hon. Parekura Horomia, member for Ikaroa-Rāwhiti since 1999, died on 29 April 2013. He was a member of the Labour party (opposition) and during the term of the previous government had been a minister for several portfolios, most notably as Minister of Māori Affairs from 2000 to 2008. In a moving debate, members paid tribute to Mr Horomia's achievements and long public service, his good humour, his ability to bridge the parliamentary divide, and his mana as a kaumātua (elder). The House then adjourned as a mark of respect. This was the first time since 1987 that a sitting member had died during a term of Parliament (Rod Donald was re-elected in 2005 but died before the opening of Parliament, and Allan Peachey died shortly after Parliament was dissolved for the 2011 election).

Recognition of parties

The standing orders provide for the recognition of parties for parliamentary purposes. Such recognition has implications for procedures in the House and for funding to support each party's parliamentary activities. The standing orders provide that, for a party to be recognised for parliamentary purposes, it must be registered by the Electoral Commission under the Electoral Act 1993. In June 2013 the Speaker was required to consider how to approach the cancellation of a party's registration by the Electoral Commission. The United Future party, led by Hon. Peter Dunne (its only MP) informed the Speaker that the Electoral Commission had cancelled the party's registration as it had not demonstrated that it had sufficient membership (a party must have at least 500 current financial members who are eligible electors).

The Speaker continued to accord parliamentary recognition to the United Future party for a short period, to give the party a fair opportunity to register under the Electoral Act. However, it became apparent that the party's resolution of the matter with the Electoral Commission would take some time, and the Speaker considered whether the party should continue to be recognised for parliamentary purposes. In doing so, he balanced two fundamental public interests. On the one hand it is not tenable for a party that cannot reasonably

demonstrate its wider representative capacity to continue to be funded. On the other, party representation of community interests expressed at a general election should not be interfered with lightly.

The Speaker determined that the parliamentary membership of the United Future party would no longer be recognised as a party for parliamentary purposes, and that Hon. Peter Dunne would be treated as an independent member. When the party subsequently regained its registration under the Electoral Act, it was again recognised as a party for parliamentary purposes.

Pacific Parliamentary and Political Leaders Forum and special debate

More than 70 Pacific parliamentarians and political leaders gathered at the New Zealand Parliament between 18 and 22 April 2013 for the Pacific Parliamentary and Political Leaders Forum, the first such forum held in New Zealand. A core objective of the gathering was to promote stronger co-operation, collaboration and political cohesion amongst new and emerging political leaders from the South Pacific and to strengthen their relations with New Zealand parliamentarians.

The forum was the result of the unanimous recommendation in 2010 of the Foreign Affairs, Defence and Trade Committee in its report on *New Zealand's relationships with South Pacific countries*. Invitations were extended to emerging leaders from all Pacific nations, including women and younger parliamentarians. Participants were invited from Fiji, Tokelau and New Caledonia, which do not have parliaments.

At the start of the forum, the House held a special debate on Pacific issues. This three-hour debate arose from a Government notice of motion. At the commencement of the sitting, the Speaker welcomed conference participants who were seated in the gallery, and members were given licence to address comments to the participants. An extended sitting that morning allowed progress on Government business, freeing up time for the special debate. This was another innovative use of the procedure for extended sittings that was introduced in 2011.

The forum continued until 22 April with a mix of seminars and debates, including some contributions from New Zealand members. Diverse topics of particular importance to the Pacific were covered, from climate change to the economic outlook, the importance of parliament, gender equality and the delivery of services in remote communities.

High public interest in passage of members' bills

Two members' bills in the names of opposition members were passed on the same day (17 April 2013). The Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Bill was passed despite the Government opposing its

passage. The Government could have exercised its financial veto to halt the bill, but did not. The Marriage (Definition of Marriage) Amendment Bill enabled couples to marry regardless of sex, sexual orientation or gender identity. The select committee considering the bill received 21,533 submissions, 2,898 of which the committee considered presented unique content. The House treated the bill as a conscience issue, and it evoked thoughtful, passionate speeches from members across the House during debates that were watched attentively throughout the country.

Record of attendance for members of Parliament

In 2013 the House passed the Members of Parliament (Remuneration and Services) Act, which included a provision updating the penalties for members who are persistently absent from their parliamentary duties without proper cause. Previously, a member could be fined $10 for each sitting day that he or she was absent after being absent for 14 sitting days in a parliamentary session. Under the new Act, a member who has been absent from the House for more than three sitting days during a calendar year is penalised by an amount equal to 0.2 per cent of the member's gross annual salary for the fourth and each subsequent sitting day on which the member is absent.

To complement these provisions, the House passed a sessional order, to take effect from 1 January 2014, which requires the Clerk of the House to keep a record of attendance, provides for members to be granted permission to be absent, and requires absences without permission to be recorded in the Journals. Members are recorded as being present in the House on a sitting day if they attend the House, attend a select committee meeting, attend other official business approved by the Business Committee or are participating in the official inter-parliamentary relations programme funded by the Office of the Clerk. The record of absences without permission published in the Journals is the basis for implementing the penalty under the Act for persistent absences.

Report of the Constitutional Advisory Panel

In November 2013 the Constitutional Advisory Panel released its report on New Zealand's constitutional arrangements. The panel had been established by the Government in 2011, following the terms of a support agreement between the National Party and the Māori Party, and conducted an extensive public "conversation". The report made recommendations to the Government, including a number about the operation and activities of the New Zealand Parliament. The panel examined the size of the Parliament (currently approximately 120 members) but recommended that no further work be undertaken on this matter. It noted that there was a reasonable level of support for a longer parliamentary term (currently three years) and recommended that

a process be established to explore what additional checks and balances might be desirable if a longer term were introduced. It recommended that any such change should take place following a referendum.

Electoral law provides for seats in the House representing Māori electorates. These are geographical electorates for which there is a separate roll of voters who wish to be enrolled as Māori electors. The panel recommended further investigation into how Māori representation in Parliament might be improved.

The panel's terms of reference included considering Bill of Rights issues. The New Zealand Bill of Rights Act 1990 sets out certain civil and political rights and freedoms, and enjoins the legislature to pass laws that subject these rights and freedoms only to such reasonable limitations as may be demonstrably justified in a free and democratic society. However, the application of this test is generally a matter for the House, as there is no provision for the courts to strike out legislation that is inconsistent with the Act. The panel noted concern about Parliament's ability to amend the New Zealand Bill of Rights Act 1990, or to pass legislation that is inconsistent with the Act, with the support of a simple majority. The panel therefore recommended setting up a process to investigate improving the effectiveness of the Act, including enhancing compliance with the Act's standards by the executive and Parliament. The Standing Orders Committee subsequently (in July 2014) recommended strengthening parliamentary consideration of Bill of Rights matters.

Webcasting of select committee hearings

Since November 2013 the Office of the Clerk has been trialling the webcasting of certain select committee hearings of evidence, following a recommendation from the Standing Orders Committee. Two select committee rooms have been equipped with webcasting facilities. A committee that is intending to hear evidence in public and is meeting in a room with webcasting facilities can choose whether those hearings are webcast. During the pilot project, only one select committee hearing can be webcast at a time, there is no on-demand facility and proceedings are not recorded nor archived.

At the end of the first week of the pilot, 700 viewers from five countries (New Zealand, Fiji, United States, Australia and the United Kingdom) had accessed the webcasting stream, and the Twitter feed for webcasting (which provides information on which hearings are to be webcast) had almost 100 followers. Demand for the service has increased, and the Standing Orders Committee has recommended to the Government that financial provision be considered for full implementation of webcasting of hearings from all select committee meeting rooms.

Citizens-initiated referendum held

Under the Citizens Initiated Referenda Act 1993, any person may promote a petition requesting an indicative referendum on a question. A referendum is held if the petition is signed by at least 10 per cent of registered electors, with signatures to be collected within a year.

An indicative referendum petition was successful in 2013, the first one since 2009. Its question focused on the Government policy to sell part of its ownership of a number of state-owned enterprises. The referendum was held by postal ballot over four weeks in November and December 2013. Approximately 45 per cent of registered voters voted. The referendum returned a majority in opposition to the Government's policy, but the result is not binding.

SIERRA LEONE PARLIAMENT

The Parliamentary Service Commission Act 2007 created a number of vacancies in the House of Parliament. One important vacancy was the Public Relations Office, headed by a Director. The Director, Cyril Juxon Smith, has started producing a parliamentary newsletter and a television programme on parliamentary activities for the public to be fully aware of the work done by Parliament.

UNITED KINGDOM

House of Commons

Tributes to state figures

Two of the major events of the year were not directly related to political or constitutional events but were ceremonial—the deaths of two very prominent figures.

The first was that in April 2013 of Baroness Thatcher. Margaret Thatcher had been Prime Minister from 1979 to 1990, the longest-serving Prime Minister since the early 19th century. She was one of the most controversial politicians of her era. While it was clear that the House would wish to mark her death, there was also an awareness that there was the possibility of controversy creeping into proceedings, particularly as the House has no formal mechanism for conducting tributes. There are precedents of a number of different procedural mechanisms, depending on circumstances. Baroness Thatcher's death fell during the Easter adjournment and it was quickly announced that the House would be recalled early to sit the following Wednesday, 10 April, ahead of the scheduled return. The recall of Parliament for the death of a former Prime Minister was unprecedented. The motion before the House was "That this House has considered the matter of tributes to the Rt Hon Baroness Thatcher

of Kesteven LG OM" (the current form of "take note" motion). The tributes were led by the Prime Minister. Although there was no procedural mechanism to prevent the motion lapsing if too many members wished to speak, in the event the debate came to a natural conclusion after over 70 members had spoken. In addition to the day of tributes, Parliament was involved in arrangements for the funeral, with the coffin arriving at Westminster Hall and being placed in the Chapel of St Mary Undercroft, where it was to lie overnight before the funeral.

The second was the death of Nelson Mandela, announced on Thursday 5 December 2013. It was immediately clear that the House would wish to mark the significance with which members regarded his life and achievements. Consultations on the Friday and over the weekend led to the decision that the business set down for Monday 9 December, the next sitting day, would be set aside (including the normally mandatory oral question time) and the only business that day would be tributes to Nelson Mandela. This time there was no opportunity for a formal motion, and the Speaker called members from either side in turn to pay tribute, without interventions, starting with the Prime Minister, the Leader of the Opposition and the Deputy Prime Minister. The final tributes from the shadow Leader of the House and Leader of the House had the character of wind-up speeches. Members' tributes took up almost all of the available time, and again around 70 members took part. Several members reminisced about meeting with Nelson Mandela in person, while many contributions recalled the former President's speech to both Houses of Parliament in July 1996.

Government involvement in private members' bills

While short and non-controversial bills which are really government bills sometimes appear as private members' bills, governments do not usually advance major and contested legislation in the name of a private member (i.e. a backbencher). An unusual combination of circumstances, in particular the existence of a coalition government, brought about something akin to such an event in 2013. It had been widely reported that the Conservative party was considering a bill to provide for a referendum on whether the United Kingdom should remain a member of the European Union but that such a measure could not be presented as a government bill because of a lack of agreement by the junior coalition party. The ballot for private members' bills therefore took on greater than usual significance as it was expected that the highest drawn Conservative member would be under pressure to introduce a referendum bill. (Only those very high in the ballot get sufficient time for their legislation to have any chance of passing through all stages in the House of Commons, if facing opposition.) In the event the Conservative member drawn first in the ballot introduced the European Union (Referendum) Bill and scheduled its

second reading for Friday 5 July. Many more members were present on the Friday than normal. The Labour party and Liberal Democrats decided not to oppose the bill and second reading was carried by 304 votes to nil. (The lack of any recorded votes against the second reading is in order as the two tellers for the "noes"—tellers are necessary to have a division—do not count towards the total, although it is presumed they are against the measure.) Given the level of support from the largest party in the House, the bill was able to proceed unamended through its public bill committee and report stages and was sent to the Lords, where it ultimately fell. It remains to be seen whether an attempt will be made to repeat the process so that the bill could be presented for Royal Assent under the Parliament Acts 1911 and 1949 without the agreement of the Lords.

Select committees—further development of their role in the House?

A theme in discussion of House of Commons reform over recent years—or decades—has been the growth in significance of select committees. In December 2013 the House agreed a new standing order on select committee statements, which allows for a committee statement, followed by questions and answers, in the same way as a ministerial statement. These statements must take place no later than five sitting days after the day on which the report is published or inquiry announced and on a day when the Backbench Business Committee determines the business. The first use of the new standing order was by the chair of the Liaison Committee—which is composed of the chairs of all select committees—to launch a report calling for a parliamentary commission on the civil service.

Lay members on the Committee on Standards

In 2012 the House agreed to appoint lay members to the Committee on Standards. It had been agreed that the committee could meet only if at least one lay member was present, and that lay members had power to append an opinion to any report, if they wished. This was a potentially highly significant innovation, both politically and procedurally. In the event, things have so far proceeded relatively quietly—by the end of 2013 the committee had agreed seven reports, without the lay members submitting any dissenting opinion. The process has perhaps revealed some cultural differences. For example, the lay members come to Westminster solely to attend committee meetings, and those meetings are the only things they have booked on the morning of a meeting; the average MP, by contrast, usually has many different commitments at any time, and if a member is on a bill committee, the whips will make sure that the bill takes priority. The idea that an MP is not in total control of his or her timetable has taken lay members some time to appreciate. Similarly, lay members come

to the committee table on their best behaviour, while to MPs it is a relatively relaxed place, where the whips and the media are absent.

House of Lords

Restoration and renewal of the Palace of Westminster

The House of Commons and the House of Lords have initiated a major programme of restoration and renewal work to repair the Palace of Westminster. The Palace is home to one of the busiest parliamentary institutions in the world, yet since its construction in the 1840s and 1850s many of its features, including the cast iron roof, have never been properly renewed. In addition, the building's heating, ventilation, water, drainage and electrical systems are now antiquated. The last time any general renovation work took place was in the 1940s, following bomb damage in World War II.

In 2012 the two Houses commissioned a study on the condition of the building, which found that unless significant restoration work was undertaken, major, irreversible damage may be done to the fabric of the building.

Following that study, the House of Commons Commission and the House of Lords House Committee agreed that doing nothing was not an option. They commissioned a costed, comprehensive and independent assessment of a range of options for approaching the restoration and renewal of the Palace of Westminster. That study is considering three options:

- Option 1: continuing repairs and replacement of the fabric and systems of the Palace over an indefinite period of time.
- Option 2: a defined, rolling programme of more substantial repairs and replacement over a long period, but still working around continued use of the Palace.
- Option 3: scheduling the works over a more concentrated period, with parliamentary activities moved elsewhere to allow unrestricted access to the Palace for carrying out the works.

Depending on which option is chosen, the work may be costly and disruptive to the work of the two Houses. The aim is for both Houses to decide in principle which option to pursue by 2016.

National Assembly for Wales

Use of Emergency Bill procedure

The Assembly's Government Emergency Bill procedure was used for the first time in 2013. A motion that a bill to be known as the Agricultural Sector (Wales) Bill be treated as a Government Emergency Bill was agreed by electronic vote on 2 July 2013, along with a separate motion to agree the bill timetable. The General Principles of the bill were agreed a week later, on 9 July, and stage 2 consideration by a Committee of the Whole Assembly took place the following

week, on 16 July. The following day there was stage 3 Detailed Consideration by the Assembly, and a stage 4 motion to approve the bill.

The explanatory memorandum to the bill stated:

> "The Bill preserves, in respect of agricultural workers in Wales, the statutory regulation of terms and conditions that currently exists by virtue of the Agricultural Wages Order 2012 ("the AWO 2012"), which was made by the Agricultural Wages Board ("the AWB"). Such preservation is necessary because the Enterprise and Regulatory Reform Act 2013 abolishes the AWB (with effect from 25/6/13) and revokes the AWO 2012 (with effect from 1/10/13)."

It further stated:

> "The intention of this Bill is to lay an important foundation for the realisation of the Welsh Government's aspirations for the development of the agricultural sector in Wales ... The regime preserved by the Bill delivers something similar to that currently in place in Scotland and Northern Ireland where separate boards will continue to exist. This is essential to meet the future challenges that face agriculture, such as climate change, skills shortage and food security issues."

Assembly competence and Supreme Court referrals

On 13 August 2013 the UK Attorney General referred to the Supreme Court the question of whether the Agricultural Sector (Wales) Bill's provisions relating to agricultural wages orders were beyond the competence of the Assembly.

This was the second of three referrals of primary legislation of the National Assembly for Wales to the Supreme Court under section 112(1) of the Government of Wales Act 2006,[19] the third referral being made by the Assembly's own Counsel General on 11 December 2013. The Counsel General notified Assembly Members that he was referring the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill—a private member's bill—even though his opinion was that the bill was within competence. The referral was made because the insurance industry disputed competence and therefore he considered it appropriate to have the matter put beyond doubt before Royal Assent.

On 9 July 2014 the Supreme Court confirmed the Assembly's competence to pass the Agricultural Sector (Wales) Bill. This ruling provides significant

[19] The fact that three referrals have been made to the Supreme Court has been cited as an argument in favour of moving from the Assembly's conferred powers model to a reserved powers model. This was one of the key recommendations of the second report of the Commission on Devolution in Wales in *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, published in March 2014.

clarification of the Welsh devolution settlement. It confirms that a provision of an Assembly bill is within competence so long as it relates to a subject in Part 1 of Schedule 7 to the Government of Wales Act 2006—such as "agriculture"—even if it also relates to something that is not in Schedule 7, such as "employment", "industrial relations" or "wages". The judgment reiterates that a bill provision will be outside competence if it falls within an express exception in Schedule 7; but that was not the case here.

This clarification will give the Assembly more certainty as to its competence and make the existing settlement more stable and workable, as the Supreme Court said. However, a question remains as to whether the settlement in Wales is so complex as to make it difficult for the Welsh public to understand and engage with. The Presiding Officer will consider that question in the light of this judgment and of judgment in the case of the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, which at the time of writing had yet to be given.

COMPARATIVE STUDY: INTERACTIONS BETWEEN PARLIAMENTS AND JUDGES

This year's comparative study asked, "To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges? Are judges disqualified from becoming a member of your parliament? To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process? Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges? Do any formal mechanisms exist for the judiciary to make representations to your parliament? Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?" The study did not cover *sub judice* rules (which may be the subject of a future comparative study) nor the courts' role in determining the boundaries of parliamentary privilege.

AUSTRALIA

Senate

Parliament has no role in the appointment of judges. Under section 72 of the Australian Constitution a judge of the High Court or any other federal court may be removed by the Governor-General in Council only on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

The Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (see notes from the Australian Senate in volume 81 of *The Table*) provided a standard mechanism for the establishment of parliamentary commissions to investigate allegations of judicial misbehaviour or incapacity and to advise the Houses before they consider making addresses under section 72 of the Constitution. In any future case it would be for the Houses to decide whether to employ this or another process to satisfy themselves of the basis for an address.

While there is no specific prohibition on judges standing for election, if one were to do so there would be a question whether a judge holds an office of profit under the Crown and is therefore be ineligible to be chosen or sit as a member of either House.

From time to time judges have given evidence to committees. No special rules apply. While there are no precedents for the Senate or its committees summoning judges, there are grounds for considering that judges are compellable as witnesses (see *Odgers' Australian Senate Practice*, 13th edition, chapter 20: Relations with the judiciary). Judges occupying the office of president of an

industrial relations commission have been ordered by the Senate to attend estimates hearings involving that body; successive holders of the office did so until the order was relaxed.

There is no restriction on debate in the Senate involving critical comment on the decisions or judgments of courts. The only limitation is the protection afforded to judicial officers by standing order 193 against offensive words, personal reflections and imputations of improper motives. This protection is based on the need for comity and mutual respect between the legislature and the judiciary and the requirement that judicial officers be protected from remarks which might needlessly undermine public respect for the judiciary.

The judiciary is involved in the interpretation of Acts of Parliament but, as the High Court is prohibited from giving advisory opinions, it has no formal role in reviewing bills for compliance with the constitution or against any other measure. Individual judges or representative bodies of judicial officers have made submissions to Senate committees on particular bills from time to time, in the same manner as any other person making a submission. There is no special mechanism for judges to make representations to the Senate or its committees.

Northern Territory Legislative Assembly

Standing order 62 provides that no member may use offensive or unbecoming words against, *inter alia*, any member of the judiciary. Any words used which the Speaker rules to have breached that prohibition are not published in the Parliamentary Record.

Judges may be consulted by a department which is developing or drafting legislation, but such interaction will be at arm's length of the executive; the judiciary's views will be contained in a briefing for the government to consider at Cabinet.

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

To what extent is your parliament (or your committees) involved in the appointment or dismissal of judges?

Judges in New South Wales are appointed by the Governor on the advice of the Executive Council, with no involvement by Parliament. However, Parliament has a role in relation to the removal of such officers. Under section 53 of the Constitution Act 1902 the holder of a judicial office can be removed from office by the Governor on an address from both Houses of Parliament in the same session on the ground of proved misbehaviour or incapacity.

Part 9 of the Constitution Act 1902, including section 53, was inserted in 1992 with the aim of protecting judicial independence as a result of an agreement between the then minority government and independent members

of the Legislative Assembly. It is entrenched in the Constitution Act 1902 by provisions which prohibit its repeal or amendment (although the validity of those provisions has been questioned). The reference to "proved misbehaviour or incapacity" is taken from section 72 of the Australian Commonwealth Constitution, which provides for the removal of judges on an address by both Houses of the Commonwealth Parliament. Before the enactment of Part 9 judges could be removed by the Governor on an address by both Houses without specifying the grounds, and the procedure was governed by ordinary statute rather than the constitution.

Under the Judicial Officers Act 1986 complaints against judicial officers are examined by the Conduct Division of the Judicial Commission. The Act provides that a judicial officer may not be removed in the absence of a report by the Conduct Division identifying matters which could justify parliamentary consideration of the officer's removal on the ground of proved misbehaviour or incapacity. A report by the Conduct Division which identifies such a matter must be provided to the Governor and the minister and tabled in Parliament. Parliament has discretion whether to consider the matter. If it does it may receive other evidence not referred to in the report.

There have been five occasions on which the Conduct Division has reported that a matter could justify parliamentary consideration of removal of a judicial officer. Four cases involved magistrates, the other a Supreme Court judge. In two of the cases the magistrate resigned before any action was taken by Parliament. In the remaining cases, the matter was considered by the Legislative Council which decided against the presentation of an address seeking removal.

In the three cases where the issue of removal was considered the following procedures were followed. A response from the judicial officer was tabled in both Houses at the same time as the Conduct Division report. The Legislative Council then resolved that the judicial officer appear at the Bar of the House and show cause why he or she should not be removed, with leave to attend in person or by a legal representative. The judicial officer then attended at the Bar pursuant to the resolution and addressed the Council. A motion was then moved that the Council present an address to the Governor seeking the officer's removal on specified grounds and that the Assembly be requested to adopt a similar address. In each case the motion was negatived in a conscience vote.

Are judges disqualified from becoming a member of your parliament?

Section 13B of the Constitution Act 1902 provides that the holder of any "office of profit under the Crown" is incapable of sitting and voting in either House. So far as is known there is no case in which a court has considered whether this provision applies to judges. In the 19th century there were cases in which members of the Legislative Assembly who had been appointed as

judges had their seats declared vacant for accepting an office of profit. More recently, however, it has been argued that the office of judge may not be an "office of profit under the Crown" because the office-holder is required to act independently and is not subject to any direction or supervision by the executive. In the 1850s, when the "office of emolument" disqualification did not apply to all members of the Legislative Council, a number of judges were appointed to the House. However, the election of a judge to Parliament today would be likely to raise issues in relation to the independence of the judiciary and Parliament.

New South Wales Legislative Assembly

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?

It has not been the practice of committees of the Legislative Assembly to seek evidence from judges, in either a personal or a professional capacity. While there is no restriction on a parliamentary committee from extending an invitation to a judge to appear, such a course may give the impression that judges are in some way accountable to parliamentary committees. In keeping with the principles of the separation of powers and the independence of the judiciary, Legislative Assembly committees have been cautious when dealing with matters relating to the judiciary. Where the views of the profession may be helpful to consideration of a broader policy issue, one option would be for a committee to invite a representative of the Judicial Commission to give evidence.

Certain statutory committees administered by the Legislative Assembly have sought the assistance of serving and former judges on matters where the individual concerned was considered an expert in the area of law. On these occasions the committees sought the judges' views on technical and complex matters of interpretation and application of the law. In one instance, a judge of the Supreme Court concerned had published an academic work on an area of law before their judicial appointment. He was invited to participate in committee proceedings conducted in private as a briefing. While the judge's attendance at the committee meeting was recorded in the minutes, the proceedings were not transcribed by Hansard and there was no official record of proceedings. The committee used the advice given by the judge to inform its deliberations.

On another occasion, the Chief Magistrate gave evidence to a select committee in relation to appropriate penalties for offenders in child sexual assault cases and the jurisdictional limits of the local court. The hearing was conducted in public.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Standing order 72(3) prohibits the use of offensive words against members of the judiciary.

Otherwise it is a matter of practice that members do not make reflections on or impute improper motives to members of the judiciary, though their judgments may be discussed (subject to the *sub judice* convention).

Consistent with standing order 72, members participating in committee proceedings are prohibited from using offensive words against a member of the judiciary.

New South Wales Legislative Council

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?
In the past decade local court magistrates and judges from specialist courts such as the Drug Court and the Children's Court have given evidence to several Legislative Council committee inquiries on policy issues such as domestic violence, the law on inebriates and community-based sentencing. In each case the judge or magistrate was sworn or affirmed and examined in the usual manner. In the 19th century a judge gave evidence about a criminal trial over which he had presided, but the recent inquiries have not concerned individual judicial decisions.

So far as is known there is no case in which a Legislative Council committee has sought to compel the attendance of a judge. In one case the President of the Industrial Relations Commission declined an invitation to make a submission to an inquiry on the consolidation of tribunals on the ground that the future operation of tribunals was a matter of government policy. However, he provided information on the work and structure of the commission and the committee did not press for a submission.

As the Houses are required to seek documents concerning the "administration of justice" by way of address to the Governor rather than by order, a judge who appeared as a witness before a committee would not be required to provide such documents.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
In accordance with rulings from the chair, members may not adversely reflect in debate on the conduct of individual judicial office-holders except by substantive motion. This includes implying that there is any political motive or a connotation of interference in the actions of the judge. In recent years it has been the practice to permit more latitude in debate and not automatically

exclude discussion in the House of matters which are already being freely ventilated in the media.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?

As noted earlier, where the removal of a judge has been considered, the judge has addressed the Legislative Council from the Bar of the House pursuant to a resolution of the House. Outside that context, there are no formal mechanisms for the judiciary to make representations to Parliament.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?

There are no established procedures for the involvement of judges in the legislative process before a bill becomes an Act. Where judicial review of legislative processes has been sought there have been differences of opinion as to whether courts can or should intervene. For example, in *Trethowan v Peden*[1] the Supreme Court of New South Wales granted an interim injunction preventing the presentation of two bills to the Governor for assent on the ground that the bills had not been approved by the electors as required by section 7A of the Constitution Act 1902. However, in *Eastgate v Rozzoli*[2] it was held that as a matter of practice the Supreme Court should refuse to grant relief in respect of proceedings within Parliament which may result in the enactment of an invalid law as the proper time for it to be asked to intervene is after the completion of the law-making process. Kirkby P observed that it is "now settled practice in Australia that … an injunction will virtually never be issued, nor a declaration be made" before assent. Priestley and Hope JJA made similar observations.

Queensland Legislative Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?

The Queensland Parliament is not involved in the appointment of judges. Judges are appointed by the Governor in Council, by commission.[3]

Judges may be removed from office by the Governor in Council, on an address of the Legislative Assembly, for (a) proved misbehaviour justifying removal from office; or (b) proved incapacity to perform the duties of the office.[4] The misbehaviour must first be proven to the satisfaction of a parliamentary inquiry

1 (1930) 31 SR(NSW) 183.
2 (1990) 20 NSWLR 188.
3 Section 59(1) of the Constitution of Queensland 2001.
4 Section 61(2) of the Constitution of Queensland 2001.

constituted of three former judges.

Are judges disqualified from becoming a member of your parliament?
Yes. The holder of a judicial office of any jurisdiction of a state or the Commonwealth is disqualified from being a candidate and being elected as a member.[5]

To what extent do judges give evidence to select committees?
There is nothing preventing judges from giving evidence to select committees; it is uncommon but not unheard of. There have been at least four occasions in the last two decades.

If they do, are there any rules which govern the process?
The same rules that apply to any witnesses giving evidence.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Standing orders provide that questions shall not be asked which reflect on or are critical of the character or conduct of those persons whose conduct may be challenged only on a substantive motion.[6]

The Assembly has adopted the practice, based on House of Commons practice, that unless debate is on a substantive motion, drawn in proper terms, reflections must not be cast on the conduct of the sovereign, the heir to the throne nor other members of the royal family, the Governor-General of an independent territory, the Speaker, members of either house of parliament nor judges of superior courts.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
There is no general provision on the judiciary making representations. They would not be prevented from making representations in the usual way, such as making a submission to a parliamentary committee.

Where the Assembly has considered the removal of a judge from office, they have first established a tribunal to determine proven misbehaviour and then, before acting on any finding, given the judge leave to appear at the bar of the House to show cause why he or she should not be removed. This occurred in June 1989.

5 Section 64(3)(b) of the Parliament of Queensland Act 2001.
6 Standing order 115(d).

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
There are no provisions for this in the Legislative Assembly. However, this would not prevent the judiciary being consulted by the government in relation to draft legislation or by a parliamentary committee once a bill has been referred to it. Parliamentary committees have a number of legal experts that they consult from time to time about compliance with legislative principles.

Tasmania House of Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?
The Tasmanian Parliament is not involved in the appointment of judges. Judicial appointments are by executive act—see section 5 of the Supreme Court Act 1887 (Tas): "appointment of the judges of the Supreme Court ... shall be by the Governor by letters patent." In practice, judges and magistrates are appointed by the Executive Council through Cabinet on the advice of the Attorney General.

Judges may be suspended or removed from office only by the Governor on an address from both Houses of Parliament on the grounds of misbehaviour or incapacity.

Section 1 of the Supreme Court (Judges' Independence) Act 1857 (Tas) provides, "It shall not be lawful for the Governor, either with or without the advice of the Executive Council, to suspend, or for the Governor to amove, any judge of the Supreme Court unless upon the address of both houses of parliament."

Are judges disqualified from becoming a member of your parliament?
Yes. Section 32(3) of the Constitution Act 1934 (Tas) provides, "No judge of the Supreme Court, and no person holding any office of profit or emolument to which the provisions of subsection (1) apply, shall be capable of being elected to, or of holding, a seat in either House."

Subsection (1) relates to the holding of an office of profit and accordingly applies to magistrates as well as judges of the Supreme Court.

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?
There are no precedents of judges giving evidence to select committees and no formal rules to govern the process. The Tasmanian Parliament has not been conferred the powers of the House of Commons through constitutional or other legislative provisions and accordingly the power of the House of Commons to compel judges as witnesses has never been tested in Tasmania.

Issues regarding the separation of powers would need to be considered before calling a judicial officer as a witness.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
There is no standing order restricting members of Parliament from making comments on members of the judiciary during debate.

The House follows the practice of the Australian House of Representatives before that House adopted a standing order prohibiting reflections on judicial officers in 1950. This practice was based on that of the House of Commons, that members are able to discuss decisions and judgments but cannot make adverse comments about the conduct of judicial officers except on a substantive motion.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
No formal mechanisms exist for the judiciary to make representations to the Parliament.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
There is no legislative provision or rule of the House providing for the judiciary to be formally involved in the legislative process. The executive may seek advice from the Solicitor General about proposed legislation if they consider it necessary. Such advice is not required to be tabled in Parliament.

Victoria Legislative Council and Legislative Assembly (joint response)

Parliament has no role in the appointment of judges.

Judicial officers are appointed by the Governor in Council on the recommendation of the Attorney General.

Under section 44(2) of the Constitution Act 1975 judges are not entitled to be members of Parliament.

Victorian parliamentary committees place no restrictions on receipt of written or oral evidence from judges or other members of the judiciary, or on behalf of the courts. Written and oral evidence has been received by a number of joint investigatory committees over a number of parliaments. No particular rules apply to such evidence; the judiciary (as witnesses) are expected to employ their discretion to respond in a manner appropriate to their office when providing evidence.

Standing order 12.20 on unparliamentary expressions states: "(1) No

Member will use offensive words against either House of Parliament, any other Member of either House, the Sovereign, the Governor or the judiciary." It may be surmised that this standing order would preclude references to individual judges that were offensive or impugned their integrity or capacity.

The standing orders make no other reference to the judiciary.

There are no formal mechanisms by which judges may make representations to the House.

There are no mechanisms by which the judiciary can have input into bills before they become Acts. Challenges to the constitutionality of Acts would be made after they became law.

Western Australia Legislative Assembly

Appointment of judges

Parliament is not involved in the appointment of judges. The executive appoints the judiciary and determines the resources to be made available to the courts.

Removal of judges

The legislature is responsible for removing judges from office. Section 55 of the Constitution Act 1889 provides, "It shall be lawful nevertheless for Her Majesty to remove any such Judge upon the Address of both Houses of the Legislature of the Colony." This translates to a power in the Governor to remove a judge if both the Legislative Assembly and the Legislative Council pass a resolution that the judge be removed.

Are judges disqualified from becoming a member of Parliament?

Yes.

To what extent do judges give evidence to select committees?

There is no prohibition on judges giving evidence to select or standing committees, but it is rare. A notable exception was when Chief Justice Wayne Martin gave evidence on 22 February 2012 to the Joint Standing Committee on the Corruption and Crime Commission on that committee's inquiry into the use of public hearings by the Corruption and Crime Commission.

If judges do give evidence, are there any rules which govern the process?

A judge is treated the same as any other witness. There are no special rules.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

Yes. Standing order 92 of the Legislative Assembly provides, "Imputations of improper motives and personal reflections on … a judicial officer … are

disorderly other than by substantive motion."

Do any formal mechanisms exist for the judiciary to make representations to Parliament?
No.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
The Government has sought the views of the judiciary on certain proposed bills. Once the bill is introduced to Parliament the judiciary has no role in the legislative process.

Western Australia Legislative Council

Parliament has no role in the appointment of judges. Judges of the Supreme Court of Western Australia and the District Court of Western Australia are appointed by the Governor.

Section 9(1) of the Supreme Court Act 1935 (WA) provides that all the judges of the Supreme Court of Western Australia shall hold their offices during good behaviour, subject to a power of removal by the Governor upon an address of both Houses of Parliament. Section 11(1) of the District Court of Western Australia Act 1969 (WA) provides that the commission of each District Court judge shall continue in force during good behaviour but the Governor may, upon an address of both Houses of Parliament, remove any District Court judge from his office and revoke his commission. Section 55 of the Constitution Act 1889 (WA) also states, "It shall be lawful nevertheless for Her Majesty to remove any such Judge upon the Address of both Houses of the Legislature of the Colony."

All serving judges are disqualified from being elected as a member of either house of the Parliament of Western Australia by section 76B of the Electoral Act 1907 (WA) and section 34(1) of the Constitution Acts Amendment Act 1899 (WA).

The courts are regularly invited by parliamentary committees to make submissions on matters under inquiry. As a matter of courtesy, all requests for submissions are addressed to the chief justice or chief judge of the relevant jurisdiction. Although judges are reluctant to comment on proposed legislation that they may in future have to interpret, they often comment on practical problems that arise from existing legislation and on legal matters generally. In 2013 the Chief Justice of the Supreme Court of Western Australia made a lengthy written submission to the Joint Delegated Legislation Committee during that committee's inquiry into the method for calculating court fees and charges.

The Supreme Court maintains its own policy on judges making public comments, including by way of submissions to parliamentary committees. The Legislative Council has no specific policy or procedure dealing with interactions with, or submissions from, judges.

There is no express prohibition on the government or Parliament seeking judicial comment on a bill, although judges are reluctant to opine on legislation that they may be asked to interpret.

CANADA

Senate and House of Commons (joint response)

Appointment of judges

Superior Court judges are appointed by the federal government. The federal Justice Minister makes a recommendation to the Cabinet, which takes the final decision. Justices of the Supreme Court of Canada are appointed by the Governor General in Council, a process whereby the Governor General makes appointments based on the advice of the Queen's Privy Council for Canada. By practice, only the Cabinet advises the Governor General, usually expressed exclusively through a consultation with the Prime Minister.

In 2006 an ad hoc selection process for Supreme Court judicial appointments was established by the Prime Minister. This informal process has been used to fill all Supreme Court vacancies since and involves a selection panel made up of five Members of Parliament (three government MPs and one MP from each recognised opposition caucus, all selected by their respective party leaders). The panel is tasked with reviewing a list of qualified candidates and providing an unranked list of three qualified and recommended candidates to the Prime Minister and the Minister of Justice.

Subsequently, the nominee, selected from this shortlist, is invited to appear at a public hearing of an ad hoc committee of Members of Parliament to answer questions. This committee is not established under the standing orders nor by special order of the House; it has only a consultative role.[7]

Dismissal of judges

Federally appointed judges of the various Canadian superior courts may be removed on address to the Governor General by both houses of Parliament. Before Parliament is seized with such a decision, complaints against individual judges are evaluated through a formal complaints process. No judge of any

[7] See *House of Commons Procedure and Practice*, 2nd edition, 2009, p 23.

Canadian superior court has been removed by an address of Parliament. Sometimes, however, a judge will retire or resign before the process reaches Parliament.

The Canadian Judicial Council has power under the Judges Act to investigate complaints by members of the public, the Attorney General of Canada and the provincial Attorneys General about the conduct (not the decisions) of federally appointed judges. These include all judges of the provincial Superior Courts, the provincial Courts of Appeal, the Federal Court, the Federal Court of Appeal, the Court Martial Appeal Court of Canada, the Tax Court of Canada and the Supreme Court of Canada.

After its investigation of a complaint, the Council must decide whether the judge's conduct has rendered the judge "incapacitated or disabled from the due execution of the office of judge" and it can make recommendations, including removing a judge from office. Should a complaint be so serious that the Council believes it has rendered the judge unable to perform the functions expected of him or her, the Council may recommend to Parliament, through the Minister of Justice, that a judge be removed from office. This would then be a decision for Parliament.

That said, section 71 of the Judges Act provides, "Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections."

Are judges disqualified from becoming a member of your parliament?

Federally appointed judges, with the exception of citizenship judges, are disqualified from becoming a member of the Canadian House of Commons.[8]

The Constitution Act 1867 sets out the qualifications of a senator. While section 23 of the Constitution does not explicitly disqualify a judge, section 55 of the Judges Act states, "No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties." As a result, it is not possible for a sitting judge to be a member of the Senate of Canada.[9]

[8] *Ibid.*, p 183.

[9] See also section 7 of the Supreme Court Act.

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?

The Senate and House of Commons and their respective committees (under the authority that is extended to their committees by the *Rules of the Senate* and the *Standing Orders of the House of Commons*) have unrestricted authority to call for persons to give evidence. The only exception is if it would infringe the privileges of the Crown or of parliamentarians from other Canadian legislatures. In other words, the Sovereign (whether in Canada or abroad), the Governor General, the provincial lieutenant-governors, senators and members of Canadian legislatures are all exempt from such a summons, but not judges.

On the other hand, the Supreme Court of Canada has argued, in *MacKeigan v Hickman*, that:

> "The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v The Queen*, *supra*; *Beauregard v Canada*, *supra*. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence. As stated by Dickson C.J. in *Beauregard v Canada*, the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislative or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence."[10]

Needless to say, there is nothing prohibiting any individual from voluntarily appearing before a committee following a simple invitation.[11]

In April 2014 a judge from the Québec Court of Appeal, in his capacity as a member of the International Hague Network of Judges, accepted an invitation to appear before the Standing Senate Committee on Human Rights as part of its study on issues related to human rights in Canada and abroad. The appearance of serving judges before Senate committees is very rare. More frequently, retired judges of the Supreme Court have appeared before Senate

[10] *MacKeigan v Hickman* [1989] 2 S.C.R. 796.

[11] See *House of Commons Procedure and Practice*, 2nd edition, 2009, pp 99–100 and 976.

committees.

In all such cases, the retired judges appeared "as an individual", and not in an official capacity.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

Attacks against and censures of judges and courts by senators or members in debate have always been considered unparliamentary and, consequently, treated as breaches of order. While it is permissible to speak in general terms about the judiciary or to criticise a law, it is inappropriate to criticise or impute motives to a specific judge or to criticise a decision made under the law by a judge.[12]

Do any formal mechanisms exist for the judiciary to make representations to your parliament?

No formal mechanism exists. Although rare, it is possible for a judge to appear before a committee.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?

There is no formal parliamentary procedure with respect to public bills. However, references seeking legal opinions of the Supreme Court can be made by the Governor in Council. Section 53 of the Supreme Court Act authorises the Governor in Council to refer to the court important questions of law or fact concerning, among other things, the interpretation of the Constitution Acts, and the constitutionality or interpretation of any federal or provincial legislation.

Section 54 of the Supreme Court Act authorises the court, or any two of its judges, to examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the court under any rules or orders made by the Senate or House of Commons. This seldom-used power is provided for in rule 11-18 of the *Rules of the Senate*.

British Columbia Legislative Assembly

Appointment and dismissal of judges

Under the federal Constitution Act 1867 authority over the judicial system in Canada is divided between the federal and provincial governments. In British Columbia there are three courts: the Provincial Court, the Supreme Court and the Court of Appeal. Judges of the Supreme Court and the Court of Appeal are appointed by the federal government. Under section 6(1) of the Provincial

[12] *Ibid.*, p 616.

Court Act 1996 provincial court judges in British Columbia are appointed by the Lieutenant Governor in Council on the recommendation of the Judicial Council—which consists of three judges, two lawyers, a judicial justice of the peace and three lay people. As such, the Legislative Assembly of British Columbia is not involved in the appointment or dismissal of judges.

However, under BC's Judicial Compensation Act 2003 the Legislative Assembly has a role in determining judicial compensation. The Act requires the establishment of a triennial commission which must make recommendations to BC's Attorney General on the remuneration, allowances and benefits of provincial judges for each of the next three fiscal years. The Act provides that government may depart from a commission's recommendations as long as it justifies its decision with rational reasons, which must be included in its response to the commission's recommendations. The commission report and government response must be tabled in the Legislative Assembly, and legislation to implement the government response is subsequently considered by the Legislative Assembly. The process was established following a 1997 Supreme Court of Canada ruling, which led to the creation of a system of independent judicial compensation commissions throughout Canada.

Eligibility to run for provincial parliament

There is no federal or provincial legislation that prevents a provincial court judge from running in a provincial election. While section 28 of British Columbia's Constitution Act 1996 prohibits federally appointed judges of the Court of Appeal or the Supreme Court from being elected provincially while holding office, neither it nor BC's Election Act 1996 exclude provincial court judges from running in a provincial election.

However, the Provincial Court Act stipulates that a judge "must devote himself or herself exclusively to judicial duties and must not engage, directly or indirectly, in any other occupation, profession or business." This is presumed to include running for the provincial parliament.

Appearing before committees

The standing orders of the Legislative Assembly do not prohibit judges from giving evidence to select committees, nor are there any rules which govern the process. However, it is a very rare occurrence. In 1977 a Special Committee on Privilege was appointed by the Legislative Assembly to investigate whether three members had violated the provincial Constitution Act. The committee's terms of reference included the authority to "request, if it deems necessary, during its hearings the opinion of a judge of the Supreme Court of British Columbia on any question of law."

Reference during parliamentary proceedings

The Legislative Assembly of British Columbia, like other Westminster parliaments, respects the *sub judice* convention, whereby a matter which is before the court is not discussed in the House. There is no rule defining the interpretation or enforcement of the convention, which is left to the discretion of the Speaker.

There are no restrictions on making reference in parliamentary proceedings to the decisions of individual judges. However, during question period the Legislative Assembly applies the rules in *Beauchesne*, including that a question must not "reflect on the character or conduct of the Speaker, the Deputy Speaker, members of either House of Parliament and judges of High Courts."

Making representations to Parliament and judicial involvement in the legislative process.

Judges are not involved in the legislative process before a bill becomes an Act. There are no formal mechanisms in British Columbia for the judiciary to make representations to the Legislative Assembly.

Prince Edward Island Legislative Assembly

The Legislative Assembly of Prince Edward Island is not involved in the appointment or dismissal of judges.

Judges may not become members of the Legislative Assembly.[13]

Judges are free to present evidence to standing committees of the Legislative Assembly. This happened most recently in March 2014 when a provincial court judge addressed a committee on the topic of a therapeutic court to address domestic violence. There are no additional rules which govern the process, other than those which apply to all witnesses.

There are no restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges, although such references would be rare.

There is no formal mechanism for the judiciary to make representation to the Legislative Assembly.

The Judicial Remuneration Review Commission is required to report to the Minister of Environment, Labour and Justice, and the Chief Judge, every three years on the appropriate salaries and benefits paid to judges.[14] The minister tables the report in the Legislative Assembly, which will have effect only after the report is adopted by the Legislative Assembly.

[13] See section 16(1) of the Legislative Assembly Act.

[14] See the Provincial Court Act.

Judges are not involved in the legislative process before a bill becomes an Act.

Québec National Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?

The National Assembly plays no role in the appointment or dismissal of Québec judges. Superior Court and Appeal Court judges are appointed by the federal government,[15] while municipal court judges and judges of the Court of Québec are appointed by the Québec government.

Judges remain in office until prescribed retirement ages, but may be removed from office before the end of their term. Judges appointed by the federal government may be removed through a process that involves the Canadian Judicial Council.

Members of bodies that exercise quasi-judicial functions are usually appointed by the Government for a fixed term. However, members of certain bodies are appointed by the National Assembly. For example, members of the Commission de la fonction publique who hear appeals brought by public servants under the Public Service Act[16] are appointed, on a motion of the Premier, by a resolution of the Assembly approved by at least two thirds of its members. The same holds for members of the Commission d'accès à l'information.[17] The members of both of these commissions may be dismissed before the end of their term by a resolution of the Assembly approved by at least two thirds of its members.[18]

Are judges disqualified from becoming a member of your parliament?

Under the Courts of Justice Act a judge of the Superior Court or the Court of Appeal may not, while a judge, be a Cabinet member, sit in the National Assembly nor hold any other remunerated public office.[19] Judges of the Court of Québec must exercise that function exclusively. In addition, under the *Act respecting the National Assembly*, a member's seat becomes vacant if he or she is found to be ineligible under the Election Act. The latter provides that judges of the courts of justice are ineligible.[20]

In 2012 Parliament adopted the *Code of ethics and conduct of the Members of*

15 Constitution Act 1867, 30 & 31 Victoria, c. 3 (UK), section 96.

16 Public Service Act, CQLR, c. F-3.1.1, section 106.

17 Appointed under the *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR, c. A-2.1, section 104.

18 Public Service Act, *supra*, section 108; *ibid*., section 107.

19 Sections 8 and 31 of the Courts of Justice Act.

20 The courts of justice are the Court of Appeal, the Superior Court, the Court of Québec and the municipal courts (Courts of Justice Act, *supra*, section 1).

the National Assembly,[21] which sets out the functions considered incompatible with the office of member. For instance, employment, a position or any other post to which remuneration or a benefit in lieu of remuneration is attached is incompatible with the office of member if it is held with, among other entities, the Government or one of its departments or a public body.[22]

To what extent do judges give evidence to select committees?

The courts are not generally called on to give evidence to parliamentary committees. However, in the context of its mandate to examine the policies, activities and management of the Commission d'appel sur la langue d'enseignement,[23] the Committee on Education heard a member of an administrative tribunal. In this case, Henri Brun, professor of constitutional law at Université Laval, appeared before the committee at the request of the commission to discuss the power of a parliamentary committee to put questions to an administrative tribunal. In the professor's opinion, despite their power of oversight of public bodies, parliamentary committees could not, given the principles of judicial independence and the separation of powers, ask questions of an administrative tribunal about its decisions or the grounds for them.

Courts of justice enjoy greater independence than administrative tribunals. But on the substance of deliberations and the grounds for decisions, the same rule applies. So while judicial independence may apply to a lesser degree to administrative tribunals, it applies entirely in respect of decisions and the grounds for them.

A tribunal must be free from outside constraints and pressures. It must be able to rule on individual cases as it sees fit, without having to justify its interpretation of the legal concepts involved. When acts of a judicial nature need to be held to account, this must be done solely through the process of judicial review. A parliamentary committee may hold to account only acts of an administrative nature—and even then its power is limited, to varying degrees, according to whether it is dealing with a court of justice, an administrative tribunal or a body that exercises quasi-judicial functions.

If they do, are there any rules which govern the process?

There are no rules to permit evidence held by a court or tribunal to be handed over to a parliamentary committee.

[21] *Code of ethics and conduct of the Members of the National Assembly*, CQLR, c. C-23.1.
[22] *Ibid.*, section 11.
[23] *Journal des débats de l'Assemblée nationale* (Hansard), 5 March 1996, CE-25 pp 30–32.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Only the *sub judice* rule may restrict members from making reference in the course of parliamentary proceedings to a judge's conduct. As mentioned earlier, a judge may be dismissed only after a rigorous process analogous to legal proceedings. Hence, a judge's conduct must not be referred to by members if it is being investigated by the Conseil de la magistrature or, in the case of a judge of the Court of Québec, if the Minister of Justice has referred the case to the Court of Appeal on the recommendation of the Conseil. Aside from those scenarios, there is no rule restricting members from making reference in parliamentary proceedings to the conduct of a judge.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
There is no formal mechanism for the judiciary to make representations to the Assembly or its committees.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
The Assembly's privilege to govern its internal affairs without outside interference means that the courts cannot intervene in questions concerning the legislative process. Québec's courts may comment only on legislation that has been duly passed and assented to, and only when dealing with a case involving the legislation in question.

However, under the Court of Appeal Reference Act, the Court of Appeal must hear and consider any question referred to it for that purpose by the Government.[24] The Court of Appeal may be called upon to rule on such questions as the constitutionality of a bill. The opinion of the court in such a referral must be considered a ruling and may be appealed to the Supreme Court of Canada.[25]

Saskatchewan Legislative Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?
The Legislative Assembly of Saskatchewan is not involved in the appointment or dismissal of judges.

[24] Court of Appeal Reference Act, CQLR, c. R-23, section 1.
[25] *Ibid.*, section 5.1.

Are judges disqualified from becoming a member of your parliament?
Judges are prohibited from being a member of the Legislative Assembly under section 11 of the Legislative Assembly and Executive Council Act 2007.

To what extent do judges give evidence to select committees?
Judges have not been asked to provide evidence to select committees in Saskatchewan. If there was a desire to appear before a committee it would be in an unofficial capacity.

If they do, are there any rules which govern the process?
There are no rules to govern this type of process as this has not happened in Saskatchewan.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Rule 51 of the *Rules and Procedures of the Legislative Assembly of Saskatchewan* states:

> "When a motion is under discussion, no member shall:
> (i) censure or impute motives of judges and courts of justice, any Officer of the Assembly, public service employee or Legislative Assembly Service employee; …"

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
There are no formal mechanisms for the judiciary to make representations in Saskatchewan.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
Judges are not involved in the legislative process in Saskatchewan.

Yukon Legislative Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?
The Yukon Legislative Assembly is not involved in the appointment or dismissal of judges.

Are judges disqualified from becoming a member of your parliament?
Section 6(2) of the Legislative Assembly Act states, "Subject to subsection (3), a person who accepts or holds any office, commission, or employment in the service of, or at the nomination of, Her Majesty, the Government of Canada, or

the Government of the Yukon is not eligible to be a member of the Legislative Assembly or to sit or vote in the Legislative Assembly." Judges are appointed by the Commissioner in Executive Council on the recommendation of the minister of justice. They are, therefore, disqualified from becoming a member of the Legislative Assembly.

To what extent do judges give evidence to select committees?
There is no rule that prevents a judge from giving evidence to a select committee. There is no record of a judge having given evidence to a select committee.

If they do, are there any rules which govern the process?
There are no special rules that would apply to this situation.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
There is no explicit prohibition; however, the chair would ensure that any such criticism is done respectfully and does negatively reflect upon the judge as a person.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
No.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
There is no rule that explicitly prevents judges from being involved in the legislative process before a bill becomes an Act. However, so far as is known this has not occurred in Yukon.

CYPRUS HOUSE OF REPRESENTATIVES

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?
The House of Representatives does not have any role in the appointment or dismissal of judges.

Are judges disqualified from becoming a member of your parliament?
Yes, because of the strict separation of powers a member of the judiciary cannot simultaneously be an MP.

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?
Judges are not invited frequently to give formal evidence to parliamentary committees, although it is not prohibited. They usually participate when a bill that specifically concerns the judiciary is being discussed (for instance, a bill on the Courts of Justice Law).

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Other than a *sub judice* rule, there is no restriction on references to the conduct or decisions of individual judges. However, any such reference would have to be full and complete so as to give other MPs the full picture.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?
The Attorney General of the Republic is invited to committee meetings whenever constitutionality issues are discussed.

GUERNSEY STATES OF DELIBERATION

The States of Deliberation have no role in the appointment or dismissal of judges in Guernsey. However, Guernsey has a body of 16 people called "Jurats" from whom jurors are selected when necessary. Those 16 Jurats have other functions such as presiding over property contract courts. They are elected by a body known as the States of Election, which comprises all members of the States of Deliberation (including the Bailiff and Law Officers of the Crown), the other Jurats, the Anglican rectors and representatives of the douzaines (parish councils).

The Bailiff of Guernsey (the Chief Justice) is *ex officio* the Presiding Officer of the States of Deliberation and the Deputy Bailiff is *ex officio* the Deputy Presiding Officer. Both are Crown appointments.

In addition, there is a Judge of the Royal Court and two magistrates. They are barred from holding any public office unless it is an appointment by the Crown, the States, the Royal Court or the Bailiff.

Jurats are barred from election to the States of Deliberation. However, they can be elected to any States committee which does not administer legislation containing a right of appeal to the Royal Court. At present, the only committee on which a Jurat sits is one administering one of the two local libraries.

In Guernsey there are no select committees in the British sense. However, there are committees which scrutinise the functions of the other governmental committees. The functions and decisions of a court would not be scrutinised in

this way.

Subject to data protection requirements and duties of confidentiality, which are reinforced in the Code of Conduct for Members of the States of Deliberation, there are no rules preventing reference to the conduct or decisions of individual judges. However, the Bailiff and Law Officers are careful to ensure that comments which might impede the administration of justice (either in a particular case or more generally) are avoided.

There is no formal mechanism to enable judges to make representations to the States of Deliberation.

Neither are there formal arrangements for judges to review draft legislation.

INDIA

Lok Sabha

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?

In India judges are appointed by the President. Parliament has no role *per se* in their appointments.

Article 124(4) of the constitution provides that a judge of the Supreme Court shall not be removed from office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of at least two-thirds of those voting; such an address must be presented to the President in the same session for removal on the grounds of proved misbehaviour or incapacity.

Article 124(5) of the constitution provides that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proving of misbehaviour or incapacity of a judge under clause (4).

Article 217(1)(b) of the constitution provides that a judge of a High Court may be removed from office by the President in the manner provided in article 124(4) for removing a judge of the Supreme Court.

The procedure for investigating and proving misbehaviour or incapacity of a judge and for presenting an address to the President is prescribed in the Judges (Inquiry) Act 1968 and rules made thereunder.

As per the Act and rules, the presiding officer of the House in which the motion for presenting an address to the President praying for the removal of a judge has been admitted creates a committee for investigating the grounds on which the removal of the judge is prayed for. The committee consists of three members: one chosen from among the Chief Justice and other judges of the Supreme Court; one chosen from among the Chief Justices of the High Courts; and one a person who is, in the opinion of the Speaker, Lok Sabha, or the Chairman, Rajya Sabha, as the case may be, a distinguished jurist.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?
Article 121 of the constitution provides that no discussion shall take place in Parliament on the conduct of any judge of the Supreme Court or a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judge.

Rule 352(v) of the Rules of Procedure and Conduct of Business in Lok Sabha also provides that a member while speaking shall not reflect upon the conduct of persons in high authority unless the discussion is based on a substantive motion drawn in proper terms.

The explanation of the rule states that "persons in high authority" mean persons whose conduct can be discussed only on a substantive motion drawn in proper terms under the constitution or such other persons whose conduct, in the opinion of the Speaker, should be discussed on a substantive motion drawn up in terms approved by the Speaker.

The only way of discussing the conduct of a judge in the discharge of his duties is on a substantive motion for his removal; such a motion must be tabled under specified provisions and the procedure prescribed therein followed.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?
There is no provision in the constitution for involving the judiciary in the process of law making. However, rule 74 of the Rules of Procedure and Conduct of Business in Lok Sabha provides that, after introduction of a bill, a motion for eliciting public opinion thereon may be moved. If such a motion is adopted, the bill is circulated to the state governments, who are asked to publish it in their Gazettes and to forward their opinions on it and the opinions of members of the state legislatures and of such public bodies, selected officers and other persons as the state governments think fit to consult. In certain cases the state governments may be asked to obtain the views of the High Courts.

The practice of referring bills for eliciting public opinion is not in vogue.

Rajya Sabha

There are some provisions in the constitution which govern the relationship between Parliament and the judiciary.

Parliament is not involved in the appointment of judges. The President of India appoints judges of the Supreme Court and the High Courts as per the consultative process in the constitution and evolved by the Supreme Court.

The process for removing judges is explained in the response from the Lok Sabha.

There have been two instances in the history of the Indian Parliament when motions for removing a Supreme Court judge and a High Court judge were admitted. In the first case, the motion fell as it could not get the requisite majority under article 124(4) of the constitution. In the second case, the motion was adopted by the Rajya Sabha. However, the motion could not be taken up in the Lok Sabha because of the resignation of the judge.

Sitting judges are not eligible to become members of Parliament. However, after relinquishing office they are not disqualified from becoming a member of Parliament.

Judges are not called on to give evidence to select committees. No written submission has been received from them. However, retired judges have been invited to give evidence to committees on certain bills, as decided by the committee.

The response of the Lok Sabha explains the bar on parliamentarians discussing the conduct of judges.

There is no formal mechanism for the judiciary to make representations to Parliament. However, when a motion for removing a judge is considered by the House, the judge is provided with an opportunity to present his defence in person or through his counsel, from the bar of the House.

As regards judges being involved in the legislative process before a bill becomes an Act, the constitution has demarcated the functions of the legislature and the judiciary. Judges are not directly involved in legislative process. The courts do not interfere in the formative stages of legislation on the ground of lack of legislative competence of the legislature concerned or otherwise. The courts may judicially review legislation, once passed, for compliance with the constitution.

JAMAICA

Senate and House of Representatives (joint response)

Parliament is not involved in the selection, appointment or dismissal of judges.

Judges are disqualified from becoming parliamentarians under section 42 of the Jamaica Constitution.

Judges do not usually give evidence to parliamentary committees.

Parliamentarians are not allowed to make reference, in parliamentary proceedings, to the conduct or decisions of individual judges.

Bills are reviewed for compliance with the constitution by the Attorney General's Chambers.

STATES OF JERSEY

The States of Jersey has no involvement in the appointment of judges.

Judges in Jersey would be disqualified from standing for election because members are not able to hold any paid office under the Crown.

Judges has never been requested to appear before parliamentary committees and committees would not normally be able to consider decisions made by the courts. There are no specific rules governing the process that would be followed if a judge was asked to appear before a committee.

Standing order 104(2)(f) states that a member of the States must not, during debate, "refer to the conduct of … any Jurat or other person performing judicial functions" although, in practice, members occasionally refer to the outcome of proceedings in court (for example to comment on the appropriateness of a sentence passed); the presiding officer will not often intervene in such cases.

There are no formal mechanisms for judges to make representations to the States. Judges are not involved in the legislative process of the Assembly, although they will normally be consulted by government officials during the drafting of legislation which affects the courts or the judicial process.

In Jersey, as in the neighbouring island of Guernsey, the presiding officer of the States Assembly, known as the Bailiff, is also President of the Royal Court and therefore a judge. There have been a number of reviews in recent years to assess whether it is appropriate for a member of the judiciary to preside over the Assembly but no decision to change the present system has been agreed as a majority of States members value the role of the Bailiff (which can be traced back some 800 years) and see no reason to change the current arrangements.

NEW ZEALAND HOUSE OF REPRESENTATIVES

To what extent is Parliament involved in the appointment of judges?

In New Zealand judicial appointments are made by the Governor-General on the recommendation of the Attorney General. So while judicial appointments are made by the executive, it is a strong constitutional convention that in deciding who is to be appointed the Attorney General acts independently of political considerations. The Attorney General by convention consults certain office-holders, depending on the nature of the appointment. He or she mentions appointments at Cabinet after they have been determined, but the appointments are not discussed or approved by the Cabinet. The appointment process followed by the Attorney General is not prescribed by statute or regulation.

To what extent is Parliament involved in the dismissal of judges?

The convention of comity between the legislature and judiciary requires strong

protections against the arbitrary removal of judges from office. The primary rule on the dismissal of a judge is in section 23 of the Constitution Act 1986, which states "A judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that judge's misbehaviour or of that judge's incapacity to discharge the functions of that judge's office." This provision applies in respect of judges of the Supreme Court and the Court of Appeal, as they remain judges of the High Court. An address from the House would also be required for the removal of a judge of the Employment Court.

The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 details procedures for examining complaints about judicial conduct. A complaint is subject to a preliminary examination by a commissioner, who may then recommend the appointment of a panel to hear and consider the complaint. If the panel reports that the removal of a judge is justified, the Attorney General may take steps to initiate the removal of that judge from office. An address from the House to the Governor-General for the removal of a judge of the High Court or the Employment Court on account of conduct would require a notice of motion. It is unlikely that any such notice would be accepted without authentication by a panel report or confirmation that the judge has been convicted of a serious offence. Parliament has no involvement in the removal of other judges, such as district court judges.

Are judges disqualified from becoming members of Parliament?

All New Zealand citizens are entitled to stand as members of Parliament. However, in seeking to preserve the mutually respectful relationship between Parliament and the courts, it is highly unlikely that a sitting judge would seek election to Parliament.

To what extent do judges give evidence to select committees?

There are no formal rules restricting the evidence judges may give to a select committee. The Guidelines for Judicial Conduct state that a judge is not precluded from making a submission or giving evidence before a parliamentary select committee on a matter affecting the legal system. However, caution is recommended. They stress the importance of avoiding entering into political matters and advise judges to bear in mind the need to maintain judicial independence from the legislature and the executive. The guidelines require the head of jurisdiction to be consulted before a judge makes a submission.

The judiciary recently made a combined submission to the Justice and Electoral Committee. It was presented by the Chief Justice and opposed a member's bill seeking to require judges to declare their pecuniary interests.

The judiciary also made a submission on the Judicature Modernisation Bill. This bill reformed the composition, jurisdiction, powers and procedure of New Zealand's courts. Submissions on the bill were received from various divisions of the court system, with the judges of the Supreme Court, High Court, District Court, Environment Court and the Māori Land Court each making distinct submissions. In a supplementary submission, the Chief Justice noted her disagreement with aspects of the District Court judges' submission.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

The standing orders prohibit members from making offensive references to members of the judiciary. Numerous Speakers' rulings reinforce this principle, while allowing for ex post criticism of the court system, the effect of court findings or a judgment—for example if the House considers legislation that modifies the law following its interpretation or application by a court. But such criticism must not extend to criticising a judge.

There is also a *sub judice* rule which covers matters before a court or suppressed by a court order.

In an exceptional case, the House retains the ability to consider a motion for the removal of a judge, as set out above. In such a debate, the Speaker would be likely to permit relevant discussion of the conduct of the judge concerned.

Do any formal mechanisms exist for the judiciary to make representations to Parliament?

No. However, like other members of the public, judges can make submissions to select committees and ask to appear in person.

Can judges be involved in the legislative process before a bill becomes an Act?

The courts do not get involved in the legislative process, and there are no formal parliamentary requirements to consult the judiciary about legislation before it is enacted. Cabinet procedures for the preparation of legislation require consultation with affected government departments. If relevant, this might include the Ministry of Justice in its capacity of administering the court system; the Ministry would seek judicial input where appropriate. The Ministry of Justice would usually be the lead agency for legislation with a direct effect on the courts and on the offices and conditions of the judiciary; it would seek input from the judiciary when preparing such legislation.

As discussed above, judges can make submissions about legislation to select committees.

SIERRA LEONE PARLIAMENT

In Sierra Leone the judiciary interprets the laws made by Parliament and punishes all defaulters as stated in Acts. This branch is supervised by the Attorney General and the Minister of Justice. The professional head is the Chief Justice.

Each branch of government operates separately even though their duties overlap.

Parliament does not have direct supervision over judges in court.

SOUTH AFRICA

National Assembly

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?

Section 174(3) of the Constitution of the Republic of South Africa provides that the President, after consulting the Judicial Service Commission (a body including members of Parliament) and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice.

Section 174(4) states that "the other judges of the Constitutional Court are appointed by the President, after consulting the Chief Justice and the leaders of parties represented in the National Assembly".

It stands to reason that Parliament has only an indirect consultative role (through the Judicial Service Commission and party leaders) in the appointment of the Chief Justice, the Deputy Chief Justice and the other judges of the Constitutional Court.

Section 177(1) of the constitution provides:

"A judge may be removed from office only if—

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members."

Section 177(2) states that "the President must remove a judge from office upon adoption of a resolution calling for that judge to be removed."

Are judges disqualified from becoming a member of your parliament?

Judges may not be members of Parliament, of the government or of political parties.

To what extent do judges give evidence to select committees? If they do, are there any rules which govern the process?

In accordance with the doctrine of the separation of powers enshrined in South Africa's constitution, judges do not give evidence to parliamentary committees as Parliament has no oversight of the judiciary.

An exception to the above is the appearance of the Chief Justice before the justice portfolio committee during the latter's consideration of the justice annual budget. However, the Chief Justice appears voluntarily and in his or her capacity as the accounting officer of the funds allocated to the administration of justice and not as the Chief Justice of the Republic.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

Rule 66 of the Rules of the National Assembly states, "no member shall reflect upon the competence or honour of a judge of a superior court, or of the holder of an office whose removal of office is dependent upon the decision of the House, except upon a substantive motion in the House alleging facts which, if true, would in the opinion of the Speaker *prima facie* warrant such a decision."

Only if a member of the National Assembly brings a substantive motion to the House reflecting upon the competence (this would include scrutiny of decisions) or honour of a judge would the Speaker warrant a decision of the House based on *prima facie* evidence on the matter.

Do any formal mechanisms exist for the judiciary to make representations to your parliament?

There are no formal mechanisms for the judiciary to make representations to Parliament.

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?

The constitution allows for a bill to be referred to the Constitutional Court only in terms of section 79(4), which provides:

"If after reconsideration, a bill fully accommodates the President's reservations, the President must assent to and sign the bill, if not, the President must either—

(a) assent to and sign the bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality."

The only instance where judges are involved in the legislative process is when the President has referred a bill back to Parliament to reconsider it; Parliament then does so, but if the President still has reservations about the bill's constitutionality (section 84(2)(c) of the constitution) it is referred by the President to the

Constitutional Court for a decision on the bill's constitutionality.[26]

UNITED KINGDOM

House of Commons

To what extent is your parliament (or its committees) involved in the appointment or dismissal of judges?

Parliament has no role in the appointment of members of the judiciary. Before the Constitutional Reform Act 2005 judicial appointments were made on the recommendation of the Lord Chancellor, who is a government minister. That Act established an independent Judicial Appointments Commission for England and Wales. Judges are represented on the commission, but do not hold a majority and the commission has to have a lay chair. The commission recommends candidates to the Lord Chancellor, who has a limited power of veto. The process for judicial appointments was further changed by the Crime and Courts Act 2013. This reduced the role of the Lord Chancellor in appointing less senior judges, by transferring his powers over judicial appointments below the High Court to the Lord Chief Justice or to the Senior President of Tribunals for tribunal appointments.

Judges in the higher courts have life tenure,[27] which protects their independence. A resolution of both Houses is needed to remove a High Court judge from office, while judges at lower levels can be removed only by the Lord Chancellor, having received the agreement of the Lord Chief Justice and after disciplinary proceedings. The judiciary's website notes, "No English High Court or Court of Appeal judge has ever been removed from office under these powers [while the power to remove a district or circuit judge] has only been exercised twice: once in 1983 when a judge was caught smuggling whisky from Guernsey into England; the other in 2009, for a variety of inappropriate behaviour."

Are judges disqualified from becoming a member of your parliament?

In the UK holders of certain judicial offices are prohibited from standing for election to the House of Commons under the House of Commons (Disqualification) Act 1975. Schedule 1 to the Act (as amended) defines those judicial offices which are disqualified. There are certain judicial offices not disqualified from being Members of Parliament under the Act, for example

[26] Relevant case: *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1.

[27] Although under the Judicial Pensions and Retirement Act 1993 there is a general judicial retirement age of 70.

recorders (two MPs declared earnings as part-time Crown Court recorders in the most recent register of members' financial interests) and lay magistrates.

To what extent do judges give evidence to select committees?

There has been a gradual and continual increase in appearances by judges before committees since the inception of the departmental select committee system in 1979. While, unsurprisingly, the House of Commons Justice Committee is the committee most often attended by members of the judiciary, an increasing range of select committees are seeking evidence from judges. Joint committees and public bill committees are also inviting judges more frequently. In 2011 there were eight judicial appearances before House of Common select committees—the highest number in a single year this Parliament.

If they do, are there any rules which govern the process?

The Judicial Executive Board's *Guidance to Judges on Appearances before Select Committees*:

- Sets out the expectation that all requests for judges to give evidence will be directed to, and administered by, the private office of the Lord Chief Justice.
- Sets out the areas where, by "longstanding constitutional conventions", judges should in general not answer questions, and exceptions to that principle, the areas being: (i) the merits of individual cases; (ii) the personalities or merits of serving judges, politicians or other public figures; (iii) the merits, meaning or likely effect of provisions in any bill or other prospective legislation and the merits of government policy; and (iv) issues subject to government consultation on which the judiciary intend to make a formal institutional response, but have not done so.
- States that the first exception to the restrictions on judicial comment is where a bill or policy "directly affects the operation of the courts or aspects of the administration of justice within the judge's particular area of judicial responsibility or expertise". In such cases a judge may comment on the "practical operation or technical aspects of the bill or policy". The second exception is where a bill or policy affects the independence of the judiciary.
- States that the conventions restricting matters on which judges may comment apply to retired judges.
- Notes that it is very unlikely that a judge will be ordered to attend by a parliamentary committee.
- Advises that where members of a committee ask questions which it would be inappropriate for a judge to answer, it is up to the judge to explain why it would be inappropriate.

Although this guidance has not been formally recognised by Parliament there

is clear overlap between the guidance and the standing orders, customs and practices that govern proceedings of the House of Commons and its select committees.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

Erskine May states that certain matters cannot be debated in the House, except on a substantive motion which allows a distinct decision of the House. This includes the conduct of "judges of the superior courts … including persons holding the position of a judge, such as a judge in a court of bankruptcy, a circuit or county court judge, or a recorder".[28] *May* goes on to state, "Such matters cannot, therefore, be raised by way of amendment, or an adjournment motion … for the same reason, no charge of a personal character [towards these categories of persons] can be raised except on a direct and substantive motion … no statement of that kind can be incorporated into a broader motion, nor, for example, included in a reply to a question."[29]

Do any formal mechanisms exist for the judiciary to make representations to your parliament?

Under section 5(1) of the Constitutional Reform Act 2005 the Lord Chief Justice (and his equivalents in Scotland and Northern Ireland) "may lay before Parliament written representations on matters which appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice". Such reports have generally been of the nature of annual reports on the judiciary and the functioning of the court system, and there has been a trend for the Lord Chief Justice to appear before the Justice Committee following each report. However, the current Lord Chief Justice has stated his belief that section 5 may be used on occasion in future for him to make direct representations to Parliament on discrete issues (which some consider to have been the original intention behind the provision).

Can judges be involved in the legislative process before a bill becomes an Act (for example by reviewing bills for compliance with the constitution)?

There is no written constitution in the UK, and therefore there is no mechanism by which the judiciary could rule a bill unconstitutional, in the way constitutional courts in other countries may.

The Judicial Executive Board's aforementioned guidance states that

[28] 24th edition, pp 443–45.
[29] *Ibid.*, p 396.

judges should not comment in public "on the merits, meaning or likely effect of provisions in any bill or other prospective legislation and the merits of government policy [however] the first exception to the restrictions on judicial comment is where a bill or policy "directly affects the operation of the courts or aspects of the administration of justice within the judge's particular area of judicial responsibility or expertise". In such cases a judge may comment on the "practical operation or technical aspects of the bill or policy". The second exception is where a bill or policy "affects the independence of the judiciary." In this context, in recent years members of the judiciary have given evidence to public bill committees—for example on the Criminal Justice and Courts Bill 2014.

The judiciary also frequently make representations to ministers in private on bills before Parliament or on possible future legislation.

There have been cases where the judiciary have declined to engage with Parliament on the legislative (or the pre-legislative policy formation) process. A request by the Joint Committee on Human Rights for judges who had presided over closed material procedure hearings to give evidence to its inquiry on the Justice and Security green paper was refused by the Lord Chief Justice on the ground that it was inappropriate for judges to comment on the merits of proposed legislation which they might then have to interpret. The same reason was given when judges declined an invitation to give evidence to the public bill committee on the Legal Aid, Sentencing and Punishment of Offenders Bill. Concern was expressed by members of the joint committee during its scrutiny of the Justice and Security Bill that although judges had been unwilling to speak to the committee they had apparently passed their views on the bill to the Lord Chancellor; this was seen as lacking in transparency.

House of Lords

This response adds to the response of the UK House of Commons. It does not replicate answers in that response, many of which apply to both Houses of Parliament.

Are judges disqualified from becoming a member of your parliament?

Before 2009 the House of Lords was the highest court in the United Kingdom. Cases were heard in the Appellate Committee, normally comprising five of 12 salaried Law Lords. Retired Law Lords remained members of the House for life. Certain other high judicial office holders (such as the Lord Chief Justice) were given life peerages so became members of the House.

The Constitutional Reform Act 2005 created a new UK Supreme Court, institutionally separate from Parliament. When the court started sitting in 2009 provisions in the Act came into force which disqualified holders of high

judicial office (that is, judges of the High Court and its Scottish and Northern Irish equivalents or above) from membership of the House. Those judges who were at that time members of the House are entitled to return to the House on retirement.

So far the only justices of the Supreme Court who have retired are former Law Lords, so all retired justices have been eligible to return to the House of Lords. It remains to be seen whether future retired justices who were not previously Law Lords will be given a peerage on retirement.

In 2013 Sir John Thomas was made Lord Chief Justice of England and Wales. At the same time he was given a life peerage and became Lord Thomas of Cwmgiedd. However, as a serving holder of high judicial office he immediately was disqualified from membership of the House of Lords so may not sit or vote (but he was ceremonially introduced).

A number of senior judges attend the State Opening of Parliament by virtue of writs of attendance. Their attendance is wholly ceremonial and they play no substantive part in the work of the House.

To what extent do judges give evidence to select committees?

The House of Lords Constitution Committee takes annual oral evidence from the Lord Chief Justice, and the President and Deputy President of the Supreme Court. These sessions are intended to enable a discussion of general developments, rather than to discuss particular cases.

Other Lords select committees take evidence from judges as necessary. For example, certain ad hoc committees carrying out post-legislative scrutiny of Acts of Parliament have taken evidence from judges with experience of applying those Acts.

Are there any restrictions on making reference in parliamentary proceedings to the conduct or decisions of individual judges?

There is no explicit restriction on such reference in the House of Lords. However, the general constitutional principle of comity between the legislature and the judiciary means that members would be advised to exercise caution when seeking to comment on an individual judge.

National Assembly for Wales

The Assembly has no involvement in the appointment or dismissal of judges.

Section 16 of the Government of Wales Act 2006 (disqualification) provides that a person is disqualified from being an Assembly Member if that person is disqualified from being a member of the House of Commons under paragraphs (a) to (e) of section 1(1) of the House of Commons Disqualification Act 1975, which includes judges.

There were no instances of judges giving evidence to Assembly committees in 2013. The last time this happened was in 2009, when The Hon. Mr Justice Roderick Wood KT, the Family Division Liaison Judge for Wales, gave evidence to the Health, Wellbeing and Local Government Committee's inquiry into CAFCASS Cymru.

In addition to Assembly standing order 13.15 on *sub judice*, relations with the judiciary are covered by standing orders 13.16 and 13.17, which state that the Assembly must not discuss individual judicial appointments, nor criticise in plenary meetings the conduct of judges in the discharge of their judicial office.

The National Assembly for Wales' Procedure for Dealing with Complaints Against Assembly Members provides members with a process of appeal against the Standards of Conduct Committee's decision on a complaint before its report is published. Since 2012 the procedure has been for the Presiding Officer to appoint an "independent legally qualified person" to undertake a judicial review of the decision-making process, in accordance with certain criteria, before deciding the appeal. That person is nominated, at the Presiding Officer's request, by the senior Presiding Judge of the Wales circuit. The standards appeal process has only been used once, in December 2010, and the appeal was dismissed. (At that time the procedure was more complex, involving the nominee judge being required to chair an appeal panel of Assembly Members, rather than deciding the appeal alone.)

PRIVILEGE

AUSTRALIA

Senate

Unauthorised disclosure

On 14 May the Privileges Committee presented a report on an allegation of contempt relating to the possible unauthorised disclosure of the draft report of the Select Committee on Electricity Prices (152nd report). This was the first such allegation referred to the committee since the committee's 122nd report recommended the adoption of new procedures. The procedures, which required committees to investigate their own unauthorised disclosures and raise as matters of privilege only the most serious cases, stemmed the number of matters raised that were not capable of satisfactory resolution. In this case, the select committee was unable to undertake the necessary investigation before it ceased to exist on presentation of its final report. The Privileges Committee effectively completed those preliminary inquiries and concluded that the case would not have warranted further investigation under the new procedures. It identified the option of select committees affected by unauthorised disclosures in future seeking a short extension to deal with the matter, but stopped short of recommending that the procedures be amended to this effect, preferring a case by case approach.

Official witnesses

On 24 June the Privileges Committee reported on its inquiry into the *Government Guidelines for Official Witnesses before Parliamentary Committees* (see 153rd report). The main purpose of the inquiry was to assess how well the guidelines assisted officials in understanding their rights and obligations.

The inquiry arose from concerns expressed by the Senate Foreign Affairs, Defence and Trade References Committee about government directives purporting to require official approval of all defence witnesses appearing before parliamentary committees and clearance of their evidence. As the committee was seeking personal accounts from witnesses it was concerned that such directives could interfere with its work by dissuading witnesses from coming forward or influencing the evidence they might give.

The main government submission to the Privileges Committee inquiry acknowledged those concerns, and the government later submitted proposed revised guidelines which sought to address the matter and which substantially updated the guidelines for the first time since 1989.

The committee noted substantial improvements in the guidelines, including

advice that witnesses choosing or required to give personal accounts of events or conduct they have witnessed "must not have requirements placed upon them that might deter them from giving evidence or cause them to feel constrained about the nature or content of their evidence."

The guidelines greatly expand the advice available to offices on other aspects of Senate practice and procedure. For the most part the committee considered that advice to be appropriate. The report contains observations about the guidelines' treatment of matters of perennial concern to senators, including:

- the process for witnesses to make public interest immunity claims;
- claims by witnesses to withhold information from committees because it is "commercial in confidence", covered by legal professional privilege or subject to statutory secrecy (or similar) provisions; and
- the (non-)application of freedom of information criteria to parliamentary inquiries.

Much of the advice relating to witnesses also applies to officers providing information to the Senate itself. The committee observed that that it was important for officers to appreciate the underlying principles in their interactions with the Houses and their committees, since no set of guidelines could adequately deal with all eventualities.

The committee made observations about Senate orders for documents that had been resisted by statutory officers, reiterating the Senate's long-held view that statutory officers are not immune from the inquiry powers of the Houses and their committees. Finally, the committee repeated its concerns about the lack of knowledge among officials—including statutory officers—of their obligations to parliament and its committees.

Queensland Legislative Assembly

Reflection on the chair

On 2 May 2013 the Ethics Committee tabled report No. 133 on an alleged reflection on the chair. On 28 November 2012 the member for Bundamba had risen on a point of order, stating in relation to Madam Speaker that "I have been vilified by you in this parliament for the last six months". The member was asked to leave the chamber under standing order 253A, having already been warned for interjecting. Madam Speaker later that day decided that the member should be referred to the Ethics Committee. The committee found that the member's comments were a reflection on the chair and therefore a contempt. The committee took into account a range of factors in considering the penalty that should be recommended, including that the member was herself a member of the Ethics Committee. The committee recommended, and the House subsequently resolved, that the member should be suspended from the committee for three months.

Alleged failure to register an interest

On 21 May 2013 Madam Speaker advised the House on a matter of privilege referred to the Ethics Committee by the Registrar of Members' Interests. The matter related to an alleged failure to register an interest in the Register of Members' Interests by the member for Redcliffe. Madam Speaker advised that she had received advice from the chair of the Ethics Committee that as there was a joint investigation by the Crime and Misconduct Commission and the Queensland Police Service on the matter, it was suspending its inquiry pending the outcome of the investigation.

In July 2013 the Ethics Committee recommenced its inquiry and tabled its report No. 139 on 19 November 2013.

The Ethics Committee recommended that the member for Redcliffe be charged with 49 counts of contempt for:

- failing to disclose interests in the Register of Members' Interests and in the Register of Related Persons' Interests; and
- deliberately misleading the House.

The committee recommended that the House move a motion to expel the member and declare the seat of Redcliffe vacant. Later that day, the Speaker informed the House that the member had tendered his resignation as the member for Redcliffe.

After the resignation announcement by the Speaker the Assembly ordered the former member for Redcliffe to attend the Bar of the House on 21 November 2013 to respond to the 49 charges of contempt. The former member appeared at the Bar, accompanied by his solicitor, who addressed the House on his behalf.

Following his appearance, the House debated and agreed a motion moved by the Leader of the House finding the former member guilty of the contempt charges and fining him $90,000 in accordance with the Ethics Committee recommendations. The House noted that the member had resigned his seat, but endorsed the Ethics Committee recommendation that the cumulative effect of the contempt findings was conduct not fitting of a member of the House which would have warranted expulsion from the Legislative Assembly.

As a result of the member's resignation the Legislative Assembly passed a motion on 20 November 2013 declaring the electoral district of Redcliffe vacant. A by-election was held in February 2014.

Victoria Legislative Assembly

On 16 April 2013 the member for Kew made a personal explanation to the House announcing that he had resigned as chair of the Privileges Committee and as a minister in the Government. This was occasioned after the member identified himself as the source of "quotes attributed to a coalition member of the Privileges Committee" in a newspaper article on the internal deliberations

of that committee. The article, or any breach of privilege associated with it, was not considered by the Privileges Committee.

CANADA

House of Commons

Ruling of 7 February 2013

The Speaker ruled on a question of privilege raised on 31 January 2013 by Mauril Bélanger (Ottawa—Vanier) about the difficulty he had encountered in obtaining information from Public Works and Government Services Canada. Mr Bélanger alleged that government procedures requiring elected officials to seek public information through the minister's office, while ordinary citizens could obtain the same information directly from the department, impeded him from carrying out his duties as a member—particularly as he required the information in preparation for oral questions. He argued that this disparity in procedures was being applied so as to create inequality of access to information between government and opposition members.

In his ruling the Speaker noted that former chair occupants had been categorical in stating that parliamentary privilege applies only where members were participating in what is deemed to be a parliamentary proceeding; it was beyond the purview of the chair to intervene in departmental matters or government processes. The chair did not conclude that the member for Ottawa—Vanier had been impeded in the performance of his parliamentary duties, and thus found that no *prima facie* breach of privilege had occurred.

Ruling of 23 April 2013

On 26 March 2013 Mark Warawa (Langley) rose on a question of privilege regarding freedom of speech and the right of a member of Parliament to make a statement under standing order 31. Having been denied the opportunity to present a statement under SO 31 by his party, he argued that such a denial of his right to speak impeded his ability to represent his constituents and that it is the Speaker's role to recognise members. While recognising the practice of parties submitting lists of speakers for proceedings, he contended that such lists should not be used to deny a member's right to speak. He therefore requested that the Speaker find his removal from the SO 31 speaking list, and thus his inability to speak, a breach of privilege. Including Mr Warawa, 19 members rose to address this question in the ensuing weeks.

In his 23 April 2013 ruling the Speaker gave an overview of the history of the use of speaking lists and explained the role and authority of the chair to recognise members to speak. He stated, "… the chair has to conclude, based on this review of our procedural authorities and other references, that its authority

to decide who is recognised to speak is indisputable and has not been trumped by the use of lists, as some members seem to suggest". He reminded members that, even if their names appear on speaking lists, those wishing to speak must rise in the House to be recognised. Declaring that he could find no evidence that the member had been systematically prevented from seeking the floor, he could not agree that Mr Warawa's privileges had been breached. He concluded by stating that the chair would continue to be guided by the lists submitted by parties, but if faced with a situation where he was called upon to decide who to recognise, he would use his discretion to ensure members are recognised in a "… balanced way that respects both the will of the House and the rights of individual members."

Ruling of 18 June 2013

On 5 June Scott Andrews (Avalon) rose on a question of privilege about the right of James Bezan (Selkirk—Interlake) and Shelly Glover (Saint Boniface) to sit and vote in the House, having failed to correct their electoral campaign returns by a specified date as required by the Chief Electoral Officer, pursuant to section 457(2) of the Canada Elections Act. Mr Andrews stated that, pursuant to section 463(2) of the same Act, the members no longer had the right to continue to sit or vote in the House. Mr Bezan and Ms Glover both stated that the issue related to a new interpretation by Elections Canada regarding certain expenses and that they had filed application with the courts to examine the issue. They stated that because of this the *sub judice* convention should apply as they awaited the interpretation of the courts.

The Speaker delivered his ruling on 18 June. He stated that there were not enough clear precedents or statutory guidance for him to make a decision, and this pointed to a severe gap in House procedures when dealing with issues raised by Elections Canada. He added that this lack of a clear process did not satisfy the needs of the House nor the needs of the members concerned. He believed it would be helpful to the whole House and to the Speaker if the Standing Committee on Procedure and House Affairs were to examine the issue with a view to incorporating relevant provisions in the standing orders. Since immediate consideration by the House was warranted, he would make available the correspondence received from Elections Canada. The Speaker therefore ruled that there was a *prima facie* case of privilege and invited Dominic LeBlanc (Beauséjour), in the absence of Mr Andrews, to move the appropriate motion. The debate began on the motion but was adjourned. The House rose for the summer break later that day before disposing of the motion.

Prorogation having occurred, the matter was raised again by Craig Scott (Toronto—Danforth) on 17 October in the subsequent session. The Speaker immediately ruled that this was still a *prima facie* question of privilege and,

accordingly, Mr Scott moved that the matter be referred to the Standing Committee on Procedure and House Affairs. The motion was agreed to without debate.

Other matters

On 7 March 2013 the Standing Committee on Procedure and House Affairs presented its 42nd report, entitled *Access to Information Requests and Parliamentary Privilege*. The committee recommended guidelines for the House to follow in determining its response to access to information requests in which the House is a third party. The committee emphasised that, by agreeing to disclose or not to disclose documents, the House in no way would be waiving its privileges; the usual protections afforded to its members, its staff or its witnesses would remain. The committee's study and subsequent report resulted from a suggestion by the Speaker that the committee review the question after an access to information request received by the Auditor General's Office in June 2012 sought email communications between House staff and the Auditor General's Office related to the Auditor General's appearance before several parliamentary committees. The report was agreed in the following session, on 2 December 2013.

Senate

In 2013 only one case of privilege was established in the Senate. The Leader of the Opposition raised a question of privilege on 7 May 2013 about a witness who had been invited to appear before the Standing Senate Committee on National Security and Defence during its study of a government bill. The witness had not appeared because of pressures exerted on him by his employer, the Royal Canadian Mounted Police (RCMP).

The following day, the Speaker ruled that a *prima facie* case of privilege had been established. The Senate immediately referred the matter to the Standing Committee on Rules, Procedures and the Rights of Parliament.

The committee heard from the witness in question and from representatives of the RCMP. The committee stated in its report that, although there had been an encroachment into the rights of Parliament, it felt that the RCMP had demonstrated that this type of encroachment would not occur again. As a result, the committee saw no reason to recommend a sanction or censure. The report of the Rules Committee was adopted by the Senate on 26 June 2013.

Alberta Legislative Assembly

In 2013 a number of purported questions of privilege were raised in the Legislative Assembly of Alberta and in one of its committees. One of these related to government advertising; a second related to concern about advance

media access to bills.

On 27 November 2013 Rachel Notley, a member of the Legislative Assembly, raised a question of privilege, suggesting that the independence and operation of the Special Standing Committee on Members' Services (the committee responsible for determining members' remuneration) had been obstructed when the Government sent a brochure to Albertans which included a statement about a multi-year wage freeze for members. These government brochures were delivered to Albertans several days before the committee meeting at which a motion for a three-year wage freeze for MLAs was scheduled for discussion.

Also as part of the question of privilege, it was alleged that the Government had breached the privileges of the Assembly by holding a media briefing on bills 45 and 46, both of which concern public sector labour issues, before either bill had been introduced in the Assembly and before copies were available to members. The media briefing had a scheduled start time of 2.45 p.m., while copies of the bills were not distributed in the Assembly until approximately 3.15 p.m.

On 2 December 2013 the Speaker, Hon. Gene Zwozdesky, presented his ruling on both matters. Having received additional information from the ministers involved in the media briefing on bills 45 and 46, the Speaker found that the distribution of the bills in the Assembly and the time at which the media briefing had taken place meant that there was no *prima facie* question of privilege.

The Speaker went on to address the matter of the brochure referring to a wage freeze for members. In a statement that included references to parliamentary authorities and precedents in other Canadian jurisdictions, the Speaker ruled that a *prima facie* case of privilege had occurred. It was noted that the Government had already been "warned to not try and presume that the Assembly would pass legislation through some form of their own advertising". The Speaker indicated that the Government was in contempt of both the Assembly and one of its committees.

Following the ruling the Deputy Premier, the Hon. Thomas Lukaszuk, apologised on behalf of the Government for any affront to the dignity of the Legislative Assembly, and the matter came to a close.

Earlier in the year, on 27 February 2013, the Special Standing Committee on Members' Services, chaired by Speaker Zwozdesky, addressed a question of privilege that had been held over from the committee's 7 February 2013 meeting at which members' pay and benefits were discussed. The question was whether a "tweet" sent before the 7 February meeting by Premier Alison Redford stating that "PCs will freeze MLA pay and housing allowances today" infringed the independence of the committee. The chair noted that there was no precedent in Alberta for dealing with a question of privilege in a special or

standing committee. Authorities, including *House of Commons Procedure and Practice* (2nd edition), were consulted to provide guidance on the procedures for dealing with a question of privilege in committee. The chair stated that in his role as chair he could determine whether the issue was connected to the subject of privilege, but he could not determine whether the issue constituted a *prima facie* case of privilege. Having clarified his role, the chair advised that he was of the opinion that the matter met the threshold that it touched on privilege and therefore that it was appropriate for the committee to decide whether the matter should be reported to the Assembly. Brian Mason, the Leader of the New Democrat Opposition, moved that the committee report the purported question of privilege to the Assembly. After debate a recorded vote was held, and the motion was defeated by 6–4.

Québec National Assembly

The chair of the Assembly ruled on two questions of privilege in 2013.

Acting on legislation that has not been passed

In June 2013 the chair ruled on a question of privilege involving publicity and other information being put out by school boards. The notice received by the chair pointed to a possible breach of privilege in that certain school boards were encouraging parents to enroll their four-year-olds in full-time kindergarten for September, even though the bill proposing kindergarten services for those children was still being examined by the Assembly. The notice enjoined the chair to conclude that the publicity and information in question undermined the authority and dignity of the Assembly or its members, and that the school boards were, *prima facie*, in contempt of Parliament.

In its ruling the chair noted that acting on a legislative provision still being examined by the Assembly could constitute contempt of Parliament. However, the fact that government departments and public bodies wished to inform the public of government policies and programmes was not in itself reprehensible, as that was part of their responsibilities. But any publicity or information must evince respect for and deference to the National Assembly and its members. The public must not be left with the impression that a proposed measure was a *fait accompli* and that Parliament had no role to play in examining and passing such a measure. In the case at hand, the facts submitted to the chair led it to conclude that the question of privilege was *prima facie* admissible.

The chair reiterated the importance of evincing deference with regard to the Assembly and its members and of explicitly mentioning, in any publicity or information about a measure in a bill, the role played by the members in passing the bill into law. Such communications must mention that the measures referred to are "subject to the passage of the bill into law by the National Assembly".

False or incomplete testimony before a committee

The second question of privilege submitted to the chair concerned testimony given before the Committee on Health and Social Services in June 2013. The chair received a notice alleging a possible breach of privilege involving affirmations by a witness during consultations on the management of the Centre hospitalier de l'Université de Montréal. Among other things, the notice mentioned that some of those affirmations were contradicted by information the committee received the day after the hearing.

Giving false or incomplete answers to the questions of a member constitutes a hindrance to the Assembly's proceedings and undermines its authority and dignity. In this case, the facts submitted to support the alleged breach of privilege raised doubts about the truthfulness of the testimony. The chair therefore concluded that the question of privilege was *prima facie* admissible.

The chair stressed the importance of committees, in carrying out their mandates, having the full co-operation of all who participate in their proceedings. Witnesses were obliged to tell the truth and to give a complete version of the facts.

Conclusion regarding questions of privilege

Members who raise a question of privilege that is ruled admissible are generally satisfied with the ruling made by the chair on the basis of a preliminary analysis, without the question being resolved as such. On several occasions members have informed the chair that, conditional on receiving a letter of apology from the persons concerned by the ruling, they will not pursue the question of privilege. In such cases there is no call for the Assembly to pronounce on whether a breach of privilege has occurred or to impose sanctions.

In both questions of privilege discussed above, the member who notified the chair received a letter of apology from the persons concerned and declined to pursue the matter further. Hence the two cases were concluded without the Assembly having to pronounce on the question of privilege.

Saskatchewan Legislative Assembly

On the morning of 14 November 2013 Executive Council staff provided the media with embargoed copies of Saskatchewan's *Action Plan to Address Bullying and Cyber-bulling*, prepared by the member for Saskatoon Fairview and Legislative Secretary to the Minister of Education, who is responsible for the anti-bullying initiative. The opposition were not provided with a copy of the report until the press conference in the afternoon of 14 November 2013. The decision not to provide a copy to the opposition, in the opinion of the Opposition House Leader, constituted a breach of parliamentary privilege. The Speaker, Hon. Dan D'Autremont, agreed. He noted a previous ruling in the Legislative

Assembly of Saskatchewan by Speaker Kowalsky and a ruling by House of Commons Speaker Milliken that "when embargoed papers are provided to the media in advance of release to the public, these documents must be provided on the same embargoed basis to the opposition." Speaker D'Autremont ruled that "the Opposition House Leader has made a sufficient case for me to find a *prima facie* case of breach of privilege." This allowed for the first use of the new time limits on debate for motions of privilege. The mover of the privilege motion is entitled to speak for up to one hour and other members for a maximum of 45 minutes. This prevents one or a few members monopolising the time for debate and ensures ample opportunity for the presentation of different arguments.

GUERNSEY STATES OF DELIBERATION

A member was subject to a Code of Conduct panel inquiry after sending all members of the States of Deliberation a copy of a confidential report commissioned by the Health & Social Services Department, of which he was a member. The complainants alleged that he had breached two rules of the Code of Conduct: that confidential information received in the course of members' duties should be used only for those duties and that committee papers should not be disclosed to a third party other than by resolution of the committee concerned. The panel found the complaint was substantiated and recommended that the member should be formally reprimanded. On 30 May 2013 the States agreed and the member was formally reprimanded.

JAMAICA

Senate and House of Representatives (joint response)

There was a change to privilege by way of legislative amendment. A new Defamation Act was passed which amended the Senate and House of Representatives (Powers and Privileges) Act by removing the criminal offence wherein "any person publishes any false or scandalous libel on either House".

NEW ZEALAND HOUSE OF REPRESENTATIVES

Parliamentary Privilege Bill

In June 2013 the Privileges Committee reported on a question of privilege that focused on the relationship between the House of Representatives and the judiciary. The committee's consideration of this matter represented a major review of parliamentary privilege in New Zealand. The Government responded to the committee's recommendations in September 2013, and agreed to the recommendation that a Parliamentary Privilege Bill be introduced to clarify

for the avoidance of doubt the nature, purpose and scope of parliamentary privilege in New Zealand.

The bill did so by providing statutory guidance for the interpretation of certain legal terms relating to privilege, and affirming in legislation certain other aspects of parliamentary privilege. The bill did not seek comprehensively to codify, or replace entirely with legislation, all aspects of privilege. Provisions in the bill to clarify the scope of parliamentary privilege included:

- defining "proceedings in Parliament" based on the definition in the Australian Parliamentary Privileges Act 1987;
- clarifying the protections afforded to certain broadcasts, rebroadcasts and reports of proceedings in Parliament;
- ensuring that no person may incur criminal or civil liability for making an oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where that statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.

It was intended that these provisions would, among other things, alter the law as stated in court decisions in *Attorney-General v Leigh* (regarding proceedings in Parliament) and *Buchanan v Jennings* (relating to "effective repetition").

The Privileges Committee received public submissions and reported on the bill in June 2014. The committee recommended a number of amendments to the bill, including proposing that the bill be restructured to reflect better the role the legislation will play as a new principal Act—one that will form part of New Zealand's constitutional framework.

Among many matters considered by the committee was the issue of communicating proceedings in Parliament. The bill was amended to define "communication" and "communication to the public", and provided future-proof definitions by covering in a technology-neutral way all communications in any form.

The bill provided for a stay of court or tribunal proceedings that are commenced on the basis of a proceeding in Parliament, or a document related to a proceeding in Parliament, communicated under the authority of the House—for example broadcasts made under the authority of the House. The bill was passed shortly before the dissolution of Parliament for the 2014 general election.

Question of privilege about use of intrusive powers on the parliamentary precinct

The Privileges Committee considered an incident involving the release of information about a member of Parliament and a journalist from parliamentary information and security systems. The information—principally information about emails sent and about use of parliamentary swipe cards—was released

by the Parliamentary Service to a person conducting a government-established inquiry into the unauthorised release of a report. The Speaker considered that the incident raised serious issues and involved a question of privilege that should be examined by the committee, because the exercise of intrusive powers against members may threaten their ability to carry out their functions as elected members and the House's power to control its proceedings and precincts. The Speaker was also concerned about any actions that may compromise the ability of journalists to report freely. While the media may not participate directly in parliamentary proceedings, they are critical to informing the public about Parliament's activities.

The committee released an interim report at the end of 2013 with its findings on the incident. In this report the committee expressed its grave concern about the conduct of the inquiry and the way the Parliamentary Service handled its requests for information. The committee noted that the incident highlighted significant gaps in the policies and principles guiding the Service in relation to information it holds. The committee signalled its intention to report to the House in 2014 on the more general issue of appropriate principles for access to and release of information from parliamentary information and security systems.

STANDING ORDERS

AUSTRALIA

Senate

The following substantive amendments to standing and other orders were made by the Senate in 2013.

Standing order 18

The membership of the Standing Committee of Privileges was increased from seven to eight by the addition of a member nominated by a minority party or independent senator (joining four members nominated by the Leader of the Government in the Senate and three members nominated by the Leader of the Opposition in the Senate) (amended 2 December 2013).

Broadcasting of Senate and committee proceedings

An updated set of resolutions authorising the broadcasting of Senate and committee proceedings was agreed on 11 December 2013. Among other things, the revised resolutions removed an earlier prohibition on use of excerpts for satire or ridicule, considered to be outdated and unenforceable.

Northern Territory Legislative Assembly

A complete rewrite of the standing orders is underway. The standing orders were last completely reviewed in 1985. The Assembly has 306 standing orders.

The review began in October 2013 and a sub-committee of the Standing Orders Committee has been established to consider the new draft. The project is due to finish in 2014, with new standing orders proposed to the Assembly in 2015. The Standing Orders Committee will receive its first report on all the proposed new standing orders in August 2014.

Queensland Legislative Assembly

Absence of members

Following the member for Redcliffe's lengthy absence from parliamentary sittings in 2013, the Committee of the Legislative Assembly conducted a review of chapter 42 of the standing rules and orders, which covers the absence of members and the vacating of seats by members. In its report, tabled on 11 September 2013, the committee recommended that the length of absence from the House for which members must notify the House be significantly reduced.

On 12 September 2013 the House amended standing orders 263A and 263B. Members are now required to notify the Speaker if they will be absent

for four consecutive sitting days (down from 12 sitting days), or for more than four sitting days within any period of nine consecutive sitting days. Members must notify the Speaker of the duration of and reason for the absence and provide evidence to support the absence. Upon receipt of written notification by a member, the Speaker must report the member's absence or intended absence to the House. Standing order 263B provides for the House to grant a member a leave of absence from attending the Legislative Assembly for 12 or more consecutive sitting days by motion without notice (reduced from 21 consecutive sitting days).[1]

Western Australia Legislative Council

In September 2013 the Legislative Council adopted the following standing order to provide protection to journalists' confidential sources during parliamentary proceedings:

"**201 Protection of the Identity of Journalists' Informants**

(1) Where a journalist is examined before a committee or the Council and, in the course of such examination, is asked to disclose the identity of the journalist's informant and refuses, the Council shall consider whether to excuse the answering of the question pursuant to section 7 of the Parliamentary Privileges Act 1891.

(2) In considering a matter under (1), the Council shall only order the disclosure of the identity of a journalist's informant if the Council is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs—

(a) any likely adverse effect of the disclosure of the identity on the informant or any other person; and

(b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

(3) Without limiting the matters that the Council may have regard to for the purposes of this standing order, the Council must have regard to the following matters—

(a) the probative value of the identifying evidence in the proceeding;

(b) the importance of the identifying evidence in the proceeding;

(c) the nature and gravity of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the identifying evidence relates;

[1] On 12 September 2013 section 72(1)(m) of the Parliament of Queensland Act 2001 was amended to reflect the reduction in the number of consecutive sitting days a member can be absent without the House's permission before the member's seat is declared vacant.

(e) the likely effect of the identifying evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the informant or any other person;
(f) the means available to the Council to limit the harm or extent of the harm that is likely to be caused if the identifying evidence is given;
(g) the likely effect of the identifying evidence in relation to—
(i) a prosecution that has commenced but has not been finalised; or
(ii) an investigation, of which the Council is aware, into whether or not an offence has been committed;
(h) whether the substance of the identifying evidence has already been disclosed by the informant or any other person;
(i) the risk to national security or to the security of the state;
(j) whether or not there was misconduct on the part of the informant or the journalist in relation to obtaining, using, giving or receiving information."

The standing order requires the Council and its committees to consider the same factors when dealing with a witness who is a journalist that courts, tribunals and commissions of inquiry must under the Evidence Act 1906 (WA).

CANADA

House of Commons

No permanent changes to the standing orders were made in 2013.

However, on 29 January 2013, extending a practice in effect since 2010, the House adopted the following motion:

"That, notwithstanding the provisions of any standing order, for the remainder of the 41st Parliament, when a recorded division is to be held on a Tuesday, Wednesday or Thursday, except recorded divisions deferred to the conclusion of oral questions, the bells to call in the members shall be sounded for not more than 30 minutes."

Orders were also made following agreement to the 4th report of the Standing Committee on Procedure and House Affairs on 3 December 2013 which, for the duration of the 41st Parliament, reduced the membership in standing committees from 12 to 10—being six members from the government party, three from the official opposition and one from the Liberal party.

Alberta Legislative Assembly

In March 2013 the Assembly amended the standing orders. Most of the changes related to the manner in which the Assembly considers main estimates. The changes:

- amended the number of members serving on legislative policy committees (which are responsible for, among other things, considering each ministry's

estimates) and other standing committees;
- amended the time allocated for considering main estimates for each ministry, which was amended to between two and six hours—the precise time to be determined by committees in conjunction with the Government House Leader (consideration of the main estimates of Executive Council remained a maximum of two hours); and
- allowed for committee meetings on the estimates on Monday evenings, various times on Tuesdays and Wednesdays outside Assembly's afternoon sittings, and on Thursday mornings (unlike previous years when such meetings were held in the evening).

The amendments to the standing orders also provided that during the main estimates consideration other standing and select committees may not meet, nor may legislative policy committees meet for any other purpose.

Northwest Territories Legislative Assembly

No changes were made in 2013. However, a major review of the rules of the Assembly is in progress and proposed amendments will be considered by members in summer 2014.

Saskatchewan Legislative Assembly

The Standing Committee on House Services appointed a sub-committee on 7 December 2011 to study and make recommendations on revisions to *The Rules and Procedures of the Legislative Assembly of Saskatchewan*. The committee proposed many new rules that put in writing, for the first time, long-established practices. On 7 November 2013 the Standing Committee on House Services tabled the report with revisions to the rules. The Assembly adopted the new rules.

The changes to the rules covered a wide range of subjects. They include:
- clarifying the process of and establishing time limits on debates on questions of privilege;
- codifying Saskatchewan's omnibus bills convention;
- providing a clearer definition and requirements for a "budget bill";
- new deadlines for submitting private bills;
- authorising the Speaker temporarily to revoke a member's ability to participate in proceedings;
- new rules for ministerial statements.

The committee plans to complete its work on private members' day and to review the Assembly's broadcast and multi-media guidelines.

CYPRUS HOUSE OF REPRESENTATIVES

On 22 November 2013 the Rules of Procedure of the House were amended

so as to provide a legal framework to the "President's [of the House] and the Parliamentary Party Leaders' Meeting", held until then on an informal basis. This meeting has a steering/advisory role, contributing to better management of the plenary—for example, by suggesting deferring debate on an issue, suggesting the total duration of debates on bills and other issues, or making suggestions on procedural or practical issues—without prejudice to any decisions to be taken by the constitutionally competent body or person. It operates by consensus.

GUERNSEY STATES OF DELIBERATION

The rules of procedure of the States of Deliberation were reviewed in 2013, with amendments agreed by the States at their meeting in September 2013. The most significant changes were the introduction of a give-way rule, motions of censure and short explanatory memoranda on the order paper on legislation.

INDIA

Lok Sabha

No amendment to the Rules of Procedure and Conduct of Business in the Lok Sabha was made in 2013. However, an exercise was begun to render the rules and directions of the Speaker gender neutral. In 2014 the necessary amendments were approved by the Lok Sabha on the recommendation of the Rules Committee.

JAMAICA

Senate

A major review of the standing orders of the Senate began in 2013.

NEW ZEALAND HOUSE OF REPRESENTATIVES

The Standing Orders Committee initiated its triennial review of the standing orders on 8 August 2013. The committee invited public submissions on the review and presented its report on 21 July 2014; the amendments were adopted before the House rose for the 2014 general election. Details of the amendments will be in the next edition of *The Table*. In summary, they included:

- provision for the Business Committee, after receiving a proposal from the Prime Minister, to make arrangements for "state occasions", at which Parliament can mark occasions of special significance, including speeches by foreign leaders;
- recognising the right of members to address the House in New Zealand

Sign Language, since by law it is an official language alongside English and Māori;
- rationalising the financial scrutiny process, so that examination of estimates and annual reviews of performance are arranged according to sector groupings or themes;
- introducing a streamlined legislative procedure for revision bills, which are intended to express laws more clearly without significantly changing their meaning;
- amending provisions on the Register of Pecuniary and Other Specified Interests of Members of Parliament, with a new clause setting out the purpose of the register and other provisions clarifying what members are expected to declare.

In addition, following a recommendation by the Standing Orders Committee, a paper by the Attorney General about the apparent inconsistency of a provision in a bill as introduced with the New Zealand Bill of Rights Act 1993 will stand referred to the select committee that will examine the bill.

SOUTH AFRICA

National Assembly

A full review of the rules is underway, so only urgent amendments are currently being made to them.

In August 2013 the composition of the National Assembly Programme Committee was changed to convert it from a consensus-seeking body to a decision-making committee.

In 2012 the National Assembly Rules Committee mandated its Sub-committee on Review of the Assembly Rules to conduct a comprehensive review of the rules. In preparation for the review the sub-committee held a workshop in August 2012 with local and international parliamentary experts. The sub-committee invited interested public organisations and political parties to submit comments on the rules and then established a drafting Task Team.

The approach of the Task Team was twofold. First, it considered each rule, and drew up technical amendments where appropriate. Technical amendments were mostly due to outdated terminology and practices. Secondly, the team analysed substantive submissions and put forward different options.

The Task Team submitted its report to the sub-committee at the end of 2013. The Task Team report was then referred to the political parties for consideration. The objective was for the parties to raise concerns and possible options in the sub-committee, which would attempt to reach consensus and finalise the review for tabling in the Rules Committee.

The drafting team identified a number of premises which underpinned the

review. First, the rules and practices had to be aligned with the constitution. It was felt that the Assembly should be proactive in establishing rules and practices that would stand the test of time and not lead to repeated court challenges. Secondly, the rules should not attempt to manage politics but instead create an enabling environment for members to carry out their responsibilities. Thirdly, the rules should capture the best conventions and practices developed over the past two decades. Lastly, the rules should serve to promote the image of Parliament with the public.

It is envisaged that the new rules will be adopted by the Assembly by the end of 2015.

UNITED KINGDOM

House of Commons

The House of Commons Public Business Standing Orders were not subject to major revision in 2013, but a number of minor changes were made. These changes included:

- new standing order 22C, which prevents the House from considering a motion which would involve additional expenditure by the House of £50,000 or more until a memorandum setting out the expected financial consequences of the motion has been made available by the Accounting Officer;
- new standing order 22D, enabling the chair or other member of a select committee to make a statement in the House on the publication of a report or the announcement of an inquiry;
- amending the standing order on written statements, which previously applied only to ministers, to enable those members who answer questions in the House on behalf of statutory bodies such as the Electoral Commission, the Public Accounts Commission and the Church Commissioners to make written statements to the House.

A memorandum is being prepared by the Clerk of the House to submit to the Procedure Committee on a wholesale revision of the standing orders, which last took place in 1997. This will largely be a "tidying-up" exercise designed to ensure that the current standing orders accurately reflect current practice, though more substantial change is proposed in certain areas. The Procedure Committee is expected to start considering the memorandum in autumn 2014, with a view to making a report for consideration by the House before the end of session 2014–15.

House of Lords

The standing orders of the House of Lords were subject to a number of minor

amendments in 2013. In particular, one set of amendments was prompted by the UK Government's green paper on *Parliamentary Privilege* (which is the subject of an article in this edition), which proposed that three standing orders which no longer appeared to have any purpose be repealed. It was agreed that it was inappropriate for either the Government or the joint committee which was scrutinising the green paper to consider House of Lords standing orders; those three standing orders were instead considered by the House of Lords Procedure Committee.

The three standing orders dated from the 17th century. The first stated, "The printing and publishing of anything relating to the proceedings of the House is subject to the privilege of the House." This standing order dated from a time when both Houses actively sought to prevent publication of reports of their proceedings—the first such report, Cobbett's Parliamentary Debates, did not appear until 1800. Following the development of parliamentary reporting in the early 19th century, the protection afforded to documents printed by order of the House, and to extracts or abstracts of such documents, was put on a statutory basis in the Parliamentary Papers Act 1840.

The second standing order related to a now obsolete legal process (the examination of witnesses *in perpetuam rei memoriam*).

The third, which stated, "No oath shall be imposed by any bill or otherwise upon peers with a penalty in case of refusal to lose their places and votes in Parliament or liberty of debate therein", had been overridden by statute in 1678, and so had had no effect for more than 300 years. Indeed the standing order contradicted the Parliamentary Oaths Act 1866, under which it is unlawful for members of the House of Lords to sit or vote unless they have sworn the oath of allegiance.

Following a recommendation from the Procedure Committee, the three standing orders were repealed in May 2013.

There was also an amendment to the private business standing orders in July 2013, to enable the public to comment on the environmental statement accompanying a hybrid bill (the High Speed Rail (London – West Midlands) Bill) and for those comments to be reported to, and taken into account by, the House. These changes were made to ensure the House's procedures were fully compliant with the objectives of an EU Directive on environmental impact assessments.

National Assembly for Wales

Standing orders are revised on a motion tabled by the Assembly's Business Committee. The following were the main changes made in 2013.

- SO 12.69 was amended to reduce the deadlines for tabling oral Assembly questions to the First Minister from five to three days, and for other

ministers from 10 days to five days. In addition, the Presiding Officer's guidance to members was changed to encourage more focused, less open, questions.

- SOs 21 and 27 were revised to deal with anomalies arising from procedures in UK or Welsh legislation which affect the timing of reporting on subordinate legislation. The issue particularly arose in relation to orders under the Public Bodies Act 2011.
- SO 22, on standards of conduct, was amended to strengthen the Assembly's sanctions regime and bring it more in line with other UK legislatures. This followed recommendations of the Standards of Conduct Committee. The amendments (a) enable the Standards of Conduct Committee to recommend a sanction of exclusion for any breach of the Code of Conduct for Assembly Members, rather than the sanction being available only for a breach in relation to Financial and Other Interests of Members; (b) remove from the standing orders any minimum or maximum period for exclusion; and (c) enable the Standards of Conduct Committee to recommend withdrawal of other rights and privileges beyond the automatic removal of salary that is associated with exclusion (e.g. rights of access during a period of exclusion).
- SO 26.89, on member-proposed bills, was amended to preclude a member entering a legislative ballot again if he or she has previously been selected in a ballot.
- SOs 29 and 30, on consent to UK Parliament bills, were revised to give effect to recommendations of the Constitutional and Legislative Affairs Committee: (a) so that the consent of the Assembly is required for UK Parliament legislation on any matter affecting the legislative competence of the Assembly or affecting the powers of Welsh Ministers (widening existing provisions on legislative consent memorandums); (b) so that all legislative consent memorandums are, except in exceptional circumstances, referred to an Assembly committee for scrutiny; and (c) so that a legislative consent motion cannot be debated until after the relevant committee has reported on the memorandum.
- SO 29 was also amended to include provision for giving Assembly consent to UK Parliament private bills.
- New SO 30A was introduced to enable for the Assembly to give legislative consent to statutory instruments made by UK ministers which contain provision that, if included in primary legislation, would require a legislative consent motion. This new procedure requires the Welsh Government to seek the consent of the Assembly to any subordinate legislation made by UK ministers alone which is within the Assembly's competence or which has an effect on it.

The Assembly's standing orders are under constant review by the Assembly's Business Committee, but a programme of reviews is underway to revise legislative procedures in advance of the Fifth Assembly, which begins in 2016. Any changes will take account of the Constitutional and Legislative Affairs Committee's inquiry into Making Laws in the Fourth Assembly.

SITTING DAYS

Figures are for full sittings of each legislature in 2013. Sittings in only that year are shown. An asterisk indicates that sittings were interrupted by an election in the year.

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	TOTAL
Aus Sen*	0	7	7	0	3	9	0	0	0	0	3	8	37
Aus N Terr	0	6	3	0	6	1	0	6	0	6	3	3	34
Aus NSW LA	0	6	9	1	11	3	0	9	6	9	6	0	60
Aus NSW LC	0	6	9	1	11	6	0	6	6	9	8	0	62
Aus Queen LA	0	3	6	3	6	4	0	6	3	6	3	0	40
Aus Tasm HA	0	0	6	7	6	3	0	6	6	3	6	0	43
Aus Vict LA	0	6	6	3	6	6	0	3	6	6	6	3	51
Aus Vict LC	0	6	6	3	6	6	0	3	6	6	6	3	51
Aus W Aus LA	0	0	0	3	9	9	0	9	9	9	9	3	60
Aus W Aus LC*	0	0	0	1	6	9	0	6	6	8	6	6	48
Canada HC	4	15	15	12	17	12	0	0	0	12	15	7	109
Canada Sen	0	9	9	7	11	13	0	0	0	10	10	7	76
Can BC*	0	11	8	0	0	2	15	0	0	0	0	0	36
Canada Alb	0	0	11	12	7	0	0	0	0	4	12	3	49
Canada NWT													47
Canada PEI	0	0	2	17	5	0	0	0	0	0	12	4	40
Canada Québec	0	6	9	10	14	9	0	0	6	12	13	5	84
Canada Sask	0	0	16	14	10	0	0	0	0	6	15	4	65
Canada Yukon	0	0	5	17	10	0	0	0	0	1	15	12	60
Cyprus	1	1	6	5	3	4	3	0	4	5	5	4	41
Guernsey	3	1	2	1	3	3	4	0	4	6	1	1	29
Guyana													33
India LS	0	5	16	6	5	0	0	16	5	0	0	10	63
India RS	0	5	16	6	5	0	0	15	6	0	0	10	63
India Uttar P	0	23	0	0	0	0	0	0	4	0	0	3	30
Jamaica HR	3	4	4	6	9	8	5	0	3	5	4	5	56
Jamaica Senate	1	4	5	2	3	3	5	0	2	4	4	6	39
Jersey	3	2	4	3	5	2	5	0	5	3	4	6	42
NZ H Reps	3	9	9	6	9	9	8	10	9	6	9	6	93
Sierra Leone													65
South Africa NA	0	6	7	3	6	9	0	3	3	6	6	0	49
UK Commons	18	13	15	9	9	16	14	1	10	17	18	12	152
UK Lords	17	13	15	5	9	16	20	1	0	16	15	12	139
Wales	8	6	6	5	7	8	6	0	2	8	8	4	68

UNPARLIAMENTARY EXPRESSIONS

AUSTRALIA

Northern Territory Legislative Assembly

Talk about drunks? Okay, I will talk about drunks [I will] start with him.	13 February
Cowardly and despicable; hollow man	26 March
… water-mate scandal stinks of corruption.	27 March
Fishwives; nodding dogs	28 March
Clown	14 May
Buffoon	14 May
No wonder she was sacked, garden slug	15 May
King Brown	15 May
You are gagging me to your shame! ... you are an embarrassment …	21 August
... stinks of corruption and rorting taxpayer funds …	22 August
Crap	28 August
Smiling assassin	28 August
Getting into the gutter	9 October
Maybe we should call him Gerry Obeid	26 November
Go with Delia or Michael. I would have voted for Michael straight away.	28 November
Take a chill pill, petal.	28 November
… did not have the imagination of a brain-dead slug!	28 November
You dropkick. You silly fool.	28 November
… you are developing a reputation as a bungling wrecker not a builder	3 December
... disingenuous at best and dishonest at worst.	3 December
Ever go to the Stella Maris Dave? Hey Dave, have you been drinking at the Stella Maris?	4 December
… little girl …	4 December
Looks like corruption!	5 December

New South Wales Legislative Assembly

Sit down, you goose.	27 March
… he is usually at the international terminal going straight to business class on the union credit card.	9 May
Sourpuss.	21 May

New South Wales Legislative Council

Boofhead [*ruled to be offensive only if the member against whom it is said finds it offensive*]	27 February
Fraud	25 March
Squawker	20 June
The greatest rorter of all time	29 August

Queensland Legislative Assembly

Ministers are too lazy to read the top-secret Costello report	5 March
… taxing the bejesus out of Queenslanders.	5 March

The LNP members in this House are absolute hypocrites …	6 March
He has wind coming out both ends.	16 April
… is the hairy-nosed wombat of environment ministers across Australia.	18 April
I hope there are no drunks using light poles.	2 May
This was a dud deal from a dud minister.	6 August
Loony, lefty loopy independent member for …	7 August
What these clowns opposite were talking about yesterday was …	8 August
The populist clown.	8 August
The opposition, who would not know the first thing about a quality health system if it bit them on the backside …	22 August
I hear some barking buffoon up the back making a bit of noise.	15 October
I will withdraw that, but he is still barking.	15 October
But to throw the doggy a bone and to appease the Labor party, I thought we would give them an amendment.	15 October
You are a disgusting little man.	15 October
"Kim Jong Bleijie". They label the Attorney General this because no-one else but a clone of a North Korean dictator ...	17 October
Let us see what law firm would lower themselves to employ an Attorney General of this calibre.	17 October
It's always hard to follow a clown.	17 October
I do not quite have the clown skills.	17 October
Judge Jarrod	17 October
You ignorant person.	30 October
The snivelling excuses for members of parliament who sit over there.	31 October
I think you are a lamebrain fool if you think that I have this wrong.	19 November

Victoria Legislative Assembly

He carried on like a pork chop	26 June
The rorting member for Frankston	18 September
You grub	30 October

Victoria Legislative Council

When that mob was in government	5 February
The minister … giving inaccurate information to her backbenchers.	6 February
She is the little lapdog	6 February
Have you got half a brain in your head, Mr Tee, or are you always this dumb?	6 February
It isn't bullshit	20 February
Where has this baboon been?	21 March
Group of no hopers	7 May
You cannot get much grubbier than that	8 May
Mr O'Brien wants to … misinterpret a whole lot of history	28 May
Talking crap	29 May
The minister for truth	30 May
The week and snivelling planning minister that Mr Tee would be	26 June

Brown paper bags need to be exposed wherever they are, and they are abundant in the Labor party	26 June
He is just a grubby little muckraker	4 September
A constant in this chamber is that Mr Tee just makes things up	14 November

CANADA

House of Commons

Even when he does have his clown nose on, he still does not really make sense	28 January
Bunch of racists	29 January
I am going to try to be very nice, because if I were to say that when God was giving out brains, the minister might have heard "trains", it would be irresponsible of me	20 November
Doctoring a report	21 November
This is the most crooked and corrupt government this country has ever seen	25 November
Bitch [*Although the term was not recorded in the official record, the member rose on a point of order to apologise for using unparliamentary language*.]	3 December
Steal	9 December

British Columbia Legislative Assembly

Disingenuous	7 March

Prince Edward Island Legislative Assembly

Untruth spectre	26 March
Disrespectful sham	26 March
Government has kept up its presence in falsehoods	26 March
The treasurer didn't have the guts to bring this to Islanders before he rammed it down their throats	27 March
Mislead Islanders	3 April
Hypocritical	5 April
Falsehoods	12 April
Falsified	24 April
Bold-faced non-truth	25 April
Wes's fables [*a play on the name of the Minister of Finance and Municipal Affairs*]	3 May
Wesonomics [*as above*]	7 May
Theft	8 May
Poopy end of the stick	13 November
Mumbo jumbo	14 November
Selling snake oil	4 December
Sham	4 December

Québec National Assembly

Savages	12 February
Betrayal	12 February
It's a good thing ridicule doesn't kill, because otherwise there would be one less Premier in this House	17 April
Turncoat	25 April
Mean-spiritedness	2 May

To talk out of both sides of its mouth [*the Government*]	14 May
Contemptuous	14 May
To accept a brown envelope [*speaking about a member*]	15 May
Crooks [*meetings with*]	16 May
Disdainful [*statements*]	21 May
Deceptive [*publicity*]	6 June
Bullshit	6 June
Truth [*to truncate the*]	6 June
Flip-flopper	6 June
Demagogue	6 June
Band of eunuchs [*speaking of the Government*]	6 June
To conceal [*services to be cut*]	13 June
Petty politicking	13 June
Intellectual dishonesty	19 September
To make a travesty of the facts	25 September
To deceive Québecers	25 September
Candour [*complete absence of*]	10 October
Incompetent [*speaking of a minister*]	10 October
To tamper with	30 October
Dupont, Dupond [*speaking of two members*]	30 October
To hide [*things from*]	5 November
Block bills [*that the opposition cease to*]	20 November
Disdainful	20 November
Madame la Marquise [*speaking of the Premier*]	28 November
To dupe [*everyone*]	29 November
Simple-minded	9 December

Saskatchewan Legislative Assembly

Cover up	6 March
Making stuff up	25 March
Half truths	16 May
Cooked and misleading books	4 December

Yukon Legislative Assembly

Fearmongering	30 April
The member really should be ashamed	2 May
Maybe the member opposite should think of another career change or something like that because she is not representing her constituents	8 May

INDIA

Lok Sabha

Well of death … you have made the CBI a well of death. Just put everybody in that well…	22 February
Step-motherly treatment? [*Aspersion on the chair*]	26 February
Harijans	6 March

Sri Lanka is waging a war against India, a racist government	7 March
Your government's face is stained with scams	7 March
The Government is corrupt, its ministers are corrupt	8 March
Three girls aged five, six and seven years were raped and I am sitting here bowing my head in shame	19 March
The minister is begging for the security of the nation and asking to save us	29 April
Land mafia	30 April
Congress is a tout. Touts have mingled with Congress people	6 August
People join the army and police to become martyrs only	8 August
The Supreme Court wants to stoke flames in the whole country	14 August
Hooligans	26 August
The chairman cannot interrupt [*Aspersion on the chair*]	4 September
In this House, neither the chair is insisting on [*following rules*] [*Aspersion on the chair*]	5 September
The chair is not above the rules [*Aspersion on the chair*]	5 September
Sycophancy	6 September

Rajya Sabha

Let the Home Minister go to hell. What is this *Tamasha* [farce] going on?	22 February
The shadow of the controversy looming large over the chair	26 February
Sinners suddenly becoming saints	27 February
Officials are corrupt, or to say without proof, or to bring women into it and say that their wives are wearing jewellery, is an insult to women and an insult to my officials which I cannot accept.	11 March
Cruel	13 March
They have worn bangles in the hands	14 March
Mockery	2 May
Farce	5 May
This chair has gone back on its own. You have misled us [*Aspersion on the chair*]	6 August
This is pure cheating	6 August
Breach of trust	6 August
Some members being misled by the chair [*Aspersion on the chair*]	6 August
They are agents of Pakistan	6 August
This is a government of impotents. Don't make the army impotent	6 August
Betrayal	6 August
Embezzlement	7 August
Loot	7 August
Fix, fixing, fixed	7 August
Autocratic	12 August
Mafias	19 August
The person or the minister who is a criminal, corrupt and whose face is affected with smut, should not answer	20 August
Double standard	23 August

The goons who launched an attack yesterday are being sheltered by a leader of the BJP	26 August
The accused	26 August
Din	26 August
Wrangler	26 August
It is a government of terrorists. They will beat the saints with canes and feed the terrorists *malpua* [*an Indian dish*]	26 August
They are coward	26 August
Hindu nationalists have divided the nation	26 August
You are protecting the Government, you are not protecting us [*Aspersion on the chair*]	27 August
Telugu people are being humiliated everywhere and even in this House we are being humiliated	30 August
Thief	30 August
Bogus	2 September
Stain of coal scam on the face	2 September
Shame	2 September
Insult	3 September
The chairman then should have been here at least to hear the arguments of the opponents [*Aspersion on the chair*]	5 September
Fool	6 September
Dacoity	6 September
The chair should not ask this type of question because the chair's duty is to protect the rights of the members. The Government can ask that type of question, why are you wasting time, etc. [*Aspersion on the chair*]	6 September
Bulldoze	6 September
Snub	6 September
Murder, murderer	9 December
Malafide	10 December

Uttar Pradesh Legislative Assembly

It was their hooliganism	14 February
This government may be false	20 February

STATES OF JERSEY

The commitment to independent taxation, crikey this is so long overdue it is crazy.	5 December
The Bailiff (Speaker): If I may say so, "crikey" is not a parliamentary term.	

NEW ZEALAND HOUSE OF REPRESENTATIVES

Curly (and curly-tops)	26 February
Absolute lack of integrity	12 March
Xenophobic	29 May
John "slippery" Key	30 May
Looking after your mates	6 June
Dance on the graves of our dead soldiers	31 July
Grumpy pensioner	31 July

Dinosaurs like Mr Peters	1 August
The member is out to lunch	23 October
Turd [*as in "cannot polish a …"*]	6 November
Doctored	13 November
They would drink their gin and tonics at 3 o'clock in the afternoon	13 November
Red Reverend	10 December

SOUTH AFRICA

National Assembly

Mouth zipped while her party incites racism

Clown and a mascot [*member behaves like a*]

Person of some weight [*member may be a*]

Minister is abusing her position in this Parliament

People bribed to vote for the ANC [*with reference to a minister*]

Those who threaten the monopoly of their alliance should be ruthlessly annihilated [*with reference to "the democratic government of the ANC"*]

Those who honestly demanded a living wage were enemies of the revolution and therefore had to be executed [*with reference to "the democratic government of the ANC"*]

Shut up [*with reference to a member*]

It is the work of some witches who go around during the stealth of the night, trying to kill us [*with reference to a member*]

UNITED KINGDOM

House of Commons

Naked opportunism [*in reference to a member of the House of Lords*]	27 February
Conman	23 October

National Assembly for Wales

Stating the bleeding obvious	6 March

BOOKS ON PARLIAMENT IN 2013

AUSTRALIA

There Being No Objection …: An Australian Senate Miscellany, by Tim Bryant and Brien Hallett (eds), Department of the Senate, $24.95, ISBN 9781742299181

A miscellany of anecdotes, myths, facts and figures on the Senate that do not always feature in official commentaries. It contains insights to some of the procedural nuts and bolts that hold the Senate together as well as the words of senators, faithfully recorded for posterity in Hansard, but which rarely make it beyond the red ochre of the Senate chamber.

Interwoven: The Commissioned Art and Craft for Parliament House, by Pamille Berg, Parliamentary Departments, $39.60

Published on the 25th anniversary of Parliament House, this book details and illustrates some of the unique commissions to Australian artists, craftspeople and designers for works in Australia's Parliament House.

Papers on Parliament No. 59: Lectures in the Senate Occasional Lecture Series, and Other Papers, Department of the Senate, Australia, free, ISSN 1031976X

Contains lectures on parliamentary issues and other papers including "Liberal Women in Parliament: What Do the Numbers Tell Us and Where to from Here?" by Margaret Fitzherbert; "The Scope of Executive Power" by Cheryl Saunders; "Will Dyson: Australia's Radical Genius" by Ross McMullin; "How Should Elected Members Learn Parliamentary Skills?" by Ken Coghill; ""But Once in a History": Canberra's Foundation Stones and Naming Ceremonies, 12 March 1913" by David Headon; "Paying for Parliament: Do We Get What We Pay For?: Lessons from Canada" by Christopher Kam and Faruk Pinar; and "Is It Futile to Petition the Australian Senate?" by Paula Waring.

The Australian Political System in Action, by Narelle Miragliotta, Wayne Errington and Nicholas Barry, Oxford University Press, ISBN 9780195518368

An examination of the Australian political system through its institutions, considering the structure, purpose and function of each. Originally published in 2009, this second edition incorporates minority government and policy issues arising from the 2010 election. Key questions discussed include "Is the Senate undemocratic?" and "How can we keep the political executive accountable?"

Australian Political Institutions, by Gwyneth Singleton, Pearson Australia, ISBN 9781442559455

Keeping the Executive honest: the modern Legislative Council Committee system: a commemorative monograph: part one of the Legislative Council's oral history project, by David Clune, Legislative Council, Parliament of New South Wales, ISBN 9781921286940

CANADA

Across the Aisle: Opposition in Canadian Politics, by David E. Smith, University of Toronto Press

Canadian Government, by Elizabeth MacLeod, Scholastic Canada (available in English and French)

How Does the Canadian Government Work?, by Ellen Rodger, Crabtree Publishing Company

L'incendie du parlement à Montréal : un événement occulté, by Robert Comeau and Gaston Deschênes, VLB éditeur

Parliament Hill, by Simon Rose, Weigl Educational Publishers

Should Canada have an elected Senate? The argument for no, by Megan Kopp, Weigl

The Crown and Canadian Federalism, by D. Michael Jackson, Dundurn

Le parlementarisme canadien (5th edition), by Réjean Pelletier and Manon Tremblay, Presses de l'Université Laval, $45, ISBN 9782763719085

Parlementarisme et Francophonie, by Éric Montigny and François Gélineau, Presses de l'Université Laval, $40, ISBN 9782763716893

Les institutions démocratiques du Québec et du Canada, by Henri Brun, Wilson & Lafleur, $18.95, ISBN 9782896891412

INDIA

Parliament: power, functions and privileges: a comparative constitutional perspective, by K.S. Chauhan, Lexis Nexis, Rs. 1295/-, ISBN 9788180389351

Focuses on the Indian polity with comparative insights into practice in various liberal democracies. An in-depth analysis of the origin, purposes and constitutional practices of parliamentary privileges which outlines the tension between the office of the Speaker, Lok Sabha, and the Supreme Court in the Cash for Query case in 2007.

Parliamentary procedure: law, *privileges*, *practice and precedents (3rd edition)*, by Subhash C. Kashyap, Universal Law Publishing, Rs. 590/-, ISBN 9788175345355

Parliamentary efficacy and the role of the opposition: a comparative study of the 2nd and 14th Lok Sabha, by M. Manisha, Centre for Research in Social Sciences and Education

Sixty years of Parliament, by B. Goswami, Raj Publishing House, Rs. 950/-, ISBN 9789381005606

Provides agendas of the 27 conferences of presiding officers held at different state capitals, including New Delhi, from 1981–2011.

Law of Election and Election Petition: A Commentary on the Law relating to the Elections to the Parliament, by H.S. Doabia and T.S. Doabia, LexisNexis, Rs. 4295/-, ISBN 9788180389047

Provides an overview of the entire electoral process in India, from delimitation of constituencies to power of recall.

SIERRA LEONE

Essays on the Sierra Leone Constitution, 1991, by Dr Abdulai Osman Conteh

SOUTH AFRICA

Multilingual parliamentary/political terminology list, by the Department of Arts and Culture, ISBN 9780621416480

UNITED KINGDOM

Mr Speaker: the office and the individuals since 1945, by Matthew Laban, Biteback, ISBN 9781849542227

Contemporary House of Lords: Westminster bicameralism revived, by Meg Russell, OUP, ISBN 9780199671564

Voice of the backbenchers: The 1922 Committee: the first 90 years, 1923–2013, by Philip Norton, Conservative History Group, ISBN 9781905116119

Parliament in British politics, by Philip Norton, Palgrave Macmillan, ISBN 9780230291935

Parliamentary Immunity: A Comprehensive Study of the Systems of Parliamentary Immunity in the United Kingdom, France and the Netherlands in a European Context, by Sascha Hardt, Intersentia, ISBN 9781780681917

Assembly line? The new experiences and development of new Assembly Members, by M. Korris, Hansard Society

This paper examines how AMs newly elected in 2011 have made the transition from members of the public to elected representatives of the National Assembly for Wales.

Attitudes of young people towards devolution in Wales, by R. Scully, UK's Changing Union,

This paper outlines attitudes towards devolution of young people in Wales. Their attitudes are compared with those of older age cohorts. The evidence from this paper is drawn from the major academic surveys of political attitudes in Wales conducted between 1997 and 2013.

Funding Devo More: Fiscal Options For Strengthening the Union, by A. Trench, Institute for Public Policy Research

This paper outlines an approach to funding devolved government in the United Kingdom, drawing on lessons from federal systems around the world and recognising the practicalities of the UK's public spending and tax systems.

The reformed union: the UK as a federation, by David Melding, Institute of Welsh Affairs, £6, ISBN 9781904773696

David Melding, Deputy Presiding Officer of the National Assembly for

Wales and a former Director of Policy (2000–11) of the Welsh Conservatives, says devolution has shown itself to be a dynamic process and nationalists have used it to advance demands for greater autonomy. He argues that without a firm constitutional settlement, where the powers of the UK state are set out and enshrined, unionism is destined to fail.

Size matters: making the National Assembly more effective, UK's Changing Union and the Electoral Reform Society.

This report is the first systematic, evidence-based investigation of the size of the National Assembly for Wales. It argues that the current number of Assembly Members (AMs) in the National Assembly is insufficient to allow for proper scrutiny of the Welsh Government and its legislative programme. It calls for an increase in the number of AMs from 60 to 100.

Law in Politics, Politics in Law, by David Feldman (ed.), Hart Studies in Constitutional Law, £45, ISBN 9781849464734

Mark Davies, private secretary to the Leader of the House of Lords, wrote the following review of this book:

The relationship between politics and the law is a familiar theme of academic examination, though one often explored in the abstract. This book, largely based on a collection of papers presented at two seminars in 2011, looks at the interaction through a more practical lens.

The reader is left with the abiding sense of lament at a slow drift apart of the two disciplines. Though the contributors detail a range of those who fight against the tide (whether departmental legal advisers, Parliamentary Counsel or the hardy souls in the Law Commission), it seems clear that the worlds have become further apart. This is not a unanimous view—Philip Sales (in a chapter entitled "Law and Democracy in a Human Rights Framework"), for instance, argues that the European Convention on Human Rights has provided a "practical juxtaposition of a liberal tradition of rights and freedoms with a tradition of democratic self-government"—but it is certainly the most lingering.

It is interesting that one of the contributors is David Howarth, the legal academic turned MP who was said to have found Parliament a frustrating forum in which to effect change. His excellent chapter shows that the opportunities to serve both politics and the law are ever-more limited—evidenced perhaps most prominently by the changes to the office of Lord Chancellor. He posits that this might reflect a cultural shift, with politics developing its unique skill set and the legal profession consciously insulating itself from political factors.

This volume is at its best when exploring the interface between politics and the law through the constitutional events that set the two together, most notably in its illuminating chapters examining the Parliament Acts 1911 and 1949 (the chapter by Rhodri Walters on "The Impact of the Parliament Acts 1911 and 1949 on a Government's Management of its Legislative Timetable,

on Parliamentary Procedure and on Legislative Drafting" first featured in volume 80 of *The Table*). Professor Dawn Oliver provides similar colour when detailing more recent constitutional changes. She argues that such changes must await "constitutional moments": instances where the political stars align and proposals gain inexorable momentum. The hypothesis is especially timely in the light of events in Scotland.

Overall, the book exhorts the benefits (both in public administration and embedding democratic support for constitutional arrangements) of mediating between politics and the law, imploring political and legal actors not to further the disjunct that has developed in recent years. This is no mean feat: the role of the European Convention on Human Rights in the British constitution remains as contentious as ever, while judicial reviews of major legal aid and welfare reforms bring sensitive challenges for the courts. Yet, as many of the authors note, the stakes for getting the balance right could not be higher. This rigorous, ranging and broad-minded book reflects the best of the two worlds; it is a valuable read for those who try to walk the line between them.

The House of Lords 1911–2011: A Century of Non-Reform, by Christopher Ballinger, Hart, £33, ISBN 9781849462891

Nicolas Besly, editor of *The Table*, wrote the following review of this book:

This book is in a sense misnamed, for what it documents is not a century of stasis in the House of Lords but a series of small, incremental reforms which were successful interspersed with attempts at significant reform which failed. As Dr Ballinger demonstrates, the word "reform", when used in respect of the Lords, is currently taken to mean election, but that was not always so. A century ago it meant limiting the Lords' powers. Until around the 1970s the major reform sought was removal of hereditary peers (or at least their voting rights); then for a while the agenda for some was not reform but abolition. It is only in the last decade or two that full or substantial election has become voguish.

The book starts with the process leading up to the Parliament Act 1911. It reveals that the preamble which refers to an intention "to substitute for the House of Lords as it at present exists a second chamber constituted on a popular instead of hereditary basis" was included as a sop to the then Foreign Secretary, Sir Edward Grey. Most of the Liberal Cabinet were opposed to any further reform. This revelation somewhat defeats the cliché used about current attempts at reform being "unfinished business" from a century ago. Indeed, one of the lessons of the history of Lords reform is that each proposal for reform should be evaluated in its own terms, not by reference to an historic event.

The book covers each attempt at reform in remarkable detail, demonstrating the author's deep familiarity with the subject. The footnotes are a trove of information.

For example, in the chapter on the Parliament Act 1949 Dr Ballinger

demonstrates that the bill was embarked on almost as an afterthought, to distract attention from Cabinet divisions over whether to nationalise iron and steel. The bill was not wholly a response to fears that the Lords would block the government's nationalisation programme—the 1945 Salisbury–Addison agreement made that unlikely. In the event, fears of Lords opposition to nationalisation were unfounded: nationalisations of iron, steel and all other industries have been effected without recourse to the Parliament Acts.

Time and again the same themes emerge as to why wholesale reform has not happened. Amongst the main reasons have been: the government had other priorities (especially the economy); the issue was not a vote winner; the Cabinet was divided; there was no consensus in the government's parliamentary party or in Parliament; there was no "trigger event" forcing reform; composition could not be reformed without changing powers; the government feared a more assertive House.

Perhaps the principal reason has been parliamentary time. It is remarkable how often that has been used as a reason not to proceed with reforms. Even the successful reforms have been limited in scope because of that factor. No doubt in many cases lack of parliamentary time has been an issue—such a major constitutional change requires full debate; and governments naturally do not want to be seen spending all their energy on an inward-looking, Westminster-focused reform. Yet the impression is left that, on occasion, a lament that there is insufficient time is a useful cover for opposition to the substance of a reform, especially when such opposition is essentially based on party or personal interest.

The lessons, perhaps, for reformers are: do it early in a government's lifetime; commit time and energy to it; expect opposition—forget about consensus; don't bother with a committee/Royal Commission/working group/constitutional convention, etc.; keep the reform limited in scope. Prepare to fail.

Since the book was published there have been further developments. The Deputy Prime Minister's bill for an 80%-elected House did not proceed past second reading in the Commons, after it became clear there was insufficient support for a timetable motion. But that is not the end of the story. The House of Lords Reform Act 2014 introduced some modest changes to composition: removing non-attenders and those imprisoned for more than a year, and for the first time allowing life peers to retire from the House—a provision first discussed during debates on the bill creating life peerages in 1958.

It is to be hoped that at some point a second edition will cover these (and no doubt other) developments with the same elegance and mastery as Dr Ballinger demonstrates in this splendid book. Surely he is unrivalled in academia in his depth of knowledge of this subject.

CONSOLIDATED INDEX TO VOLUMES 78 (2010) – 82 (2014)

This index is in three parts: a geographical index; an index of subjects; and lists of members of the Society who have died or retired, 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, amendments to standing orders and unparliamentary expressions. Miscellaneous notes are not indexed in detail.

ABBREVIATIONS

ACT	Australian Capital Territory;	N. Terr.	Northern Territory;
Austr.	Australia;	PEI	Prince Edward Island;
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.
NSW	New South Wales;		

GEOGRAPHICAL INDEX

For replies to the annual questionnaire, privilege cases and reviews see the separate lists.

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** Marks cases when the House in question took substantive action.*

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