Australasian Parliamentary Review

JOURNAL OF THE AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Editors
Colleen Lewis
Isla Macphail

Special Issue: Parliament and the Law

Dimensions to Parliamentary Privilege

The Ethic of Mutual Respect and the Importance of Independence

SPRING/SUMMER 2015 · VOL 30 NO 2 · RRP $A35

AUSTRALASIAN STUDY OF PARLIAMENT GROUP (ASPG) AND THE *AUSTRALASIAN PARLIAMENTARY REVIEW* (APR)

APR is the official journal of ASPG which was formed in 1978 for the purpose of encouraging and stimulating research, writing and teaching about parliamentary institutions in Australia, New Zealand and the South Pacific (see back page for Notes to Contributors to the journal and details of AGPS membership, which includes a subscription to APR). To know more about the ASPG, including its Executive membership and its Chapters, go to www.aspg.org.au

Australasian Parliamentary Review

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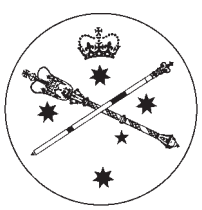

Acknowledgments

The ASPG wishes to express its gratitude to the Department of the House of Representatives and the Department of the Senate for their generous support of the Group, especially the publication of *Australasian Parliamentary Review*.

Australasian Parliamentary Review

SPRING/SUMMER 2015, VOL. 30, NO. 2

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ISSN 1447–9125

Edited by Dr Colleen Lewis, Adjunct Professor, National Centre for Australian Studies, Monash University.
Designed and typeset by Keep Creative, Canberra.
Printed by Instant Colour Press

From Your Editor(s)

Colleen Lewis and Isla Macphail

Colleen Lewis is editor of the *Australasian Parliamentary Review*.

This special issue is co-edited with Isla Macphail.

COMMENT: COLLEEN LEWIS

Welcome to the Spring/Summer edition of the *Australasian Parliamentary Review*. This is a special themed issue that focuses on 'Parliament and the Law'. The idea for this topic is not mine. It belongs to Isla Macphail from the Western Australia Chapter of the Australasian Study of Parliament Group (ASPG). Isla is the Sergeant-at-Arms and the Principal Research Officer to the Legislative Assembly's Procedure and Privileges Committee at the Parliament of Western Australia. Isla also makes a considerable contribution to the running of the WA Chapter of the ASPG and to the Group more generally.

Isla suggested the topic of 'Parliament and the Law' to me at the 2014 ASPG Conference and mentioned several people who could be invited to contribute articles. As the idea was Isla's, I invited her to be co-editor of this special issue and was delighted when she responded positively to the invitation.

Isla is the consummate professional and working with her in putting together *Parliament and the Law* has been an absolute pleasure. I thank her most sincerely for the idea and the hard work she has put into bringing this issue to its conclusion.

I also thank Robyn Smith for her regular *From the Tables* contribution. Sadly, this is Robyn's last *From the Tables* and on behalf of all APR subscribers and other readers of the journal, I would like to express gratitude to Robyn for her excellent overview of Australian parliaments over many years. Thank you Robyn, you have been highly professional at all times and we appreciate the enormous amount of time you have put into ensuring that APR readers are kept up-to-date with important happenings in all parliamentary jurisdictions.

COMMENT: COLLEEN LEWIS AND ISLA MACPHAIL

The distinguished contributors to this special issue have given generously of their very scarce 'free time' to write authoritative articles on various aspects of the intersection of Parliament and the law. We thank them most sincerely for their generosity and for their expert intellectual input into what is a critical issue in democratic political

systems. Their contributions have created what we, as editors, believe is a particularly worthwhile issue—creating a dialogue across papers that adds greater understanding to a fascinating and important area.

The Hon David Harper AM QC, former Judge of the Supreme Court of Victoria and former Member of the Appeal Division of that Court has written on 'Parliament and the Judiciary: Judicial Independence and the Nature of the Relationship Between Parliament and the Judiciary'. Harper points to 'a fault line' that exists in the rule of law concept. While it is recognised by legal academics and other interested parties, it sometimes encroaches upon a wider stage. When this occurs, the results can be serious, as they can impact on the relationship between Parliament and the judiciary. As Harper explains, 'If Parliament acts in a way adjudged by the courts to be unlawful and contrary to the rule of law, and if Parliament does not accept that judgment, the result is a constitutional crisis'.

Former Queensland Integrity Commissioner and former Chair of Queensland's Electoral and Administrative Review Commission, Dr David Solomon, uses evidence from the Australian State of Queensland in his article, 'Parliament and Independent Statutory Officers', to argue that 'Parliament will rarely be able to protect the independence of statutory officers if the government wants to act against them. Even so, those officers cannot afford to lose the respect and confidence of the Parliament (or its relevant committee) if they are to maintain their independence'.

In her article, 'Royal Assent—The Business of Parliament or the Executive?', Professor Anne Twomey, Professor of Constitutional Law at the University of Sydney, explores whether in Westminster systems of responsible government 'there is any discretion, after a bill has been passed by the Houses, for assent to be refused or delayed'. As she explains, 'Too often … commentators reflexively rely on one particular principle, such as the principle of responsible government that a vice-regal officer acts upon the advice of Ministers, without paying sufficient attention to other constitutional principles, such as representative government, and how any conflict between them ought to be resolved'. Twomey argues 'that rather than applying a simplistic binary choice between one rule or another, greater effort should be made to reconcile conflicts between constitutional principles in accordance with their underlying purposes to achieve the most appropriate constitutional outcome'.

The Hon Michael Mischin MLC, Attorney General of Western Australia, examines the effect of the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) on the *Evidence Act 1906* (WA) and the *Public Interest Disclosure Act 2003* (WA) in relation to 'shielding' journalists from being compelled to disclose their sources. In doing so, he discusses some differences between Western Australia and other jurisdictions' approach, underlining that 'WA leads the way' in having enacted laws that are 'comprehensive, appropriately adapted to their context, and consistent with existing statutory and common law protections' whilst also delivering 'a balanced approach to journalists' protection laws' that avoids undermining the administration of justice. The Attorney General also discusses the Parliament of WA's decision to apply journalist

shield law protections to its *own* proceedings but to do so via Standing Orders, thereby maintaining exclusive cognisance and 'ensuring that the separation of roles between the Parliament and courts is maintained'.

The Clerk of the Senate, Dr Rosemary Laing, examines the issue of exclusive cognisance. After examining what is meant by this concept, and the policy reasons for its existence, she considers areas 'in which it has been modified, surrendered or never fully enjoyed'. Dr Laing argues that while a presumption in favour of parliamentary predominance remains '… across centuries and jurisdictions, parliaments have ceded much ground to the other branches of government, to the extent that there are now significant questions about the continuing relevance of the doctrine of exclusive cognisance'. Her article concludes by speculating on 'where the doctrine may continue to have some traction in the future'.

Member for Armadale in the Legislative Assembly of the Parliament of Western Australia and Honorary Fellow, Faculty of Law at the University of Western Australia, Dr Antonio Buti, in his article on 'Information and Parliamentary Democracy: The Battle of Privileges', examines the power of parliamentary committees to compel production of documents that would elsewhere be protected by legal professional privilege. When analysing if parliamentary privilege 'trumps legal professional privilege', Dr Buti comes to the conclusion that it should and does. In arriving at this decision, he offers an overview of parliamentary privilege and legal professional privilege, and their competing policy imperatives, and references a recent instance where a parliamentary committee in Western Australia successfully obtained information that was originally refused on the grounds of legal professional privilege.

The article by the Chief Justice of Western Australia, The Hon Wayne Martin AC, titled 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' argues that the 'core responsibilities of the legislative and judicial branches of government are well defined and easily recognised'. But, as he points out, 'there are some areas in which responsibilities might be thought to overlap, or even be contestable'. The boundaries of responsibility, the Chief Justice explains, 'have traditionally been maintained by an ethic of mutual respect'. His article evaluates 'the extent to which that ethic continues to adequately regulate relationships between the two branches of government and to inform the propriety of conduct at or near the boundaries between the relative responsibilities of each branch'.

'Parliament and Law Reform: The Role of the Australian Law Reform Commission over Forty Years' is the subject of the article by the President of the Australian Law Reform Commission, Professor Rosalind Croucher AM. Professor Croucher explains that 'The relationship between Parliament and the ALRC is multi-layered' and a central element to sustaining this relationship is 'respectful engagement and respectful distance, as befits an independent statutory agency'. As she argues, the Commission 'has earned the respect in which it is held, both nationally and internationally'. Nevertheless, Professor Croucher goes on to warn that this level of respect cannot and should not ever be

taken for granted. The ALRC has 'a high reputation to maintain': it has demonstrated its independence and importantly 'must continue to demonstrate the right to keep it'.

The article by Professor Philip Joseph, Professor of Law from the University of Canterbury, titled 'Parliamentary Privilege Developments in New Zealand: The Good, the Bad and the Ugly', demonstrates convincingly New Zealand's significant contribution 'to the common weal in the area of parliamentary privilege' amongst Westminster-type jurisdictions. This article provides an overview of some of the problematic developments in recent New Zealand case law and the 2014 legislative correction by the New Zealand Parliament. As Professor Joseph concludes: 'Some developments have been good (*Prebble v Television New Zealand Ltd* and the *Parliamentary Privilege Act 2014*), some bad (*Jennings v Buchanan*), and some ugly (*Attorney-General v Leigh*)'.

The Clerk of the Queensland Parliament, Neil Laurie, in his article titled 'Parliament, Executive and the Courts: Laws of Separation, Conventions of Mutual Respect and Outstanding Flashpoints', explains that in the majority of Westminster jurisdictions outside of the United Kingdom 'some of the standards, practices or customs have become acknowledged or entrenched in statute law. Legislation, usually a written constitution, has supplemented convention to formalise or ensure recognition and enforcement of some conventions'. However, Laurie goes on to note, even in jurisdictions that have a written constitution, conventions still play a 'significant role'. As Laurie explains, case law has frequently 'recognised the conventions of government in the context of understanding the constitutional arrangements of the Commonwealth and the States. Any understanding of the separation of powers in our system of government … must not only consider the legal frameworks of separation, but also consider the conventions of mutual respect that underpin that separation'.

In his article, 'Pusillanimous Parliamentarians', Professor James Allan, Garrick Professor of Law at the University of Queensland, prosecutes the case that 'blame for the recent inroads into democratic decision-making in five of the oldest democracies in the world does not lie solely at the feet of unelected judges, bills of rights and international law'. While critical of the judiciary, Allan maintains that some of the responsibility also attaches to parliamentarians. He evaluates a number of instances across Westminster jurisdictions where parliaments have shown a lack of resolve in defending the constitutional role of the elected branch of government to make critical policy decisions that impinge on society.

We, the editors of this special issue, are confident that subscribers to the *Australasian Parliamentary Review* and others interested in the topic of the intersection of Parliament and the law will gain much from reading the excellent articles by this group of eminent scholars and practitioners in the field.

Colleen Lewis
Isla Macphail

December 2015

Articles

Parliament and the Judiciary: Judicial Independence and the Nature of the Relationship Between Parliament and the Judiciary

David Harper

The Hon David Harper AM, former Judge of the Supreme Court of Victoria and former Member of the Appeal Division of that Court

A fault line runs through our notions of the rule of law. It is not often noticed, except by legal academics, but it occasionally intrudes upon a wider stage. When it does, there are no settled means of dealing with the tremors, sometimes merging into worse, for which that intrusion is responsible. The consequences can be serious, including the impact they can have upon the relationship between parliament and the judiciary. If parliament acts in a way adjudged by the courts to be unlawful because it is contrary to the rule of law, and if parliament does not accept that judgment, the result is a constitutional crisis.

There is an unlikely precedent. It is to be found in the generally staid legal landscape of Victorian England. In 1839, the House of Commons received a report from the Inspectors of Prisons. In it, the inspectors identified a book circulating in Newgate Prison. It had been sold (and was probably written) by John Stockdale. In their report, the inspectors described it in most unflattering terms. The House of Commons ordered that the report be published. The Hansard family, then the reporters of proceedings in Parliament, did as they were told. Stockdale sued for libel. The Hansards pleaded the privilege of the House, which had taken the view that it, and not the judicial arm of government, should be the judge of the existence and extent of parliamentary privileges. The Court of Queen's Bench disagreed. In the case of *Stockdale v Hansard*[1] it held that it is no defence in law to an action for publishing a libel, that the defamatory matter is contained in a document, which was, by order of the House of Commons, laid before the House. The fact that the document thereupon became part of the proceedings of the House, and was afterwards, by order of the House, printed and published, did not strengthen the defence. (The result may have been different had the publication been ordered by both the Lords and the Commons).

This was not an outcome the House was prepared to accept. On the contrary, having been informed by the Attorney-General (Sir John Campbell) that the judgment was "totally contrary to law … and a flagrant usurpation of power by the Court"[2], the House imprisoned for contempt the two sheriffs who sought to execute the Court's judgment.

1 (1839) 9 Ad. and E 1; 112 ER 1112.
2 *The Parliamentary Debates (Hansard)* 3rd series, vol. 48, 65-366 (17 June 1839).

The result was a retreat, if not a capitulation, by the Court. In the *Sheriff of Middlesex's case*,[3] it acquiesced in the imprisonment of the unfortunate sheriffs, and Parliament passed legislation which confirmed the privilege it claimed. But Campbell appreciated the significance of the dispute. In his autobiography he referred to the possibility of "a convulsion unexampled in our history", and suggested that, if the House had committed the judges rather than the sheriffs for contempt, the Queen would have been forced to determine "on whose side the army should be employed, and for a time we must have lived under a military government."[4]

In theory at least, the issue remains unresolved. The House of Commons has never conceded the courts' jurisdiction to be the final arbiter of its privileges.

On any view, the House in 1839 acted in a way that was contrary to the rule of law. It determined not only what its privileges were, but also whether or not they had been breached; and—given that a breach had occurred—what the punishment should be. The rule of law, by contrast, forbids any persons or entities to be judge in their own cause. It also requires (among other things) that citizens have what was denied to the sheriffs - a right to a fair trial presided over by a duly constituted court. Pared to its essence, around which a more detailed examination of the concept may be conducted, the rule of law exists (in the words of Murray Gleeson, a former Chief Justice of the High Court of Australia) when "all authority is subject to, and constrained by, law".5 Another authoritative definition is that of Professor A V Dicey, sometime Vinerian Professor of English Law at Oxford who defined it as: "the equal subjugation of all classes to the ordinary law of the land administered by the ordinary law courts".6

The High Court of Australia has consistently held that the rule of law is an element in the constitutional arrangements by which Australia is governed. It is in this context that a former Chief Justice of the High Court, Sir Anthony Mason, could say of the Australian Constitution:

> Apart from creating a federal system under the Crown and providing for the separation of powers, the principal objects of the Constitution were to provide for a system of representative and responsible government and the maintenance of the rule of law.[7]

Speaking judicially, another Australian Chief Justice, Sir Owen Dixon, described the Australian Constitution as an instrument framed in accordance with many traditional conceptions, and added: "Among these I think that it may fairly be said that the rule of law forms an assumption".[8]

3 (184) 11 Ad. And E 273; *Parliamentary Papers Act 1840*.
4 Hardcastle (1881: ii. 129).
5 M Gleeson 'Courts and the Rule of Law' in *The Rule of Law* (Eds.) C Saunders and K Le Roy, Federation Press 2003) 179.
6 A V Dicey *An Introduction to the Law of the Constitution* (10th ed, London: McMillan 1959) 202.
7 A Mason 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1 at 4.
8 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193.

If Gleeson is right, societies in which the supreme authority is neither subject to nor constrained by law cannot be described as being governed in accordance with rule of law principles. Dictatorships make and change their own rules by whim, and their laws are made and amended according to the same unprincipled motives. Yet there is a school of thought, of which Professor Joseph Raz of Oxford University, the University of Columbia and Kings College London is a principal proponent, which maintains that:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law.[9]

It might be argued that the Confederate States of America constituted a practical example of that which Professor Raz had in mind. On one view, it is true, the Confederacy did not qualify: its constituent States were, on this view, soundly democratic. There was, however, another view. To the four million African American slaves in the South at the beginning of the decade of the civil war (the total Southern population in 1860 was 12 million), the governmental structures by which they were surrounded epitomised a non-democratic legal system based on the denial of human rights, on extensive poverty, on racial segregation, and on sexual inequalities (though not, it seems, religious persecution). The law was generally obeyed by the governments of the member States, and was enforced by their courts. Slavery was lawful, the human rights of the slaves were denied, racial segregation was absolute and their poverty was enforced.

To the white population, the Confederacy represented the essence of liberty and democracy. In theory, at least, the slaves were governed by authority which was subject to, and constrained by, law.

In practice, however, the opposite was true. Slave owners had, under the law, wide discretionary power over their slaves, who in the eye of the law were merely chattels to be bought and sold, no matter that this trade separated wife from husband, parents from children and siblings from each other. And that discretionary power was amplified by the reality that few if any slave owners were prosecuted for criminal misconduct towards the men, women and children who were their property. Female slaves, for example, had no practical means of defence against the sexual predations of their masters. Likewise, male slaves had no practical means of defence against the brutality of their overseers, or any other Europeans, who took the opportunity to indulge in unchecked aggression. For the slaves, and for many other of the inhabitants of Professor Raz's world, the rule of law meant (and in that world still means) nothing.

9 Joseph Raz 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, reprinted in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 211, 221.

For these reasons I would dismiss the position of Professor Raz as being too unrealistic to have logical utility and because it takes no account of the fact that in a non-democratic legal system ultimate power will not be governed by law. But even given that it includes some logical basis, I agree with Lord Thomas Bingham, formerly (2000–2008) the Senior Law Lord of the United Kingdom, who has written:

> I would roundly reject [Professor Raz's contention] in favour of a definition [of the rule of law] embracing the protection of human rights within its scope. A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.[10]

Bingham went on to quote the President of the Constitutional Court of the Russian Federation (V D Zorkin) who, at a symposium held by the International Bar Association in Moscow on 6 July 2007, said that "Law cannot be simply what is dictated by political authority." He might also have referred to the speech given on 30 October 2002 by Justice Dyson Heydon (then a judge of the Court of Appeal of New South Wales) at a Quadrant Magazine Law Dinner, when he said that "[t]he purpose of the rule of law is to remove both the reality of injustice and the sense of injustice."

Parliaments in the Westminster system are one of the three arms of government. Parliaments are therefore at the heart of the structure of authority in that system. The other arms—the executive and the judiciary—are also sources of authority. If the rule of law as defined by Gleeson is to be maintained, parliaments, executive governments and the judiciary (as well, of course, as other sources of authority) must be subject to, and constrained by, law.

Everything that the executive branch of government operating under the Westminster system does is governed by the law, except to the (very limited) extent that parliament has done that which parliaments ought not to do, but occasionally manage to get away with: giving the executive powers the exercise of which is beyond legal challenge because parliament has removed the right of judicial review. Even then, the executive is not released from its obligation to obey the law; it is merely freed, like the slave owners of the Confederate States, from the consequences of disobedience.

The courts of those countries which acknowledge the rule of law as a guiding principle of their constitutional arrangements have traditionally seen themselves as the guardians of the rule of law "with its insistence on adherence to fundamental principles, especially the recognition of human rights"[11]; and with justification, at least to the extent that the equal subjugation of all to the ordinary law of the land administered by the ordinary law courts is an element in, if not a complete explication

10 Tom Bingham *The Rule of Law* (Allen Lane, 2010) 67.

11 Justice John Toohey (High Court of Australia) 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158.

of, any acceptable definition of the rule of law. If, as I think is established, it is accurate to say that the rule of law includes this element, then it follows that the judiciary must be, and be seen to be, independent and impartial. In *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations*, [12] Street CJ said:

> Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. The built-in protections of natural justice, absence of bias, appellate control, and the other concomitants that are the ordinary daily province of the courts, are fundamental safeguards of the democratic rights of individuals.[13]

As the arm of government with particular responsibility to ensure that the rule of law is maintained, the courts themselves have an enlarged responsibility to obey the law. They are, in Murray Gleeson's terms, subject to, and constrained by, law; and this, for them, is a principle of especial constitutional significance.

What is true of the executive and the courts is, however, not true of parliaments. Parliaments make the law, and are therefore not constrained by it except to the extent that a constitution (whether written or contained, in whole or in part, in conventions generally accepted as binding) limits their power. To the extent that no constitution stands in the way, there will remain scope, generally wide, for the exercise of parliamentary authority without the restraining influence of some external and superior law.

Professor Dicey argued in his seminal work *An Introduction to the Law of the Constitution* that the Parliament of the United Kingdom has absolute power. In a now famous aphorism in that work he wrote: "It is a fundamental principle with English lawyers, that parliament can do everything but make a woman a man and a man a woman."[14] Professor Geoffrey Walker of the University of Queensland described the Dicey theory in the following words:

> By way of legislation [Parliament] could do anything at all, and there was no person or body in the kingdom with power to set its acts aside. No matter that a purported statute trampled on ancient constitutional principles or flew in the face of the most deep-rooted customs and moral values of the people. No matter that parliament could therefore validly pass retroactive criminal statutes or could, to use Leslie Stephen's example, command that all blue eye babies be killed.[15]

If this is true and if, as Gleeson suggests, the rule of law exists when all authority is subject to, and constrained by, law, then the rule of law, at least in its pure form, cannot logically be one of the conceptions upon which the Australian Constitution

12 [1986] 7 NSWLR 372.
13 Ibid, 375-376.
14 A V Dicey *An Introduction to the Law of the Constitution* (10th ed, London: McMillan 1959) 43.
15 G Walker *The Rule of Law Foundation of Constitutional Democracy* (Melbourne University Press 1988) 144.

is accurately framed. Indeed, in the Hamlyn Lectures delivered in 2006, Sir Francis Jacobs, the Jean Monnet Professor at the School of Law, Kings College, London, observed that "sovereignty is incompatible, both internationally and internally, with another concept which also has a lengthy history, but which today is widely regarded as a paramount value: the rule of law."[16] Professor Jacobs added that the rule of law "cannot coexist with traditional conceptions of sovereignty".[17]

Nor is Professor Jacobs alone. In delivering the Magna Carta Lecture on 15 June 2006, Vernon Bogdanor, the Professor of Government at Oxford, said it was clear that "there is a conflict between those two principles, the sovereignty of parliament and the rule of law" – a conflict which, if not resolved, could generate a constitutional crisis.[18]

The seeds of the crisis are obvious enough. On the one hand, the courts must obey the law, and must therefore give effect to legislation which is unambiguous. On the other, they are an arm of government independent of the other arms, with a duty to uphold the rule of law. Dr F A Mann poses the problem in the following words:

> Suppose Parliament enacts a statute depriving Jews of their British nationality, prohibiting marriages between Christians and non-Christians, dissolving marriages between blacks and whites, or vesting the property of all red-headed women in the State. Is it really suggested that English judges would have to apply, and would in fact apply, such a law? Do not evade the issue, do not avoid the legal test by asserting that, as we all hope and believe, no English Parliament would ever pass such a statute. Would the hypothetical question really have to be answered in the affirmative, while a similar German statute was condemned by four Law Lords as constituting 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'?[19]

The English case to which the passage refers is Oppenheimer v Cattermole,[20] in which Mr Oppenheimer claimed exemption from laws imposing double taxation on those who drew their income from two or more governments while being the subject of only one. It is of present interest only because of its conclusion that a German decree of 1941, which stripped some Jews—those within the category in which Oppenheimer found himself—of their German nationality, was so discriminatory that English courts would refuse to recognise it. Mr Oppenheimer accordingly retained both his German nationality, and his right to avoid double taxation in Britain.

A more immediately relevant question is what Australian, English and New Zealand courts would do were they to be confronted with Dr Mann's dilemma. In *R (Jackson)*

16 'The Sovereignty of Law: The European Way' Hamlyn Lectures 2006 (Cambridge University Press 2007) 5.
17 Ibid, 8.
18 Vernon Bogdanor 'The Sovereignty of Parliament or the Rule of Law?' Magna Carta Lecture 15 June 2006, 20, quoted in Tom Bingham *The Rule of Law* op. cit. 161.
19 F A Mann *Britain's Bill of Rights* (1978) 94 LQR 512,513.
20 [1976] AC 249, 278, 282.

v Attorney-General,[21] Lord Steyn, Lord Hope[22] and Baroness Hale[23] all suggested (without deciding) that parliamentary sovereignty would not necessarily prevail when, to use Lord Steyn's words, "exceptional circumstances" arose "involving an attempt to abolish judicial review or the ordinary role of the courts". In such circumstances the Supreme Court:

> … may have to consider whether this is [a] constitutional fundamental which even a sovereign parliament acting at the behest of a complaisant House of Commons cannot abolish.[24]

No British court has settled the issue raised by the Law Lords in 2005, which in any event came without the citation of any authority in support, and without detailed reasons. Accordingly, the British Parliament's power to abolish a "constitutional fundamental" remains doubtful. Yet the sovereignty of parliament has a strong hold on British legal sentiment. Writing in the *Law Quarterly Review* in 2007, Professor Richard Ekins of Oxford University described the tentative propositions of Lord Steyn and his colleagues as "unargued and unsound", "historically false" and "jurisprudentially absurd".[25] Moreover, their former colleague, Lord Bingham, "cannot accept that [their] observations are correct." Bingham continued:

> To my mind, it has been convincingly shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle, and they cannot, by themselves, change it.[26]

Lord Bingham finds considerable support for his position from Professor Jeffrey Goldsworthy of Monash University. In *The Sovereignty of Parliament*, Professor Goldsworthy wrote:

> Since virtually all significant moral and political controversies in contemporary Western societies involve disagreement about rights, this [judicial power to overrule or disregard an act of parliament] would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum. It is no wonder that the elected branches of government regard that prospect with apprehension. [27]

In my opinion, the position in Australia is settled in Professor Goldsworthy's favour. Nevertheless, Justice John Toohey, then a member of the High Court of Australia, wrote in his 1993 *Public Law Review* article entitled 'A Government of Laws, and not of Men?', that:

21 [2005] UKHL 56.
22 Ibid, pars. 104-109.
23 Ibid, para.159.
24 Ibid, para. 102.
25 Richard Ekins 'Acts of Parliament and the Parliamentary Acts' (2007) 123 *Law Quarterly Review R* 91, 103.
26 *The Rule of Law* op. cit., 167.
27 (Oxford University Press 1999) 260.

> [I]t might be contended that the courts should … conclude … that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties – a presumption only rebutted by express authorisation in the constitutional document. Just as parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit parliament to enact such laws before the courts will hold that those laws are valid.[28]

I am not aware of any expression of agreement with Justice Toohey's view. But there have been Lord Steyn-like murmurs from across the Tasman Sea. In *New Zealand Drivers Association v New Zealand Road Carriers*, Justices Cooke, McMullin and Ongley expressed:

> … reservations as to the extent to which in New Zealand even an act of parliament can take away the rights of citizens to resort to the ordinary courts for the determination of their rights.[29]

Sir Robin Cooke added to these thoughts in two other cases. In *Fraser v State Services Commission*, he said:

> It is arguable that some common law rights may go so deep that even parliament cannot be accepted by the courts to have destroyed them.[30]

In the following year, his Honour added that:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of parliament. Some common law rights presumably lie so deep that even parliament could not override them.

Injustices of the kind, Dr Mann had in mind, were a feature of laws enacted during the apartheid era by the Parliament of the Republic of South Africa. The *Group Areas Act 1957* is an example—(albeit an indirect one, since it fell to the supposedly independent South African judiciary to give to it the particularly repugnant attributes it soon acquired. The Act provided that particular racial groups would be given the exclusive right to reside in particular areas. During the parliamentary debates, which preceded its enactment, politicians belonging to the governing Nationalist Party emphasised that the Act was not to apply unequally. The Act itself contained nothing to contradict what the politicians had said. After the Act came into force, however, a proclamation was made pursuant to its terms. It designated defined areas of the municipality of Durban as being exclusively available for particular racial groups. Despite the protestations of the politicians during the parliamentary debates, the proclamation allocated all the most desirable areas to the white population, with less attractive areas being allocated to coloured and black residents.

28 J Toohey 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.
29 [1982] 1 NZLR 374, 390.
30 [1984] 1 NZLR 116, 121.

Mr Lockhat, an Indian, challenged the validity of the proclamation. He argued that the effect of its allocation was to discriminate to a substantial, and therefore unreasonable, degree against Indians; and that, if such discrimination were to be valid, it had to be either expressly or by necessary implication authorised by the enabling legislation.

The challenge succeeded in the court which first heard the case. Judge E S Henochsberg found in the *Group Areas Act* no express authorisation for the partiality and inequality which the proclamation embodied.[31] Nor was such authorisation necessarily to be implied. The judge held that, in these circumstances, the law required him to assume that parliament did not intend its legislation to operate in a substantially discriminatory way.

On appeal, this proposition was upheld. In delivering the unanimous decision of the Appellate Division, Judge G N Holmes accepted that, if the discrimination effected by the proclamation were to be valid, it had to be either expressly or by necessary implication authorised by the enabling legislation. But, for Lockhat, it was a pyric victory. Judge Holmes also held that, although the power to discriminate unreasonably was not expressly given in the Act, it was "clearly implied":

> The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of group areas of numbers of people throughout the country. Parliament must have envisaged that compulsory shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities.[32]

Under South African judicial practice, courts were not permitted to have recourse to parliamentary debates when construing legislation. Judge Holmes however allowed himself to find a clear implication - not in the words of the *Group Areas Act* or the parliamentary debates, but in his understanding of governmental policies under apartheid. It was an inglorious example of the courts disregarding the "fundamental safeguards" about which Street CJ spoke in *Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations:* that is, the practical application of "the … protections of natural justice, absence of bias, and the other concomitants that are the ordinary daily province of the courts". It was an equally striking example of the South African courts' willingness to ignore the principles of the common law, by which - in the circumstances of cases such as that brought by Lockhat - they were bound. The "reality of injustice", to adopt Justice Heydon's phrase, was during the apartheid era given the imprimatur of many members of the South African judiciary.

If the courts are to be true guardians of the rule of law, the assumption that, in the absence of an express legislative provision or necessary implication to the contrary, Parliament does not intend its legislation to operate in a substantially discriminatory way, would be one to which the judiciary gave practical application. They would also

31 *Lockhat v Minister of the Interior* (1960) (3) SA 765 (D).
32 *Minister of the Interior v Lockhat* (1961) (2) SA 587 (A), 602.

strive to ameliorate the effect of legislation that unquestionably allows those who break the law to do so with impunity. Here again the judges of apartheid South Africa failed to uphold the rule of law with, in Justice Toohey's words quoted above, "its insistence on adherence to fundamental principles, especially the recognition of human rights". These are principles by which the South African judges ought to have been bound.

It could be convincingly argued that those "old order" judges could not simply ignore, or deliberately disobey, the laws made by the then South African Parliament. But they could have done a whole lot better than they did. Mr Lockhat's case is an example. Another is the case of Albie Sachs (who was later appointed by President Nelson Mandela as a judge of the Constitutional Court of South Africa). He was a victim of the so-called "90 day detention law" (Act No 37 of 1963).

Section 17 of that Act provided that:

(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer … may… without warrant arrest … any person whom he suspects upon reasonable grounds of having committed … any offence under the Suppression of Communism Act … and detain … such person … for interrogation … until such person has in the opinion of the Commissioner of Police replied satisfactorily to all questions at the said interrogation …

(2) [No person is to] have access [to any person so detained except with the consent of the Minister of Justice].

(3) No court shall have jurisdiction to order the release from custody of any person so detained.

Albie Sachs was detained under s. 17. He argued that, while the Act entitled the authorities to detain him for interrogation and deprive him of his right to access to others, it did not to deprive him of any of his other rights. The authorities took a different view. They saw him as being properly subject to punishment not for anything of which he had been convicted (he was not being held as such) but for not giving them the answers they wanted from their questions of him. So they kept him in his cell and refused to give him anything to read. He responded by applying for orders that he be let out of his cell for a reasonable time each day, and have access to reading materials.

He initially succeeded. The court of first instance, the Cape Provincial Division, held that it would be surprising to find that the legislature intended punishment to be meted out to an unconvicted prisoner, and that the official in charge of detainees had applied a discretion not conferred on him. But the Appellate Division disagreed. The purpose of s. 17 was to induce detainees to speak, and in furtherance of that object their detention should be as effective as possible "subject only to considerations of humanity as generally accepted in a civilised country".[33]

The judges of the Cape Provincial Division were clearly justified in coming to the decision they did. Equally clearly, the supposedly independent judges of the Appellate

33 *Roussouw v Sachs* (1964) (2) SA 551(A) 558-559.

Division sought and found a solution to the case that was consistent with the governmental policy which they discovered as necessarily to be implied in s. 17.

The *Terrorism Act 1967* of South Africa is another product of the Nationalist-dominated Parliament, which might (and ought to) have been a vehicle for the judiciary to demonstrate that the injustices of apartheid could be ameliorated without disobedience to that law, and in accordance with rule of law principles. It is also another example of the means by which a legislature can excuse officers of the executive government from obedience to the law. Section 6 of the *Terrorism Act* provided that:

(1) Notwithstanding anything to the contrary in any law contained, any commissioned officer … of or above the rank of Lieutenant-Colonel may, if he has reason to believe that any person … is a terrorist … arrest such person … without warrant and detain … such person … for interrogation … until the Commissioner orders his release …

…

(5) No court … shall pronounce upon the validity of any action taken under this section, or order the release of any detainee.

(6) No person other than the Minister or an officer in the service of the State … shall have any access to any detainee …

The Act therefore allowed members of the South African police to ignore so much of the law as conferred rights upon a detainee.

That law did not "rule" in the sense that it governed the actions of the police. It could be, and was, disobeyed at will and without fear of redress or punishment. Those nominally disobedient police officers were accordingly placed beyond the rule of law. Moreover, given the width of discretion in the power conferred upon them, they often had no law to obey.

In 1971, Natal was gripped by a "terrorism" case in which the accused had been detained for lengthy periods under the *Terrorism Act*. The defence alleged that, during his detention, their client had been tortured. In the midst of the publicity surrounding the case, Barend van Niekerk—a professor of law at Natal University—made a speech in which he said that, since it was widely accepted that extended periods of solitary confinement (even without other ill-treatment) was in itself torture, no judge should accept the evidence of any confession obtained from a detainee who had suffered in this way.

For articulating a proposition which would have been routine in other nations espousing parliamentary governance, Professor Van Niekerk was charged with both contempt of court and attempting to defeat or obstruct the ends of justice. At first instance he was acquitted of the second charge, but convicted and fined on the first. He appealed. The Appellate Division not only confirmed the conviction for contempt, but also held, contrary to the judge at first instance, that the professor intended to defeat or obstruct

the course of justice.[34] In the course of his judgment, the Chief Justice (Judge Ogilvie Thompson) quoted from the impugned Van Niekerk speech:

> The Terrorism Act, as I have said, is a negation of what any true lawyer would ever call justice. And yet our lawyers, the guardians of our nation's legal heritage, have done so very little to mitigate its crudities. What then can our lawyers do? In the very first place our lawyers, all our lawyers from judges downward, can make their voices heard about an institution which they must surely know to be an abdication of decency and justice. No doubt they will tell you that it is not their function to criticise the law but to apply it. This is the very understandable retort of our judges to the demand sometimes made upon them to have their influential voices heard when the rule of law is trampled in the dust. But we must surely ask these lawyers, when will ever a point be reached when their protests become justified? Will they still make their excuse for abject inactivity if it is decreed that public flogging be introduced for traffic offences, the burning at the stake for immorality, and decapitation for the use of abusive language?....Cannot our judiciary even go further and in effect kill one aspect of the usefulness of the Terrorism Act for our authorities? They can do so by denying, on account of the built-in intimidatory effect of solitary confinement, practically all credit-worthiness to evidence procured under those detention conditions?[35]

The South African judiciary could have done as Professor Van Niekerk urged them to do. But, on the contrary, the Appellate Division held that, because the professor was asking that judges act "contrary to their obvious duty to consider all evidence on its merits" he was guilty of contempt of court.[36] But that missed the point. It is almost impossible, and always unjust, to give credence to any evidence obtained after prolonged solitary confinement during which (by definition) all access to the outside world is denied. Moreover, and at the same time, the court passed over an opportunity to do something which courts must do if executive action denies an accused the right to a fair trial: refuse to allow the prosecution to proceed until fairness is restored.

There is, I think, a conclusion to be drawn from the arguments outlined above. It is that, at least until laws of which Nazi Germany would be proud are enacted by Australian parliaments, the courts will adhere to the notion of parliamentary sovereignty. They will hold that their obligation to obey the law as enacted by parliament trumps any notion that their independence, or their duty to uphold the rule of law, permits them to fail to give effect to legislation unequivocally expressed—no matter that injustice might, at least in the opinion of the judge, be the result. On the other hand, they should never meekly surrender to the parliament, or the executive, as the South African courts frequently (but not invariably) did. There may be means by which the rule of law can be upheld, and justice done, even when parliaments seek to subvert one or both.

34 *The State v Van Niekerk* (1972) 3 SA 711.
35 Ibid, 716-717.
36 Ibid, 726.

Parliament and Independent Statutory Officers

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Following the publication of the Fitzgerald report[1] in 1989, the Queensland Parliament created two independent bodies to implement its recommendations for structural change—the Criminal Justice Commission (CJC) and the Electoral and Administrative Review Commission (EARC). Each Commission was headed by a Chairman, together with four part-time Commissioners and in both cases the appointment of the Chairman had to be approved by the Opposition as well as Government members of a parliamentary committee. Each Commission was required to report to its parliamentary committee, a committee that was required by the relevant Act to 'monitor and review the discharge of the functions of the Commission'.

Mr Fitzgerald's inquiry was originally a very limited one, into the alleged criminal activities of five named persons, and possible police corruption. But the inquiry quickly expanded and, more importantly, Mr Fitzgerald decided to focus additionally on the causes of, or factors that had contributed to, the corruption that was being unveiled. He reported that the problems were 'not merely associated with individuals, but are institutionalised and related to attitudes which have become entrenched'. They included a weak parliamentary system.[2] Evidence involving political figures 'demonstrated that misconduct in the Police Force was not isolated, but part of a wider malaise to do with attitudes to public office and public duty'. He said:

> There is no purpose in piecemeal solutions, which only serve to conceal rather than cure the defects in the existing system. Sooner or later there must be a major overhaul and the longer it is postponed the more drastic and expensive it will be, both in terms of money and in terms of social disruption and loss of community standards and freedoms.[3]

His recommendations were aimed at changing structures and putting new structures in place. As Mr Fitzgerald explained:

> This report recommends the setting up of two new potentially important agencies, the Electoral and Administrative Review Commission and the Criminal Justice

1 Report of the *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989). (Fitzgerald report)
2 Fitzgerald report, pp. 123-4.
3 Fitzgerald report, pp. 13-4.

> Commission. The establishment of each of these bodies will provide a firm foundation for reform. It is those *permanent* bodies which will have the opportunity and resources to continue the work of this Commission with respect to electoral, administrative and criminal justice reforms.[4]

His proposals were rapidly adopted and supported by Government and Opposition parties—at least initially.

The functions of the two Commissions were very different. The objects of the Criminal Justice Act were to provide for the establishment of a permanent body:

> (i) to advise on the administration of the criminal justice system in Queensland with a view to ensuring its efficiency and impartiality;
>
> (ii) to continue investigations commenced by the Commission of Inquiry;
>
> (iii) to investigate the incidence of organised or major crime;
>
> (iv) to take measures to combat organised or major crime for an interim period;
>
> (v) to investigate complaints of official misconduct referred to the body and to secure the taking of appropriate action in respect of official misconduct;
>
> (vi) to hear and determine disciplinary charges of official misconduct in prescribed circumstances.[5]

The object of EARC, on the other hand, was:

> … to provide reports to the Legislative Assembly and to the Minister with a view to achieving and maintaining
>
> (a) efficiency in the operation of the Parliament; and
>
> (b) honesty, impartiality and efficiency in-
>
> (i) elections;
>
> (ii) public administration of the State;
>
> (iii) Local Authority administration.[6]

For present purposes, what is important about the creation of these statutory bodies was that their chairmen and commissioners were designed to be independent statutory officers. While these were not the first such officers to be created in Queensland—importantly, the Auditor-General was of long-standing (since 1860) though his independence was somewhat limited, while the Ombudsman was a more recent creation (1974)—the CJC and EARC were the first to be deliberately tied to Parliament in a way that was intended to ensure that while they were independent bodies they (and particularly the CJC) were not autonomous[7]. As it turned out, they were to serve as a

4 Fitzgerald report, p. 14 – emphasis added.
5 *Criminal Justice Act 1989*, s. 1.3 (a).
6 *Electoral and Administrative Review Act 1989*, s. 2.9 (1).
7 Fitzgerald report, p. 302-3.

model for the creation of later independent statutory officers, such as the Queensland Integrity Commissioner and the Information Commissioner.

In this paper, I will be concentrating on developments in Queensland, for several reasons. First, Queensland, for almost a century, has had a unicameral Parliament. As a consequence of this, the separation of legislative and executive powers is problematic—the government necessarily dominates the Parliament, except in the very rare instances (as at the time of writing, and in the late 1990s) when the government is in a minority and depends on one or more independents or minor parties for its continuance in office. This has given force to the use of devices such as the requirement that the Opposition have a veto over the appointment of the chairs of the CJC and EARC, to give Parliament and not just the government a role in maintaining the independence of such statutory offices as it creates. Second, relatively recent Queensland history illustrates a range of inter-relationships between Parliament, and in particular parliamentary committees and independent statutory officers. Third, I am more familiar with the situation in Queensland in relation to statutory officers, having served for more than a year as Chair of EARC (1992-93), and more recently for five years as Queensland Integrity Commissioner (2009-13), the latter position bringing me into regular contact with four other independent statutory officers—the Chair of the Crime and Misconduct Commission (previously the CJC), the Ombudsman, the Auditor-General and the Information Commissioner—through regular meetings of an informal group known as the Integrity Committee.

I begin by discussing the respective relationships of the CJC and EARC with their parliamentary committees and (later) with government.

The CJC' s initial relationship with its parliamentary committee was concerned (with increasing hostility) primarily with reports made by the CJC recommending reforms to the criminal law. The first, in September 1990, was its *Report on Gaming Machines Concerns and Regulations*. This was followed a month later by *Reforms in Laws Relating to Homosexuality—An Information Paper*. A year later the CJC produced a report on prostitution. In December 1991 the CJC published its *Report on an Investigation into Possible Misuse of Parliamentary Travel entitlements by Members of the 1986-1989 Queensland Legislative Assembly*—a report that became known as the 'travel rorts report'. The CJC had:

> investigated the travel claims of politicians over the 1986-89 Parliament (but not before that date). It found many were illegitimate and that no proper procedures had been put in place for expenditure entitlements (indeed a culture existed that 'holidays' were seen as a perk of the job and as part of the 'salary package' available to MLAs). In total 54 previous members were investigated of whom 40 members were considered to have misused funds with only two cleared (and of these 25 were still in the present parliament – including 11 ministers and 5 Labor backbenchers) … In December 1991 two ministers (Terry Mackenroth and Ken

> McElligott) along with Labor's Chair of Committees, Clem Campbell, were forced to resign their official appointments.[8]

According to Professor John Wanna, there was a

> widespread view among Labor MLAs that the PCJC should have controlled the CJC far more effectively … that the parliamentary committee should set the agenda for the CJC rather than allowing the CJC to set its own (even though this was not in accord with the enabling legislation) …[9]

Labor had a majority on the PCJC and a Labor backbencher, Peter Beattie, was its initial Chair. Beattie himself appeared unconcerned about such attitudes. His own view was that Parliament should devote more time (indeed some time) to debating the reports that the PCJC provided to the Parliament, at the discretion of the Committee, and that the Government should be required to respond to reports within a fixed period.[10] This was one of the main recommendations of the first triennial review of the CJC by the PCJC, and like most of its other suggestions, nothing came of it for some time.

A major change in the relationship of the CJC to its parliamentary committee came in 1997, after a change of government. For reasons discussed below, the Borbidge Government was much more hostile to the CJC than the Goss Government. In the *Criminal Justice Legislation Amendment Act 1997* the Government created the position of Parliamentary Commissioner, an independent officer of the Parliament who was answerable to the PCJC, and who could undertake investigations accessing CJC files and personnel, responding to complaints about the CJC. This significantly increased the PCJC's ability to monitor the activities of the CJC, without controlling what it might do.

Move forward about a decade and a half through a series of triennial reviews of the (now) Crime and Misconduct Commission (CMC) and one can see that the parliamentary committee was essentially supportive of what the Commission was doing.

Just how effective the alliance between the Parliamentary Commissioner and the parliamentary committee (now the PCMC) could be was demonstrated in the extraordinary events of March 2013, when it was revealed that the CMC had released or destroyed thousands of documents from the Fitzgerald Inquiry that it was required by its legislation to maintain and keep secret. Parliament approved a special inquiry by the PCMC in which it was directly aided by the Acting Parliamentary Commissioner, acting as counsel assisting. Aided also by the Clerk of the Parliament, the Committee used its full powers and those of the Parliamentary Commissioner to obtain documents, including deleted emails, from the CMC to find out how the Fitzgerald documents were

8 John Wanna, 'Managing the Politics: The Party, Factions, Parliament and Parliamentary Committees' in Bron Stevens and John Wanna, eds. *The Goss Government: Promise and Performance of Labor in Queensland*, Macmillan Education (1993) p. 59.

9 Wanna, (1993) p. 63.

10 Peter Beattie, 'Parliamentary Committees and Reform' in *Keeping Them Honest, Democratic Reform in Queensland*, edited by Andrew Hede, Scott Prasser and Mak Neylan (1992) UQP, pp. 145-146.

mishandled, and the chain of responsibility for what had happened. In the end, the Committee made recommendations for a separate review to assign guilt, having itself named those it thought responsible. It also proposed significant changes in the CMC's internal structures. As it happened, these proposals coincided with a review that had been initiated by the government—of which more shortly.[11]

One last clash between the Committee and the CMC should be noted. In November 2013 a storm erupted over the publication of an opinion article by the Acting Chair of the CMC, Dr Ken Levy, supporting the Government's (controversial) anti-bikie legislation. The Committee thought it had been given contradictory evidence by Dr Levy over his contact with anyone in the Government about the contents of the article. There were calls for his dismissal, and for a police investigation into whether he had lied to the Committee (a criminal offence).[12] The Government reacted by dismissing the Committee. Whether this was permissible under the legislation was never tested.

The relationship of the CJC and its successor bodies with government was even more fraught than its relationship with their parliamentary oversight committees. According to a recent history of Queensland, 'relations between the Goss government and the CJC were relatively civil, if not always harmonious':

> The impact of a 1994 CJC report advocating that the laws relating to cannabis be softened (especially for first-time offenders) was negated by the premier's personal opposition. Furthermore, the CJC's recommendation that legal brothels be permitted as a means of breaking the established link between prostitution and crime was narrowly rejected by the PCJC. This was possibly influenced by Goss's publicly expressed disapproval of the measure.[13]

But it was the travel rorts affair that most antagonised MPs, on both sides. According to the veteran political correspondent (for the *Courier-Mail*, and then *The Australian*) Tony Koch:

> For the next decade the CJC … was subjected to vilification and accusation, and a constant erosion of its powers. Most of the bitterness came from the Labor side because of the travel rorts findings, but the Nationals had an abiding hatred of the CJC. That came from their MPs who were caught up in the travel rorts but, more significantly, they also saw the CJC as the 'son of Fitzgerald', and it was Fitzgerald's inquiry that effectively ended the long line of National Party governments.[14]

The Goss Government was succeeded by the Borbidge Government, which came to power in controversial circumstances after a by-election for the seat of Mundingburra. A week after the change of government, it was revealed that during the by-election the then Opposition Leader Rob Borbidge and his Shadow Police Minister Russell

11 Parliamentary Crime and Misconduct Committee, *Inquiry into the Crime and Misconduct Commission's Release and Destruction of Fitzgerald Inquiry Documents. Report No. 90*, April 2013.

12 *The Courier-Mail*, 21 November 2013.

13 Ross Fitzgerald, Lyndon Megarrity and David Symons, *Made in Queensland: A New History* (2009) UQP, p. 204.

14 Koch, *The Tony Koch Story*, (2009). http://tony-koch.com/index.php?page=detail&id=378 (accessed 28/07/2015), p. 2.

Cooper had signed a secret Memorandum of Understanding with the Police Union. Its 27 clauses included provisions for weaker police disciplinary measures, a reduction in the powers of the CJC to make it responsible for serious criminal matters only, and involvement of the union in the selection of the next Commissioner of Police. Cooper indicated his agreement, or agreement in principle, with most provisions. The union donated $20,000 to the Opposition's campaign fund.[15]

The public storm that followed persuaded Cooper to ask the CJC to hold an inquiry. It appointed a retired NSW Supreme Court judge, Kenneth Carruthers, to do so. As the inquiry proceeded, relations between the Government and the CJC deteriorated. The Government then established an inquiry into the CJC headed by two former Queensland Supreme Court judges, Peter Connolly (who had previously been a Liberal MP) and Kevin Ryan. At one point it began inquiring into the Carruthers inquiry. Carruthers promptly abandoned his inquiry. But the Connolly/Ryan inquiry was then shut down by the Supreme Court for 'ostensible bias'. Meanwhile, the Government decided to remove the CJC's organised and major crime function and give it to a new body, the Crime Commission.

Labor won government in 1998 under new leader Peter Beattie. The new government, two years later, restored the CJC's powers by merging it with the Crime Commission to form the Crime and Misconduct Commission.[16] However, a feature of the new Commission was a change in the way misconduct matters were handled. The new Commission would concentrate on more serious and complex matters while the remainder would be dealt with by relevant agencies. This was a move that had begun with the CJC and had been supported by the PCJC.[17]

The next major problems for the CMC followed the next change of government, in 2012, when the Liberal National Party (LNP), led by Campbell Newman, took office with a massive majority. The election was conducted on a 'no holds basis'.[18] Importantly, Premier Anna Bligh referred Newman to the CMC on four occasions over his family business interests. No impropriety was found.[19]

The Newman Government announced a new review of the CMC in November 2012, to be conducted by former High Court judge Ian Callinan and Professor Nicholas Aroney. According to Professor Scott Prasser it was:

> triggered by the way the previous Bligh and Beattie Labor governments were perceived to misuse the CMC by often sending it references to delay decisions, deflect attention or to embarrass and silence the opposition and other critics.[20]

15 Rae Wear, 'Robert Edward Borbidge', in Murphy, Joyce, Cribb and Wear, *Premiers of Queensland* (2003) UQP p. 394.
16 Colleen Lewis, 'Crime and Misconduct Commission: Moving Away From Fitzgerald', in Lewis, Ransley and Homel, *The Fitzgerald Legacy* (2010) Australian Academic Press, pp. 64-5.
17 Lewis (2010) pp. 68-72.
18 Ian Callinan and Nicholas Aroney, *Review of the Crime and Misconduct Act 2011 (Qld)* (2013) p. 12.
19 David Marler, 'Newman regime vs CMC explained', http://greenshack.info/index.php/newman-regime-vs-cmc-explained.html, (2013) p. 1.
20 Scott Prasser, 'Bligh, Beattie used crime watchdog as a political weapon', *The Australian*, 6 November 2012.

He quoted Attorney-General Jarrod Bleijie, saying 'the problem in the past has been that just referring a matter to the CMC becomes part of the political debate and that is not why the commission is there. It should not be used as a political football'. Hence, Prasser said, the Callinan review under its terms of reference is to assess, 'the use or any abuse of the powers and functions conferred by the act' and to ensure 'maintenance of public confidence in the act and the relevant agencies'.

Later, in announcing the Government's response to the Callinan/Aroney recommendations, the Attorney-General said:

> The Government remains concerned the CMC has been called upon to investigate certain complaints that are lodged for political purposes, and as such has become part of the political debate. This acts as a distraction to the CMC undertaking its important crime and misconduct functions.[21]

The result of the review and the Government's response was to further downgrade the importance, relevance and utility of the CMC, which now became the Crime and Corruption Commission (CCC). The trend to off-loading the investigation of complaints was pushed to what must be its limit: the new body would only investigate corrupt conduct—not misconduct or official misconduct as previously. Corrupt conduct is defined in terms similar to what was official misconduct previously. Even so, the CCC would only examine 'more serious' cases of corrupt conduct and systemic corrupt conduct.[22] Other serious cases of corrupt conduct would be investigated by the agency concerned.

Other changes to the legislation removed the CCC's prevention function in relation to corruption in the public sector and required that it only conduct research with the approval of the Minister.[23]

But perhaps the most debilitating change was a requirement that complaints about corruption could only be made by way of statutory declaration (with a few minor exceptions). This (together with the possibility of charges being brought against complainants) would prevent complaints being made unless the complainant could in effect prove corruption—the job that the CCC was supposed to do through its investigations.[24]

At the time of writing, the parliamentary committee is reviewing the provisions of the new legislation. However there can be no doubt that the legislation of the Newman Government delivered a CCC that was a very neutered version of the CJC that was established to meet the Fitzgerald recommendations.

But at least it still exists in some form, which is more than can be said of the other Fitzgerald creation, the Electoral and Administrative Review Commission, although,

21 *Government response to the 8th Parliamentary Crime and Misconduct Committee Report No. 86*, May 2012 (2013) p. 1.
22 *Crime and Corruption Act 2001*, ss. 15 and 35(3).
23 *Crime and Corruption Act 2001*, ss. 23 and 52.
24 *Crime and Corruption Act 2001*, s. 36.

as highlighted earlier, both were intended by Fitzgerald to be 'permanent'. EARC was abolished less than four years after it was created.

EARC's relationship with its parliamentary committee—the Parliamentary Committee for Electoral and Administrative Review (PCEAR)—was more productive and not as tempestuous as that of the CJC and its parliamentary committee.

By the end of 1990, after a year's work, EARC had published six reports. The first was on declaration of interests by MPs, the second on the local authority electoral system, the third on Queensland's joint electoral roll review, the fourth on the Legislative Assembly electoral system, the next on judicial review of administrative decisions, and the final report was on freedom of information. The parliamentary committee considered the first reports quite quickly, producing its own reports and recommendations within two or three months. But the final two reports took six and four months respectively to clear the Committee and 12 and 20 months to be enacted.[25] The early reports were also largely accepted by the Committee, with few recommendations in each report being rejected. But by mid-1993 it was clear that EARC was having less success in persuading the Committee and the Government to adopt its recommendations. In total, at that time, of 1715 recommendations in 18 reports, the Committee accepted outright or with modification 1185 recommendations and rejected 26, while the Government accepted wholly or with modification some 805 recommendations and rejected 88.[26] Worse was to come. EARC's review of parliamentary committees in 1992 was largely ignored, and it was another two decades before a committee system resembling that recommended by EARC was adopted. Its 1993 review of appeals from administrative decisions was similarly dismissed, and the Queensland Civil and Administrative Tribunal was not created until 2009. EARC's final report, recommending a bill of rights, was completely ignored.

The turning point came with a review conducted by PCEAR of EARC's first three years. This was mandated in the legislation,[27] but was commenced in December 1991, just two years after EARC began operating. The Committee reported in July 1992, recommending that EARC be wound up, as soon as it finished the reviews on which it was then engaged. [28] EARC, in a submission to the Committee, made the point that is was 'a relatively unusual institution within a Westminster democracy':

> Although it has power only to make recommendations, its investigative mandate extends across the three branches of government (the Legislature, the Executive and, to a limited extent, the Judiciary …) Queensland must reach the point where the ordinary institutions of government have to maintain and protect basic accountability and democracy within the system.[29]

25 David Solomon, 'Reform Fatigue Following the Fitzgerald Report?' in *Griffith Law Review*, Vol. 18, No. 3 (2009) 621-637 at 623-4.
26 Electoral and Administrative Review Commission, Fifth annual report (1994) pp. 37-41.
27 *Electoral and Administrative Review Act 1989*, s. 5.8 (f)(i).
28 Parliamentary Committee for Electoral and Administrative Review (1992) pp. 1-3.
29 Parliamentary Committee for Electoral and Administrative Review (1992) p. 51.

Not all submissions agreed with this, but the Government made it clear that it was anxious to be rid of EARC. I have suggested previously that 'reform fatigue' or 'reform weariness' was taking hold and the Goss Government did not want its agenda driven by a body that was beyond its control—even if it was free to ignore or reject EARC's recommendations.[30]

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This article is titled 'Parliament and Independent Statutory Officers'. There are in Australia many hundreds of independent statutory officers. In Queensland, a recent survey found there were 459 government boards, many of which were or contained independent statutory officers.[31] For example, the Queensland Department of Justice and Attorney-General lists on its website 15 independent statutory authorities that report to Parliament through the Attorney-General and Minister for Justice, including the Anti-Discrimination Commission, Legal Aid Queensland, the Queensland Law Reform Commissioner and three Parole Boards.[32] All of these have a relationship with Parliament, but it tends to be at some distance, and of little if any significance. Some of them may have to appear before a parliamentary estimates committee, but none of them is directly supervised by a parliamentary committee in the way the CCC is and the former EARC was.

The Department of Justice and Attorney-General website also lists four independent statutory authorities 'which report directly to Parliament'. These are the Crime and Corruption Commission, the Electoral Commission, the Office of the Ombudsman, and the Office of the Information Commissioner.[33] While each does report directly to Parliament, of more importance and significance is that there is a specific parliamentary committee that is required to monitor and review the performance and functions of each of these statutory authorities.

The parliamentary committees that have among their responsibilities the task of monitoring and reviewing one or more statutory authorities are:[34]

> Finance and Administration Committee: The Auditor-General, the Integrity Commissioner, the Family Responsibilities Commission, and the Queensland Family and Child Commission.
>
> Health and Ambulance Services Committee: The Health Ombudsman.
>
> Legal Affairs and Community Safety Committee: The Criminal Organisation Public Interest Monitor, the Ombudsman and the Information Commissioner. It

30 Solomon (2009).

31 Simone Webbe and Patrick Weller, *A Public Interest Map for Queensland Government Bodies* (2009). Not all boards are independent, even when created by legislation. For example the hospital boards in Queensland must follow any directions issued by the Minister.

32 http://www.justice.qld.gov.au/justice-services/justice-agencies/statutory-authorities Accessed 15 July 2015.

33 At page 3.

34 As at 31 July 2015.

must be consulted regarding senior appointments to the Electoral Commission of Queensland.

Parliamentary Crime and Corruption Committee: The Crime and Corruption Commission.

In addition, each of the portfolio committees is responsible for examining any report by the Auditor-General that is referred to it by the Parliament. This arrangement replaces the former and more usual practice of having a Public Accounts Committee that examines all reports of the Auditor-General.

The relationship between these committees and their independent statutory officers has proven to be unexceptional, and useful for both the statutory officers and for the committees—leaving aside, that is, the sometimes difficult relationship between the Parliamentary Crime and Misconduct Committee and the CMC. It is reasonable to assume that the very existence of these ties helps the statutory officers maintain their independence from government and the ministers who have some oversight of them, and who are responsible for their budgets.

In an earlier article[35] I sought to examine the situation of those statutory officers that are specified by the legislation that governs them as officers of the Parliament.[36] I referred to research that had been undertaken in the United Kingdom, and criteria developed in New Zealand for the designation of officers of Parliament. I suggested that the one significant development that could enhance the independence of these officers would be if their budgets were included in the appropriations of the Parliament. I proposed that parliaments, led by the committees to which these officers report, and pressed to act by those officers, should do what they could to encourage this reform.

In the absence of such a mechanism, the independence of statutory officers is far from guaranteed. Government may not seek to interfere directly in the exercise of their functions, but it can, and in some cases does, avail itself of its power to alter their constitution or their very existence—witness the way in which the CJC became the CMC and then the CCC. Or, at the Commonwealth level, observe the way the Government has gone about destroying the Office of the Australian Information Commissioner (OAIC). Unable to get amending legislation through the Senate, the Government has cut funding for the office, and avoided making appointments to the most senior positions.

This means that these officers are not independent in the way that, for example, judges are independent. Notwithstanding their links to Parliament, and their statutory foundations, they are part of the executive government, and their very existence is subject to what the Government determines.

35 David Solomon, 'The Integrity Branch—Parliament's Failure or Opportunity?' *Australasian Parliamentary Review* Vol. 28, No. 2, Spring 2013, pp. 36-45.

36 The term 'officer of the Parliament' may lead to some confusion. The Queensland Parliament website, for example, under the heading 'Officers of the Queensland Parliament' lists first 'Elected officers' (the Speaker, Chairman of Committees, Temporary Speakers) then 'Permanent officers' (the Clerk, etc) and then 'Associated officers' (listing only the Ombudsman and the Auditor-General, but not several others who are designated in legislation as 'officers of the Parliament'). Other parliaments list officers and officials of Parliament.

A reminder of this was provided recently by Professor Wanna, who was commenting on the dispute between the president of the Human Rights Commission, Dr Jillian Triggs, and the Federal Government over remarks and actions by Dr Triggs that led the Prime Minister to declare he had no confidence in her. Professor Wanna said:

> Statutory office-holders and the commissions or authorities they head are primarily the creations of executive government. This point is generally ignored by those who think these officers are free spirits able to criticise governments at will. Executive governments initiated these bodies and appoint their leaderships, they propose their statutory powers and, importantly, fund their activities.
>
> But statutory bodies are also simultaneously creatures of the legislature which has debated and deliberated their empowering legislation and voted to authorise their creation (but of course in our fusion of powers the executive are significant members of the legislature as well as of the ministry).
>
> …
>
> One of the dimensions of statutory independence is for the office-holder to retain the respect and confidence of the parliament, and that includes the executive in our Westminster system; the parliament does not have to agree with her (Dr Triggs') reports or applaud her investigations, but it has to respect the source from which they came.[37]

Parliament will rarely be able to protect the independence of statutory officers if the government wants to act against them. Even so, those officers cannot afford to lose the respect and confidence of the Parliament (or its relevant committee) if they are to maintain their independence.

37 John Wanna, http://www.canberratimes.com.au/comment/how-independent-is-statutory-independence-2050619-ghqygl.html 19 June 2015.

Royal Assent—The Business of Parliament or the Executive?

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INTRODUCTION

In Westminster-type systems of responsible government, the critical action that turns a bill into a law is the grant of royal assent. Although royal assent normally occurs as a matter of course, with any controversy about the passage of a bill occurring in the Chambers of the Parliament during debate and voting on the stages of a bill, the question arises on rare occasions as to whether there is any discretion, after a bill has been passed by the Houses, for assent to be refused or delayed. It arises in two different contexts. First, can assent be refused or delayed upon ministerial advice to do so? Secondly, is there a 'reserve power' to refuse assent to a bill that has been passed by the Houses of Parliament? While most focus has been on the second question, this article will focus on the first issue of whether the person who gives assent to a bill acts upon the advice of the Houses of Parliament or responsible Ministers.

In most countries that employ the Westminster system of government, there is no explicit constitutional answer to this question. The answer must be sought in constitutional principle and convention. Too often, however, commentators reflexively rely on one particular principle, such as the principle of responsible government that a vice-regal officer acts upon the advice of Ministers, without paying sufficient attention to other constitutional principles, such as representative government, and how any conflict between them ought to be resolved. This article contends that rather than applying a simplistic binary choice between one rule or another, greater effort should be made to reconcile conflicts between constitutional principles in accordance with their underlying purposes to achieve the most appropriate constitutional outcome.

THE PASSAGE OF LAWS AND THE ROLE OF THE HEAD OF STATE IN ASSENT

Traditionally, parliaments in Westminster-type systems of responsible government are comprised of a Lower House, an Upper House and the head of state (which for these purposes is to be taken as including the Sovereign and his or her vice-regal

representative, such as a Governor-General or Governor[1]). For a statute to be enacted, it usually requires the approval of all three branches of the Parliament, being passage by each House and assent by the head of state. Passage by the Houses is a pre-requisite for assent. There are, of course, variations. A Parliament may be unicameral[2] or there may be certain categories of laws that do not require passage by one of the Houses[3] or that may be passed by an alternative procedure, such as a joint sitting of the Houses of the Parliament.[4]

In most cases there is a distinct role for the head of state, who is both head of the executive and a constituent part of Parliament, in giving assent to a bill in order to transform it into a law. There are, however, exceptions. In Papua New Guinea, for example, the Governor-General does not give assent to bills. Instead, the Speaker provides certification, under the National Seal, that a law has been made by Parliament.[5] Similar procedures apply in Nauru and Sri Lanka[6] and at the sub-national level in the Australian Capital Territory.[7] In these jurisdictions, the role of the executive in relation to the enactment of legislation is confined to its effective control over voting in the Lower House. While one might assume that this approach would avert any attempt to prevent a bill becoming law when it has been passed by the House or Houses of Parliament, this is not always the case. In Nauru, for example, the Speaker on at least two occasions refused to certify a bill—once because it was being challenged before the courts on grounds of unconstitutionality and on the other occasion because the bill contained errors.[8] Hence, controversy may still arise in relation to the bringing of laws into effect, even when the role of the executive is minimised or excluded.

Where the head of state has the role of giving assent to a bill, the first question that needs to be asked is whether the head of state, in giving assent to a bill, acts as a constituent part of the Parliament, fulfilling a legislative function, or whether he or she is exercising an executive function as part of the executive. The difficulty arises because there is no clear separation of powers between the executive and the legislature in Westminster-type systems of government. While the head of state (be it the Sovereign or his or her vice-regal representatives) is not a Member of Parliament, the persons that he or she appoints as Ministers to comprise the executive government almost invariably are, either by law or convention, Members of Parliament who collectively hold the confidence of the Lower House of the Parliament. The executive government is therefore dependent for its existence upon the Lower House

1 This terminology is used for convenience only and should not be taken as accepting that the Governor-General is head of state of Australia.
2 See, e.g., the Queensland Parliament and the legislatures of the Canadian provinces.
3 See, e.g., *Constitution Act 1902* (NSW), s 5A re the passage of bills for the appropriation of moneys for the ordinary annual services of the Government; and the *Parliament Acts* 1911 and 1949 (UK).
4 See, e.g., Commonwealth Constitution, s 57.
5 Constitution of Papua New Guinea, s 110.
6 Constitution of Nauru, s 47; Constitution of Sri Lanka, s 80.
7 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 25.
8 Peter MacSporran, *Nauru – The Constitution* (Seaview Press, 2007), 108-9.

of the Parliament and cannot secure the passage of legislation without the support of a majority of Members in one or both Houses, as the case may be. At play are the principles of responsible government and representative government, which for the most part are complementary, but have the potential to clash.

REPRESENTATIVE GOVERNMENT V RESPONSIBLE GOVERNMENT

The principle of representative government places primary political authority in the Parliament, or at least the Lower House of the Parliament, on the basis that it is the body that represents the will of the people through elections.[9] As the High Court noted in *Lange v Australian Broadcasting Corporation*, at federation, 'representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system'.[10]

The principle of responsible government requires the executive to be responsible to the people through the Parliament. This responsibility applies in at least two ways. First, Ministers are responsible to Parliament for their administration of public service departments and the expenditure of public money. They may be questioned, criticised, censured and ultimately the subject of a vote of no confidence, which if passed by the Lower House would require, by convention, the resignation of the relevant Minister or in some cases the government. The head of state is not responsible in this direct manner to the Houses of Parliament. Instead, he or she, by convention, ordinarily acts upon the advice of his or her responsible Ministers, who are required to be responsible to Parliament for that advice. If the Houses disagree with the action taken by the head of state, then their recourse is against the Ministers who advised it, rather than the head of state.

As the executive government almost always holds the support of a majority in the Lower House of the Parliament, there is little room for any conflict between the principles of representative and responsible government, except in relation to the role of the Upper House and whether the government is required to be responsible to it.[11] However, as discussed below, there may be circumstances in which the Houses pass a bill and Ministers advise the head of state to refuse or defer assent to the bill. Upon whose advice must the head of state act—Ministers or the Houses?

One argument is that if the act of giving assent is a legislative act, then the head of state, acting as a constituent part of the Parliament, acts upon the advice of the

9 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ).

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

11 A classic example of such a conflict arose in relation to the 1975 dismissal of the Whitlam Government which raised the question of whether the Senate could block supply and whether this meant that the Government had to be responsible to both Houses of the Parliament.

other two parts of the Parliament—the Houses of Parliament.[12] If, however, the act of giving assent is regarded as an executive act, like most other acts of the head of state, then he or she would be bound by convention to act upon the advice of responsible Ministers (except in the case of the exercise of a reserve power). Hence, the classification of the act of giving assent to bills is significant.

Judicial authority

Judicial authority upon this question remains unclear. References to the issue tend to be incidental and offered without full argument or consideration of the point. There are, for example, some judicial statements supporting the proposition that an Australian State Governor, when giving assent, is acting as a constituent part of the Parliament[13] and that the grant of assent is part of the legislative process,[14] yet courts have not gone so far as to accept that the grant of assent, being a legislative process, is subject to the protection of Article 9 of the *Bill of Rights 1688* (Imp), preferring to confine Article 9 to proceedings within the Houses.[15]

One of the more complicated, but interesting, treatments of the issue arose in a peculiar Tasmanian context where the Governor had been purportedly delegated certain powers to amend legislation by way of proclamation. On 29 January 1937, the Governor refused assent to a bill to amend the *Licensing Act*. He did so on the advice of his Ministers, on the ground that equivalent amendments to the Act had already been made by the Governor by way of proclamation and it was therefore unnecessary that the bill should receive assent.[16] Clark J observed:

> The position, therefore, which we have now reached, is that His Excellency as the Executive "enacted" the provisions of the Bill, and then as the representative of the Crown in Parliament (and in consequence of the advice he had received) vetoed the Bill.[17]

Clark J held that it was not competent for the Governor to make the relevant amendments by way of proclamation after the two Houses of the legislature had passed a Bill making equivalent amendments.[18] He concluded that primacy lay with the Parliament.

In other cases, however, the relevant principles have become blurred. The recent Canadian case of *Galati v Governor-General of Canada*[19] is a prime example of the type

12 Note, however, Lindell's argument that it may be a legislative act but still be required to be performed on ministerial advice: Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 130.

13 See, e.g.: *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 193 (Kirby J).

14 *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351, 455 (Dawson J).

15 *McDonald v Cain* [1953] VLR 411, 419 (Gavan Duffy J); *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, [97] (McGechan J). See also: Enid Campbell, 'Royal Assent to Bills' (2003) 14 *Public Law Review* 9, 13.

16 *Re Scully* (1937) 32 Tas Law R 3, 29 (Clark J).

17 *Re Scully* (1937) 32 Tas Law R 3, 30 (Clark J).

18 *Re Scully* (1937) 32 Tas Law R 3, 31 (Clark J).

19 *Galati v Governor-General of Canada* [2015] FC 91 (Federal Court, Canada).

of conceptual confusion that can manifest itself in judicial pronouncements concerning royal assent. Rennie J in the Canadian Federal Court held that the grant of royal assent by the Governor-General was a legislative act and was therefore not justiciable. He regarded royal assent as 'the final stage in the legislative process' and that it is given on behalf of the Queen in Parliament.[20] This was consistent with previous authority that the Lieutenant-Governor, as a representative of the Sovereign, is a part of the legislature, including when giving royal assent.[21]

Rennie J then observed:

> In granting assent, the Governor General does not exercise an independent discretion. He acts on the advice of the Prime Minister. Assent must be given to a bill that has passed both Houses of Parliament; to withhold assent would be inconsistent with the principle of responsible government.[22]

Rennie J was not dealing with the question of whether or not the Governor-General should refuse assent to a bill passed by both Houses if so advised by the Prime Minister. However, his observations that the Governor-General must act upon the advice of the Prime Minister and that the Governor-General must give assent to a bill that has passed both Houses, are potentially inconsistent. It is not clear whether his assertion that the withholding of assent 'would be inconsistent with the principle of responsible government' applies to withholding assent upon the advice of the Prime Minister, or only those cases where assent is withheld contrary to, or without, ministerial advice.

As Rennie J ultimately held that the grant of royal assent was non-justiciable, and as other courts are unlikely to inquire into, or rule upon, the question of whose advice the head of state must act upon in giving assent, the value of judicial pronouncements on the issue is limited.

Textual indications

There are textual indications in statutes in countries such as the United Kingdom and Canada that the head of state acts upon the advice of the Houses. The enacting words of Acts of Parliament in the United Kingdom provide:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -[23]

Similarly, the enacting words in Canada at the federal level provide:

20 *Galati v Governor-General of Canada* [2015] FC 91, [43]-[45] (Rennie J).

21 *Re Initiative and Referendum Act* [1919] AC 935, 943 (Viscount Haldane); and *Gallant v The King* [1949] 2 DLR 425, 430 (Campbell CJ).

22 *Galati v Governor-General of Canada* [2015] FC 91, [46] (Rennie J).

23 See also the enacting words of Barbados, Grenada, Jamaica, Malaysia, Malta, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines.

> Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:[24]

It could be argued, however, that while the advice of the Houses is a necessary prerequisite for assent, it is not sufficient, as ministerial advice is also required. Further, not all jurisdictions identify a source of advice in the words of enactment. In the Commonwealth of Australia, the original words of enactment were:

> Be it enacted by the King's Most Excellent Majesty, the Senate and the House of Representatives of the Commonwealth of Australia as follows: -

In 1990, these words were simplified to: 'The Parliament of Australia enacts'. Australian States, however, originally used the traditional format by which the monarch (or in some cases the Governor) enacted the law on the advice of the Houses.[25] While most have now moved to the simplified formulation,[26] Tasmania still uses as its words of enactment 'Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:'.

These words of enactment also reflected constitutional descriptions of the source of the power to legislate. For example, s 2(1) of the *Constitution Act 1889* (WA) provides that 'it shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order and good Government of the Colony of Western Australia'.[27] While it could legitimately be argued that such provisions reflect the historical origins of legislative power being vested in the Sovereign and exercised by her colonial Governors subject to the advice of legislators, it might also be regarded as reflecting a deeper truth about parliamentary primacy—that the role of a vice-regal official in giving assent is to give effect to the will of the people through their elected representatives in the Houses of Parliament, rather than the will of the executive government.

Practice and views of the participants in the grant of assent

As constitutional convention grows out of practices and procedures, it is important to assess what advice is actually given to the head of state prior to the grant of assent to bills. Practices, however, are inconsistent amongst jurisdictions, reflecting a general lack of clarity about where assent fits into the constitutional system.

In the United Kingdom, the Queen gives assent to bills as set out in letters patent prepared by the Clerk of the Crown, listing every bill that has been passed by the

24 At the provincial level, some provinces provide that 'Her Majesty, by and with the advice and consent of the Legislative Assembly of … enacts as follows', while others, such as the Province of Quebec, provide 'The Parliament of Quebec enacts as follows:'.

25 This formulation finds an earlier source in the *Australian Constitutions Act 1850* (Imp), s 14.

26 See further, regarding South Australia: Geoffrey Lindell, 'Royal Assent to South Australian Legislation' (2003) 14 *Public Law Review* 133.

27 See also: *Constitution Act 1867* (Qld), s 2.

Houses by the assent date.[28] No advice is given by Ministers[29] and there is no involvement of the Privy Council. The list of bills ready for assent is prepared and authorised by the Clerk of the Parliaments. Hence, it is an officer of the Parliament who determines the bills to which the Queen grants royal assent. That assent is not complete until it is notified to each House of Parliament.[30]

While it has been argued that the presentation of the bills to the Queen by the Clerk of the Crown (a senior civil servant in the Ministry of Justice) implies ministerial advice to give assent to them,[31] it is a well-recognised principle in the United Kingdom that bills cannot be withheld from presentation to the Queen for assent.[32] As Bennion has stated, there 'is no power to withhold a Bill from assent, whether on the instructions of the Government or anyone else'.[33] While it is certainly the case that the obligation to present a bill for assent does not entail an obligation on the Queen to give assent to the bill, it remains difficult to argue that presentation of the bills for assent indicates implied ministerial advice to assent, if there is no capacity to withhold the bills from presentation to the Queen.

At the national level in Australia, the Governor-General is not given ministerial advice about whether or not to assent to bills. It is the Presiding Officer of the House in which the bill originated who writes to the Governor-General requesting that assent be given to the bill and enclosing copies of it. The Attorney-General also provides a certificate to the Governor-General with respect to legal matters concerning each bill, being whether or not it needs to be reserved for the Queen's assent and whether any corrections need to be made to the bill. The Governor-General gives assent by signing on the back cover of the assent copy of the bill.[34] There is no ministerial counter-signature accepting responsibility for the action,[35] as there normally is in relation to formal executive acts of the Governor-General.

28 Francis Bennion, 'Modern Royal Assent Procedure at Westminster' (1981) *Statute Law Review* 133, 139-40.

29 Compare the position where the Queen gives assent to reserved bills from colonies or her Realms, in relation to which she does receive ministerial advice. Compare also the Queen's consent to the introduction of bills that affect her prerogative, which is given upon ministerial advice.

30 *Royal Assent Act 1967* (UK), s 1(1); and Francis Bennion, 'Modern Royal Assent Procedure at Westminster' (1981) *Statute Law Review* 133, 141.

31 John Waugh, 'Government Control of Royal Assent in Victoria' (2006) 8(4) *Constitutional Law and Policy Review* 69, 73.

32 Malcolm Jack, *Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) 642-3. Note that this maxim is not intended to imply that assent must be given to the bills—just that they must be presented for assent.

33 F A R Bennion, *Bennion on Statutory Interpretation* (Lexis Nexis, 5th ed, 2008) 218.

34 Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Legislation Handbook,* (2000): http://www.dpmc.gov.au/pmc/publication/legislation-handbook, para 15.5-15.8. See also: B C Wright (ed) *House of Representatives Practice* (Dept House of Representatives, Canberra, 6th ed, 2012) 403; and Paul Hasluck, *The Office of Governor-General*, (Melbourne Uni Press, 1979) 13.

35 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 126-7.

At the State level in Australia, it is generally parliamentary officers who provide bills to the State Governor for assent.[36] Moreover, the maxim that all bills must be presented for assent has solidified into a constitutional requirement in New South Wales, Queensland and Western Australia.[37] Only South Australia provides formal executive advice to the Governor to assent to bills. This is done through the Executive Council.[38] Otherwise, State Governors assent to bills without receiving ministerial advice.[39] They do, however, receive legal advice from the Solicitor-General, or in some cases the Attorney-General, about whether or not they are legally entitled to give assent.[40] This does not amount to ministerial advice to assent, although the withholding of such advice has been used as a procedural tactic to delay the giving of assent.[41]

There are mixed views amongst State Governors about whether, if a bill had been validly passed by the Houses of Parliament and a Minister then advised the Governor to refuse to assent to it, the Governor should act upon such ministerial advice. Some Governors have expressed the view that they would be obliged to act upon the advice of the Houses of Parliament, as this is the primary authority in a system of representative and responsible government. Davis McCaughey, a former Governor of Victoria, stated in a public lecture that the Governor in giving assent does not do so on the request of the Premier, but is instead waited upon by the Clerk of the Parliaments. He concluded that

36 Enid Campbell, 'Royal Assent to Bills' (2003) 14 *Public Law Review* 9, 10. For a detailed description of Victorian practice and relevant Standing Orders, see: Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41, 42-5.

37 *Constitution Act 1902* (NSW), s 8A; *Constitution Act 1867* (Qld), s 2A(2); and *Constitution Act 1889* (WA), s 2(3). These provisions are subject to other constitutional provisions concerning the manner and form of validly enacting a law. See also *Constitution Act 1975* (Vic), s 65G regarding a requirement to present bills passed by a joint sitting to the Governor for assent. Note that such an obligation originally derived from s 31 of the *Australian Constitutions Act 1842* (Imp) which provided that every bill which has been passed by the colonial legislature shall be presented to the Governor for royal assent.

38 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 62. In contrast, in Victoria assent is given to bills *before* the regular meeting of the Executive Council so that commencement dates may be set or regulations made at the meeting: Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41, 45.

39 Although express advice may not be received, there may be a standing instruction or ongoing implication that assent is to be given unless advised to the contrary. In 1996 the Kennett Government gave such a standing instruction to the Victorian Governor.

40 This advice was more relevant before the enactment of the *Australia Acts 1986* (Cth) and (UK), as the advice informed Governors whether or not they were obliged to reserve bills for royal assent. Since 1986, this is no longer an issue regarding State bills. The legal certificate regarding assent may still be relevant, however, if special manner and form requirements apply to the passage of the bill.

41 For example, in 1979 when the British Foreign Secretary warned that he would advise the Queen to refuse assent to a New South Wales Bill to abolish Privy Council appeals if it was reserved, the NSW Government simply withheld the certificate in relation to the Bill so that the Governor took no action in assenting to it or reserving it for assent. It was left in limbo until it was later annulled by the *Constitutional Legislation (Repeal) Act 1985* (NSW). See further: Anne Twomey, *The Chameleon Crown – The Queen and Her Australian Governors* (Federation Press, 2006) 182-190. See also the deferral of assent to a law changing daylight saving time by withholding the certificate: New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 February 1989, 5077.

the Governor in giving assent is not reinforcing the power of the government of the day, but rather, recognising the authority of Parliament.[42]

Other Governors have taken the view that they would act upon ministerial advice or have observed that they were uncertain as to how they would act in such a dilemma.[43] Unsurprisingly, Ministers tend to take the view that Governors must act upon ministerial advice, regardless of Parliament. Parliamentary officers, on the other hand, tend to take the view that the Governor is advised by the Houses, rather than Ministers, in giving assent to bills.[44] Nonetheless, as the President of the Victorian Legislative Council has noted, the 'Parliament has no power to insist on the Governor giving his assent'.[45]

Academic views on the prevailing principle

The predominant academic view, which is strongly influenced by an aversion to the prospect of the exercise of any reserve power,[46] is that the Sovereign and her vice-regal representatives must act upon the advice of responsible Ministers.

Amongst early scholars, Harrison Moore considered that the discretion accorded to the Governor-General in deciding whether to grant or withhold assent, should be 'guided by the advice of his Ministers',[47] although he recognised that Todd had previously argued in relation to royal assent that a vice-regal officer should act 'unfettered by any consideration of the advice which he has received from his own Ministers on the subject'.[48] Indeed, it may be that the type of Ministerial advice contemplated by Harrison Moore was simply legal advice as to whether or not assent could validly be

42 J D McCaughey, *The Crown at State Level,* (Hugo Wolfsohn Memorial Lecture, La Trobe University, 1993) 3. Note Waugh's observation that before McCaughey came to office as Governor in 1986, the Executive Council had advised in relation to the grant of assent in Victoria, and after McCaughey retired, the Premier gave standing advice to the Governor in 1996 to assent to any bill provided that the Attorney-General had certified that there was no objection to its passage: John Waugh, 'Government Control of Royal Assent in Victoria' (2006) 8(4) *Constitutional Law and Policy Review* 69, 71.

43 Conversations between the author and past and present Australian State Governors and their Official Secretaries.

44 See the views of the Clerks of the State Parliaments in 1954 on whether the Governor is advised by the Executive Council in giving assent to bills, as discussed in: Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41, 57-8. Even the South Australian Clerk of the House of Assembly considered that the Governor was not obliged to act upon the advice of the Executive Council. See also the view of the President of the NSW Legislative Council (B Lagan, 'New row over daylight saving', *Sydney Morning Herald,* 11 January 1989, 7) and the President of the WA Legislative Council (WA, *Parliamentary Debates,* Legislative Council, 5 November 1991, 5879).

45 Victoria, *Parliamentary Debates,* Legislative Council, 20 October 2005, 1561.

46 See, e.g., Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 132, referring to the consideration which 'tips the balance' as the 'undesirability of the Queen and her representatives refusing to act in accordance with the advice of Ministers' and the expansion of the 'highly contentious' reserve powers.

47 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles Maxwell, 2nd ed, 1910) 111. See also Sir John Latham who thought that in normal cases the Governor-General's discretion in granting assent should be guided by Ministers but in exceptional cases he could disregard their advice: J G Latham, *Australia and the British Commonwealth* (Macmillan & Co, 1929) 65.

48 Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 2nd ed, 1894) 169.

given or whether the bill had to be reserved. It is this type of ministerial involvement that is considered by Quick and Garran.[49]

Lowell, however, was clear that the refusal of royal assent could only occur upon ministerial advice. He noted that ordinarily, if a ministry sought to advise the refusal of assent to a bill it would raise a matter of confidence, being a ground for resignation or dissolution. He then observed:

> One can imagine, however, a case where after a bill has passed the Commons the ministry should resign, and the House of Lords should insist on passing the bill in spite of the opposition of the new cabinet. It would be rash to assert that in such a case the royal assent would not be withheld.[50]

What is interesting about these statements is that they implicitly raise the issue of the responsibility of ministerial advisers. If important legislation is passed against the wishes of Ministers, then this gives rise to doubts about whether or not they maintain the confidence of the House, and raises the proposition that they should resign or seek a dissolution rather than advise the refusal of assent. If, however, a new government has been formed which holds the confidence of the House and it objects to a bill passed under the auspices of its defeated predecessor, then there is a stronger argument that its advice to refuse assent to a bill should be accepted, assuming the responsibility of Ministers has been established.[51] In most cases, however, the preferable course for a government that holds the confidence of the Parliament would be to pass an appropriate amendment to the objectionable Act.

In more recent times, Brazier has asserted that the 'only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course – a highly improbable contingency – or possibly if it was notorious that a bill had been passed in disregard of mandatory procedural requirements'.[52] He considered that ministerial advice to refuse assent to a bill 'could hardly arise unless a change of Government occurred without a General Election within the brief interval between the passage of the bill and its presentation for assent'.[53] Elsewhere, Brazier has suggested that Ministers might advise the Queen to refuse assent to a private member's bill if it passed on a free vote in the Commons but against the government's advice to Parliament. He noted, however, that it is unclear why a Government would allow a free vote if it objected to the bill in the first place and suggested that this scenario was more likely to arise in a hung Parliament.[54] Both examples raise issues of responsibility. In the first case, if the new Government has established the confidence of the House it may be entitled to advise against assent

49 J Quick and R R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 690-1.
50 A Lawrence Lowell, *The Government of England* (Macmillan Co, 1926) 26.
51 Note, however, that if it would be considered wrong for the Ministers of an incoming government to advise the Sovereign to disallow a law passed under the previous government, then the same might be said for advice to withhold assent.
52 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 127.
53 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998) 127.
54 Rodney Brazier, *Constitutional Practice,* (Oxford University Press, 3rd ed, 1999) 193-4.

to a bill passed with the support of the defeated previous government. However, in the case of a hung Parliament, if a bill of significant importance were passed against the wishes of the Government, doubts would arise about the responsibility of Ministers and whether they were entitled to advise the refusal of assent.

Bradley, Ewing and Knight have made the more bald assertion that the Queen's refusal of assent to a bill 'could now only be exercised on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament'.[55] Tomkins has added that if the monarch was given clear advice by the Prime Minister to withhold assent from a bill 'it seems to be the case that the monarch should follow that advice'.[56] Winterton has argued that there is no reserve power to grant assent contrary to the government's advice,[57] which implies that the head of state in granting assent must act upon ministerial advice rather than the advice of the Houses of Parliament.

Lindell has also supported the view that a vice-regal representative must act upon ministerial advice to refuse assent to a bill even if this conflicts with the wishes of a majority of the Parliament. He noted that the Parliament may still move a vote of no confidence in the government if it acts in this manner.[58] On the other hand, one could equally argue that the government could introduce to Parliament a bill to amend the law to which it objects, with retrospective effect, if it desired. It would then be a matter for the government to convince both Houses to pass the amending bill.

Lindell, who has given some of the closest attention to the issue, concluded that neither Australian nor English precedents provide a clear answer, due to the paucity of relevant occurrences.[59] Nonetheless, he has argued strongly that vice-regal officers must act upon the advice of Ministers, rather than the Houses of Parliament in relation to the grant of assent to bills. In doing so, he recognised the potential clash between the principles of representative government and responsible government, but he concluded that 'the Australian Constitution embodies only *a particular form of representative government known as responsible government'*.[60] The implication appears to be that where they conflict, the elements of responsible government override those of representative government.

Lindell, however, tacitly recognised the importance of the continuing responsibility of Ministers in giving advice to vice-regal officers, stating that it is his view that assent is only exercisable in accordance with the wishes of the Government of the day and

55 A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (Pearson, 16th ed, 2015) 207.
56 Adam Tomkins, *Public Law* (OUP, 203), 63-4.
57 George Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 274, 294.
58 Geoffrey J Lindell, 'The Arrangement for Self-Government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government' (1992) 3(1) *Public Law Review* 5, 14; and Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 132.
59 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 129 and 131.
60 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 130 [original emphasis].

that this is 'especially so if the Government commands the confidence of the House of Representatives'.[61] He stated that he relied upon the 'normal rule' of responsible government, that 'the Queen's representative should act in accordance with the advice of Ministers who are members of, and command the confidence of, the House of Representatives'.[62] The critical question, however, is whether a vice-regal officer is still obliged to act upon the advice of Ministers to refuse assent if those Ministers appear to have lost the confidence of the House or at least failed to hold its confidence in relation to the particular bill. The principle of responsible government is a two-way street—while the head of state must act upon the advice of responsible Ministers, Ministers must maintain their status as responsible to Parliament in order to be entitled to give that advice. The whole *raison d'être* of responsible government is to give primacy to Parliament by ensuring executive accountability to it. It would seem illogical, therefore, for the principles of responsible government to be relied upon to override the will of Parliament.

This point has been taken up in more recent commentary on this issue by Barber. He contended that those who argue that the Queen must accept the advice of her Ministers in relation to royal assent, do so because they categorise assent with other prerogative powers that are exercised on ministerial advice. He noted that the reason why the Queen acts upon ministerial advice in exercising her prerogative powers is because 'Ministers are accountable to Parliament and, ultimately, to the electorate, for the ways they use these powers'. He continued, however, to argue:

> But does this reason justify the inclusion of royal assent within the group of prerogative powers that are exercised on ministerial advice? It is hard to see that it does. Now the convention is operating against democratic values, rather than upholding them. Rather than supporting parliamentary government, it would undermine it. The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law. But just as it would be undemocratic to allow one person – the Monarch – to veto legislation, so too it would be undemocratic to give this power to the Prime Minister. In short, when presented with a bill that has passed through Parliament in a proper manner, the duty of the Monarch is to give assent – irrespective of the advice of her Ministers. There is no room for discretion. On its best interpretation, this is what the convention requires: if the Monarch were to accept the advice of her Prime Minister on this issue, she would be acting unconstitutionally.[63]

61 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 127.

62 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 128.

63 N W Barber, 'Can Royal Assent be Refused on the Advice of the Prime Minister?', UK Const L Blog, 25 September 2013: http://ukconstitutionallaw.org.

RESOLVING THE CONFLICT OF PRINCIPLES

One way of approaching the issue is not to regard it is a binary choice. Instead, the principles of responsible and representative government should be read together to achieve the accountability of the executive to the Parliament while retaining the legislative primacy of the elected representatives of the people from whom governments are formed. This would involve an assessment of the responsibility of Ministers to Parliament in the relevant circumstance.

Dealing with errors in bills when Ministers remain responsible to Parliament

For example, one circumstance in which Ministers might advise the refusal or deferral of assent to a bill is where the government supported the bill in the Houses but then discovered a legal error or other significant flaw in the bill after it had been passed by both Houses but before assent.[64] If the bill is required to come into immediate effect upon assent and the deleterious effects of the law could not adequately be remedied by later legislation, then Ministers may advise the deferral or withholding of assent. In such a case, no question would arise as to whether the government retains the confidence of the Lower House and its Ministers are 'responsible' for the purposes of advising the head of state. It would therefore seem appropriate for the head of state to act upon that advice as it may reasonably be assumed that it would also be supported by at least the Lower House of the Parliament, the approval of which is a necessary pre-requisite for assent.

Indeed, the assumed legislative support of the Legislative Assembly was expressly flagged by the Lieutenant-Governor of Ontario in his withholding of assent to a bill about the sale of medicines and alcohol in 1898. The explanation given in the Journals of the Legislative Assembly of Ontario was as follows:

> His Honour the Lieutenant Governor doth withhold Her Majesty's assent to this Bill, on advice of his Council, it being understood that the Legislative Assembly also desires such withholding of assent thereto, by reason of the bill having been ascertained since the passing thereof, to cover, by its terms, cases not contemplated on the passing of the Bill.[65]

64 Note, however, the advice of the Commonwealth Attorney-General in 1904 that Ministers should not advise that assent be withheld because a clause in a bill is constitutionally invalid, because this would usurp the role of the courts in making such an assessment: J H Symon, Opinion on Royal Assent, 14 December 1904, in P Brazil (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* (AGPS, Canberra, 1981), Vol 1, 239.

65 Ontario, *Journals of the Legislative Assembly of the Province of Ontario,* Vol 31, 17 January 1898, 188.

The same explanation was given by the Lieutenant-Governor of Ontario for withholding assent to the *Street Railway Bill* in 1894.[66]

A more recent example was the deferral of assent to the *Standard Time (Amendment) Bill 1988* (NSW) which would have changed the date for the ending daylight saving time. Business and transport organisations argued that they could not make the necessary arrangements to adjust timetables and practices in time. The Government agreed to delay assent until March 1989 after the period of daylight saving would end under the prior law. However, the President of the Legislative Council argued that the failure to submit the bill to the Governor breached the principles of the Westminster parliamentary system and undermined the paramountcy of the Parliament.[67] The Government backed down and the bill was given assent on 18 January 1989. The law was then amended in February 1989, so that its implementation was delayed until the following year.[68] This was possible because the Government was responsible and had the support of Parliament for the change.

Another example arose in Victoria in 2005 when assent to the Racing and Gambling Acts (Amendment) Bill was deferred for six weeks upon the advice of Ministers in order to give sufficient time for those affected by the bill to change their practices to ensure compliance with it. This action was the subject of criticism,[69] but as the Government remained responsible to Parliament, the Governor acted as advised.

Lindell has observed that in such a case the error should instead be cured by the head of state recommending amendments to the bill, as is permitted by s 58 of the Commonwealth Constitution.[70] Certainly, if this method is available (as it was in Victoria, under s 14 of the *Constitution Act* 1975 (Vic)), it should be employed, as it transfers the decision back to the most appropriate decision-making bodies—the Houses of Parliament. However, not all Westminster-type jurisdictions have such a power.

Change in government between the passage of the bill and assent

More difficult questions arise where the bill was passed under the auspices of a government that has since been defeated and where the newly appointed government

66 Ontario, *Journals of the Legislative Assembly of the Province of Ontario,* Vol 27, 5 May 1894, 203. See also the advice by Ministers of Nova Scotia to the Governor-General to disallow one of their own laws in 1922 due to an error that would have resulted in two changes to traffic rules coming into effect at different times, potentially causing traffic chaos and deaths: Eugene Forsey, 'Disallowance of Provincial Acts, Reservation of Provincial Bills and Refusal of Assent by Lieutenant-Governors since 1867' (1938) 4(1) *Canadian Journal of Economics and Political Science* 47, 50.

67 Bernard Lagan, 'New row over daylight saving', *Sydney Morning Herald,* 11 January 1989.

68 *Standard Time (Amendment) Act 1989* (NSW), assented to on 28 February 1989.

69 See, e.g, Victoria, *Parliamentary Debates,* Legislative Assembly, 26 October 2005, 1768-70; Orietta Guerrera, 'Delay to betting laws "unconstitutional"', *The Age,* 21 October 2005, p 6; and Paul Austin, 'Pipped at the post: Bracks' new racing law', *The Age,* 28 October 2005, p 15; Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41, 63.

70 Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 128.

does not wish to proceed with assent to the bill. If the new government is 'responsible' because it holds the confidence of the Lower House, then it would be appropriate to act upon ministerial advice in refusing assent. In such a case it could reasonably be assumed that the Lower House of Parliament would support the Government's advice.

If, however, the incoming government does not hold the confidence of the Lower House, then an issue arises as to whether or not a vice-regal officer should act upon ministerial advice to refuse assent. This issue arose in New South Wales when the Lang Government was dismissed by the Governor, Sir Philip Game, on 13 May 1932. That morning a number of bills had been passed, including a very controversial one that would have imposed a large tax on mortgagors in the midst of the Great Depression. After the dismissal of Lang, the Governor appointed Bertram Stevens as Premier, even though he did not hold majority support in the Lower House. Arguably, his lack of responsibility meant that he was not entitled to advise the Governor to refuse assent to bills that had been passed by both Houses. However, matters were overtaken by events before the issue of assent was resolved. The Houses were prorogued and then dissolved on 18 May 1932. Both the Governor and the Premier sought legal advice on the status of the bills that had not yet received assent. The Attorney-General advised on 1 June that the bills had lapsed upon the dissolution of the Legislative Assembly.[71]

Policy objection to bills passed against the wishes of the Government

The third category of cases arises where a government opposed a bill or amendments to it and was defeated in the Parliament. This might occur in the case of a hung Parliament with a minority government, or where members of the government have crossed the floor to support a bill or amendments to it against their party's wishes, or where the government has formally given a free vote to its members[72] in the expectation of one outcome, but when confronted with a different outcome sought to prevent it by advising the refusal of assent.

It might be argued that in such a case the government had ceased to be responsible, due to its defeat on what must be regarded as an important legislative measure (given that Ministers are taking the serious step of advising the Governor to refuse assent to it) and that the Governor therefore is not obliged to accept the advice of Ministers who have ceased to be responsible. It might also be argued that a 'Cabinet ought not to advise a normative refusal of assent in the first place'[73] and that because it is breaching convention in doing so, its advice ought to be rejected.

71 Mr D Levy, Attorney-General, Opinion No 32/4653, 1 June 1932: NSW SRO CGS 322, Precedent Book 1932-53, 11/1502, 1. The Stevens Government, which won the ensuing election, remained concerned that if Lang were re-elected in the future, he might present the bills for assent without any further involvement of Parliament. A *Bills Annulment Act* 1935 (NSW) was later passed to ensure that they could not receive assent in the future.

72 Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, Oxford, 1984) 22; Rodney Brazier, *Constitutional Practice,* (OUP, 3rd ed, 1999) 193-4.

73 Andrew Heard, *Canadian Constitutional Conventions – The Marriage of Law and Politics* (OUP, Toronto, 1991) 37.

Such a case arose in New Zealand in 1877 when a bill was passed with amendments to which the Government objected. The Prime Minister, Sir George Grey, advised the Governor, Lord Normanby, to refuse assent. The Governor declined to do so, concluding that if Ministers had a problem with provisions of the Bill, the place to deal with that was in the Parliament. They did not get a second chance at a veto through the Governor. Grey then refused to provide the certificate of legal advice concerning assent to the Bill. The Governor responded by declining to give assent to an Appropriation Bill. Grey capitulated and signed the document and the Governor gave assent to both bills.[74] A B Keith has noted, that Ministers were entitled to advise the Governor to refuse assent, but the Governor could also choose not to follow their advice if he considered that he could obtain other advisers who would assume full responsibility for his actions.[75]

A less serious case of deferral, rather than withholding, of assent occurred in Victoria in 1958. The Police Offences (Trap-Shooting) Bill was passed as a private member's bill by the Victorian Parliament, against the wishes of the Liberal Premier who had voted against it (although 17 Liberal and Country Party members had supported it). The Premier announced on 3 December 1958, after the bill had been passed, that its assent would be delayed until the new year. The reason seemed to be solely a populist one. The Premier, Henry Bolte, was concerned that shooting clubs would have arranged shooting fixtures over the Christmas period and that the commencement of the Act 'would be like banning football a week before the grand final'.[76] The Opposition moved a motion in the Legislative Council contending that the Premier's actions amounted to a breach of the privileges of Parliament. Galbally, for example, objected to the will of the Parliament in passing a bill being flouted by the Premier.[77] Nonetheless, the motion failed along party lines because Bolte retained the confidence of the Legislative Assembly.

This leads to the question of whether, if there is doubt about the responsibility of Ministers and the support of the Houses for the refusal of assent, the head of state should leave this to the Lower House to determine. If Ministers advise the refusal of assent to a bill, the Lower House can always express its objection by voting no confidence in those Ministers, bringing down the government. If a head of state, on the other hand, rejects the advice of Ministers, they may well respond by resigning and it may not be possible to find a new government that holds the confidence of the Lower House. Ultimately, just as the determination of the validity of laws is most appropriately

74 John E Martin, 'Refusal of Assent – A Hidden Element of Constitutional History in New Zealand' (2010) 41 *Victoria University of Wellington Law Review* 51, 72. See also: Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 2nd ed, 1894) 664.

75 A B Keith, *Responsible Government in the Dominions* (Clarendon Press, Oxford, 1912) Vol II, 1007-8. Note, however, Lindell's objection that this precedent is no longer relevant because it comes from another era: Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation – On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126, 131.

76 'Bird Slaughter Goes on Till New Year', *The Herald* (Melbourne), quoted in: Victoria, *Parliamentary Debates,* Legislative Council, 3 December 1958, 2245-6.

77 Victoria, *Parliamentary Debates,* Legislative Council, 3 December 1958, 2247.

made by a court, the determination of confidence in Ministers is most appropriately made on the floor of the House. However, circumstances may arise where Ministers who are not responsible advise the head of state to override the wishes of the Houses by refusing assent to a validly passed bill, where the Parliament is adjourned or prorogued and the Government is putting off summoning Parliament to avoid being defeated on the issue of confidence. In such a case it is arguable that the principle of representative government trumps that of responsible government, given that the key element of responsibility is lacking. In such cases it is a matter for the head of state to make a judgment, based upon all the circumstances, as to the most appropriate resolution of the conflict of constitutional principles.

CONCLUSION

The principles of responsible government are not an end in themselves. Their purpose is to make the executive accountable to the people through their elected representatives in the Parliament. The reason why the head of state, outside of cases of the exercise of reserve powers, is required to act upon the advice of Ministers is *because* they are responsible to Parliament and in order to achieve government by the people through their elected representatives. When Ministers cease to be responsible to Parliament, the force of this conventional requirement to act upon advice is diminished. When Ministers seek to override the will of the Parliament, the principle of responsible government is being employed to work against its foundational purpose.

While the circumstances in which these principles clash arise extremely rarely, as seen by the paucity of examples, it is too simplistic to state that the head of state *must* act upon the advice of the Houses or *must* act upon the advice of Ministers in relation to the grant or refusal of assent in all cases. Consideration needs to be given by the head of state to the circumstances of each case and what actions would best reconcile these fundamental constitutional principles to support the ultimate constitutional rule that the people govern through their elected representatives.

Journalist Shield Laws and Binding the Parliament

Michael Mischin

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INTRODUCTION

In 2011, Western Australia significantly reformed its journalists' shield laws by introducing the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (WA) (the 2011 Bill) which subsequently became the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) (the 2012 Act). In this area, Western Australia leads the way. Its laws are comprehensive, appropriately adapted to their context, and consistent with existing statutory and common law protections. One significant aspect of the laws is their recognition of the need to adopt a balanced approach to journalists' protection laws, to avoid undermining the administration of justice.

This paper outlines the effect of the 2012 Act on the *Evidence Act 1906* (WA) (*Evidence Act*) and the *Public Interest Disclosure Act 2003* (WA) in relation to "shielding" journalists, and touches on some of the differences between the regimes in Western Australia and other jurisdictions. The paper examines the distinction between "privilege" and "protection" for journalists: the latter was adopted by the Western Australian scheme to more accurately describe the nature of the "shield" afforded to journalists. Consideration is given to the manner confidential information is protected, when that information is communicated in a professional context, and the protections afforded to the identity of journalists' informants. Finally, it looks at the Parliament of Western Australia's approach to affording protection to journalists through Legislative Council Standing Order 201 and Legislative Assembly Standing Order 314.

PROTECTION OF CONFIDENTIAL INFORMATION GIVEN IN PROFESSIONAL RELATIONSHIPS

The 2012 Act introduced several new concepts into the *Evidence Act*. Particularly, the inclusion of sections 20A-20F in the *Evidence Act*, as "professional confidential relationship protection" (PCRP) provisions, provides a general protection outside the realm of journalists.

This protection applies to any communication made by a person in confidence to another person in the course of a professional relationship, which does not include

journalists who are the subject of section 20I, and when there is an express or implied obligation of confidence.[1]

Section 20C(1) is the source of the protection afforded to protected confidences disclosed in the context of a professional relationship. It provides that a court may direct that evidence not be adduced if it would disclose a protected confidence or disclose information about the person who made the confidence. The court may do so on application or on its own initiative.[2] This represents a significantly increased protection to such persons. Previously, unless covered by legal professional privilege, there would be no protection afforded these persons.

Crucially, section 20C(1) does not mandate the exclusion of such evidence in a proceeding on the basis that the evidence would disclose a protected confidence or protected identity information.[3] Rather, it confers on the court discretion to direct that such evidence not be adduced, should the court be satisfied that harm will or might be caused to the confider of the information and that the nature, extent and likelihood of that harm outweighs the desirability of the evidence being given.[4] Accordingly, the *Evidence Act* appropriately achieves a balanced approach by increasing the protection to persons who disclose confidential information in the context of a professional relationship without providing an absolute protection that may impede the administration of justice. The assessment and determination of this balancing exercise is, appropriately, left with courts.

Additionally, section 20C(4) prescribes mandatory relevant considerations that courts must take into account.[5] Courts must expressly address these criteria and provide reasons for giving or refusing to give a direction.[6] Inclusion of these mandatory relevant considerations, in conjunction with an obligation on the court to provide reasons, establishes a transparent, accountable and fair process for protecting certain information.

PROTECTION OF JOURNALISTS' INFORMANTS

The *Evidence Act* specifically provides a protection for journalists' informants ("protection provisions (journalists)") in sections 20G-20M. Section 20I establishes a broad protection:

> If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor a person for whom the journalist was working at the time

1 *Evidence Act 1906* (WA) ss 20A(1), 20B(2).
2 *Evidence Act 1906* (WA) s 20C(2).
3 See also s 20C(2) of the *Evidence Act 1906* (WA).
4 *Evidence Act 1906* (WA) s 20C(3)(a)(b).
5 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 *per* Mason J. See also Explanatory Memorandum, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (WA) at pp 8-9.
6 *Evidence Act 1906* (WA) s 20C(6).

> of the promise is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained (*identifying evidence*).

This is a robust protection designed to ensure that journalists and media outlets are, as a general rule, not compelled to reveal their sources. Journalists are defined to mean "a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium", so limiting the protection of informants to those who disclose information to those who seek or who are provided information in the course of their work, and who might be expected to adhere to some form of professional standards, practices and ethics. This ensures the freedom of the press and other media so integral to our free speech and democratic traditions.

Of course, such a protection cannot be absolute, and must be balanced against competing public interest considerations. Accordingly, section 20J of the *Evidence Act* recognises exceptions to the protection when a person acting judicially considers that the public interest in disclosure of a journalist's source outweighs likely adverse impacts on the informant and the public interest in the ability of the media to access sources of facts. As with the "professional confidential relationship protection" provisions, this, too, applies a proportionality test, requiring the decision-maker to balance competing interests to determine which should be given preference in relation to specific circumstances and evidentiary matters. Therefore, as is appropriate, individual cases will turn on their own facts.

In section 20J(3), as with section 20C(4), several specific considerations that the judicial officer must consider are enumerated. These include the probative value of the evidence, availability of other evidence, possible means of protections and national or State security considerations. This comprehensive, but not necessarily exhaustive, list of criteria assists judicial officers (and others acting judicially) to apply a consistent set of principles to this proportionality test. It also ensures that journalists and their sources are apprised of the circumstances in which a court might compel the revelation of a source. This differs slightly from the scheme in the Uniform Evidence Acts, where the matters relevant to the determination of the proportionality test are not specifically listed.

The reason for section 20J's specific provisions was indicated in the Second Reading Speech of the Minister for Planning, the Hon Mr John Day MLA, when he introduced the Bill into the Legislative Assembly, viz:[7]

> [a]lthough it is generally recognised that journalists should identify the source of their information, it is necessary to ensure that protection is provided to cover the circumstances in which a source wishes to remain anonymous.

The Minister also explained that:[8]

7 *Parliamentary Debates*, Western Australia, Legislative Assembly, 12 September 2012, 5738 (Hon John Day MLA, Minister for Planning).

8 *Parliamentary Debates*, Western Australia, Legislative Assembly, 12 September 2012, 5738 (Hon John Day MLA, Minister for Planning).

> This bill achieves this balance by providing a protection for the identity of journalist's sources. The protection prevents a journalist from being compelled to give evidence disclosing the identity of their sources unless it is determined that the protection should not apply in the circumstances of the proceedings in question.

The protection afforded by section 20I extends not only to a journalist providing oral testimony, but also swearing an affidavit.[9] Significantly, it is presumed that the journalist is not compellable to give evidence of the information disclosed or identity evidence of their source unless the court directs otherwise.[10] These 2012 Act provisions are a significant and valuable increase, compared to the previous legal situation, in the level of protection afforded to journalists[11]—and their sources—while preserving the ability of the courts to ensure the proper administration of justice.

Furthermore, the protection may also be lost, with the court directing that the journalist give identifying evidence in the event of "misconduct" as described in section 20K. Again, this is discretionary and a balancing exercise, although section 20K(3) provides that generally a direction should be given in the circumstances set out therein.

The Western Australia shield laws received national attention when they were used in 2012 to set aside a subpoena directed to *The West Australian* newspaper and Mr Steve Pennells, a senior journalist, in *Hancock Prospecting Ltd v Hancock (Hancock* Case*)*.[12] The subpoena was to compel the newspaper and journalist to reveal their sources so as to provide evidence in civil proceedings. The case is an illustration of the 2012 legislation applying in precisely the context it was envisaged it would apply: that is, requiring the court to take into account the legislatively specified factors and make a decision as to whether to compel the revelation of the sources. The court decided not to compel the disclosure of the sources.

"PROTECTION" V "PRIVILEGE"

The *Evidence Act 1995* (NSW), *Evidence Act 1995* (Cth) and *Evidence Act* 2001 (Tas) employ the word "privilege" to describe the protection they afford journalists. However, unlike the States which operate under the Uniform Evidence Act, Western Australia has eschewed using the word "privilege" in its provisions, because it is considered to misleadingly equate the protection with the more traditional concept of "legal professional privilege".

The Parliament of Western Australia expressly rejected the notion that the provisions in the 2012 Act would create a "journalists' privilege": the Explanatory Memorandum

9 See Explanatory Memorandum, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (WA) at p 16 concerning the term "give" rather than "adduce".

10 *Evidence Act 1906* (WA) s 20J(1)(2); see also *Parliamentary Debate*s, Western Australia, Legislative Assembly, 12 September 2012, 5739 (Hon John Day MLA, Minister for Planning).

11 See *Parliamentary Debate*s, Western Australia, Legislative Assembly, 12 September 2012, 5739-40 (Hon John Day MLA, Minister for Planning).

12 [2012] WASC 290.

to the 2011 Bill states that "[p]roperly understood … the [Professional Confidential Relationship Protection] provisions introduce a protection *not a privilege*" [emphasis added].[13]

This was noted by the Western Australian Supreme Court in the *Hancock* Case.[14] In that case, Justice Pritchard considered firstly that:[15]

> … the so-called newspaper rule [namely that sources of journalists' information is privileged] is not, in fact, a rule at all, but simply a practice which has developed over time to inform the exercise of a court's discretion whether to require a journalist or news media defendant to disclose a confidential source of information.

Secondly, the Court further explained:[16]

> … that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interest of justice … The point is that there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to superior public interest, such as the public interest in national security. *The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence* …" [emphasis added].

During the Bill's Second Reading Speech, the Minister said the intention of the Bill was to "introduce responsible and accountable protections for professional persons and journalists which, in appropriate circumstances, preclude them from being compelled to give evidence".[17] Subsequently, he emphasised:[18]

> The new protection that the bill introduces is not absolute. The [protection] provisions are intended to assist professionals in reconciling their ethical obligations to preserve their client's confidentiality and their legal obligations to give evidence when required to do so by a court. The bill reconciles these conflicting obligations by vesting a guided discretion in the court to exclude evidence of a confidential communication.

13 See Explanatory Memorandum, Evidence and Public Interest Disclosure Legislation Amendment Bill 2012 (WA) at p 3.

14 [2013] WASC 290.

15 [2013] WASC 290 at [75] citing *John Fairfax and Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 356 *per* Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; *West Australian Newspapers Ltd v Bond* (2009) 40 WAR 164 at 176 [45] *per* Buss JA (with whom Owen and Wheeler JJA agreed); *Wran v Australian Broadcasting Commission* (1984) 3 NSWLR 241 at 250 *per* Hunt J.

16 [2013] WASC 290 at [76] quoting *John Fairfax and Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 354 *per* Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

17 *Parliamentary Debates*, Western Australia, Legislative Assembly, 12 September 2012, 5738a (Hon John Day MLA, Minister for Planning).

18 *Parliamentary Debates*, Western Australia, Legislative Assembly, 12 September 2012, 5739a (Mr John Day MLA, Minister for Planning).

There is obviously a public interest in the flow of information and news. However, it is essential that this is balanced against the need for courts and tribunals to be properly apprised of information that may affect their decisions. If journalists' sources were privileged, they would rarely, if ever, be admissible in legal proceedings. A qualified protection, on the other hand, ensures that the interests of justice are always at the forefront. Describing the protection as a privilege is apt to mislead.

Excepting that they do not use the word "privilege", the Western Australian provisions are considered to adopt or follow those in the *Evidence Act 1995* (NSW).[19] Despite containing the word "privilege", The Supreme Court New South Wales has held that:[20]

> [s]ection 126B [of the *Evidence Act 1995* (NSW)] does not create a privilege, properly so called, but confers on the Court a discretion by which it may direct that evidence of a confidential communication not be adduced, which is to be exercised having regard to the various relevant factors, including those listed in section 126B(4). The mere fact of confidentiality gives rise to the discretion, but it is clear from the factors listed in section 126B that the mere fact of confidentiality does not create an entitlement to a favourable exercise of that discretion.

Accordingly, in Western Australia, and arguably in the Uniform Evidence Act jurisdictions, it is wrong to describe this protection as a "privilege". This difference is reinforced by section 20B of the WA *Evidence Act* which provides that nothing in the 2012 Act's provisions affects the law in relation to legal profession privilege.

PARLIAMENT

In addition to the parliamentary debates, two reports were tabled dealing with extending the proposed journalists' protection to parliamentary proceedings: Report 23 of the Legislative Council's Standing Committee on Procedure and Privileges, titled *Reference from the House – Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* and Report 4 of 2014 of the Legislative Assembly's Procedure and Privileges Committee, titled *Disclosure of the Identity of Journalists' Informants in the Course of Parliamentary Proceedings*.

The protections proposed by the 2011 Bill were to be available when persons acting judicially had to decide whether to compel journalists to disclose sources of their information. A balancing test was required to be used as the central part of this decision-making process.

During consideration of the Bill in the Legislative Council, an important issue arose, which required an answer to two questions.

19 See Explanatory Memorandum, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (WA) at pp 1-2.

20 *Director-General, Department of Community Services v D* (2006) 66 NSWLR 582 at 590 [23] *per* Brereton J.

First, as a matter of statutory construction, did the Bill, as drafted, extend to parliamentary proceedings? There was legal advice that the Bill, as a matter of statutory construction, had that legal effect. However, to avoid any uncertainty, it was suggested that, if it were Parliament's intention to so extend the operation of the Bill that far, it should be made clear by an express amendment. Such an amendment should indicate that the reference in the Bill to a person acting judicially includes "a member of a House of Parliament or a Committee of a House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence".[21]

That amendment was not pursued for several policy and legal reasons. The latter included the possibility that such an amendment "unquestionably qualifies the principle of the exclusive cognisance of the House"[22] and potentially subject parliamentary proceedings to judicial review. Consequently, it was decided not to pursue such an amendment. Instead, it was decided to do two things. First, the Bill was amended to expressly exclude its application to parliamentary proceedings. Secondly, the Standing Orders of the Legislative Council and Legislative Assembly were amended to expressly indicate that Parliament and its Committees could, when confronting the question of whether a journalist should be compelled to reveal their sources of information, apply the same balancing test as contained in the Bill.[23]

Secondly, during these considerations, there was a background constitutional law issue; namely, that if the amendment had been pursued and enacted, would it also have been possible to ensure that the amendment bound future Western Australian parliaments? In this context, legal advice also indicated that enactment of the amendment would create "difficulties or [a] radical constitutional shift".[24] That shift might not have only been in relation to the longstanding relationship between the Parliament and the courts, but also in relation to a Parliament endeavouring to bind future parliaments. In addition to the obvious intricacies involved in the law surrounding manner and form provisions, including whether section 6 of the *Australia Act 1986* (Cth) is the only source of legal efficacy of manner and form provisions and the scope of section 73(2) of the *Constitution Act 1889* (WA), there are important considerations including the democratic representative nature of Parliament and its continuing sovereignty.

Ultimately, the position was taken that the proposed legislation should not bind the Parliament and that the Parliament should not attempt to bind its successors. The course of confining the legislation to persons acting judicially and having Parliament's

21 See *Evidence Act 1906* (WA) s 20G, which currently provides that a person acting judicially "*does not* include a member of a House of Parliament or a Committee of a House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence" (emphasis added).

22 Standing Committee on Procedure and Privileges, *Reference from the House – Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*, Report 23, 2011, Legislative Council, Western Australia, pp 5-6.

23 See Appendix A: reproducing Legislative Council Standing Order 201 and Legislative Assembly Standing Order 314.

24 Council Report p 7 (quoting legal advice provided to the Procedure and Privileges Committee of Mr Bret Walker SC, 18 November 2011, p 9, paragraph 17).

position regulated by its own Standing Orders preserved democratic legitimacy and the Western Australian Parliament's sovereignty.

Given that, the 2012 Act does not apply to the operations of the Parliament. The protection provided by those amendments would not be available, by their own force, to journalists giving evidence to parliamentary committees.

STANDING ORDERS 201 & 314

Ordinarily a person before a parliamentary committee is obliged an answer all questions put to them and to answer them truthfully. This includes journalists. Consequently, journalists could have been compelled to reveal their sources or, if they refused to do so, be punished for contempt pursuant to the *Parliamentary Privileges Act 1891* (WA). Parliament considered that this inconsistency between the general law applicable to judicial proceedings and parliamentary practice was undesirable. Consequently, on 23 August 2012, the Legislative Council resolved to request its Parliamentary Procedure and Privileges Committee to draft a Standing Order reflecting the new sections of the *Evidence Act*.

Two alternative draft Standing Orders were considered by the Committee. The first provided that where a journalist is, under examination, asked to disclose a source, the Council may excuse the answering of the question under section 7 of the *Parliamentary Privileges Act 1891* (WA). It also provided that the Legislative Council was to apply sections 20I to 20M of the *Evidence Act* when considering whether to compel or excuse a journalist from revealing their sources.

The second was essentially to the same effect, but inserted the words of the relevant sections of the *Evidence Act* into its Standing Orders. The Committee adopted this second iteration. It preferred this because the proposed Standing Order "makes clear the considerations required by the House in these circumstances, without reference to an Act of Parliament".[25]

Accordingly, Standing Order 201 provides a robust protection to journalists giving evidence to Parliament while enabling the Legislative Council or one of its committees, should it take view that there is an overriding reason for the source to be revealed, to compel the journalist to reveal their source.

The Legislative Assembly took a different approach, and adopted a Standing Order which requires the Assembly when "considering whether to require a journalist to disclose an informant's identity [to] have regard to the public interest of having a free press when it does so".[26] The Legislative Assembly Report's reasons included "that the circumstances in which a journalist refused to disclose an informant's identity already

25 Legislative Council Report 24, p 22.
26 Western Australia, Legislative Assembly, Standing Order 314.

could—and undoubtedly would—be taken into account by an Assembly committee and by the House itself in the absence of journalist shield provisions".[27]

CONCLUSION

While deciding to retain and not impair the Western Australian Parliament's democratic legitimacy and sovereignty, two significant reforms to protect journalists and their sources have been implemented. First, the Parliament is able by resort to Standing Orders to deal with questions of whether or not a journalist should reveal their sources. This is an important way to enable Parliament to conduct its proceedings while also ensuring that the separation of roles between the Parliament and courts is maintained. Second, legislation enables the courts, with express and clear criteria which need to be taken into account when persons acting judicially are required in the course of litigation to decide whether information—including information about journalists' sources—should be revealed to litigants and the court, to balance competing public interests.

I would commend these reforms, and the parliamentary reports on which they are based, to other jurisdictions.

APPENDIX A

PARLIAMENT OF WESTERN AUSTRALIA LEGISLATIVE COUNCIL STANDING ORDER 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 —

27 Legislative Assembly Report p 13.

(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;

(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.

PARLIAMENT OF WESTERN AUSTRALIA LEGISLATIVE ASSEMBLY STANDING ORDER 314. DISCLOSURE OF THE IDENTITY OF JOURNALISTS' INFORMANTS

If the Assembly is considering whether to require a journalist to disclose an informant's identity it shall have regard to the public interest of having a free press when it does so.

Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?

Rosemary Laing

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ABSTRACT

Although, under the Australian Constitution, the privileges of the Parliament must exist in a textual context which provides for the other branches of government, including the judicature, tradition, practicality and law require that a large measure of deference should be accorded to the exercise by the Parliament of its privileges. In ascertaining the Parliament's purpose in a matter connected with its privileges, no court should strain legislative language to claim a jurisdiction which has not been clearly vested in it. Restraint is the watch-word for courts in this context. If the Parliament wishes to confer jurisdiction in accordance with the legislative powers that it enjoys under the Constitution, it may do so. But, subject to the Constitution, it is for the Parliament, and the Parliament alone, to surrender its privileges and to involve the courts in the resolution of controversies that concern those privileges.[1]

INTRODUCTION

While there remains a presumption in favour of parliamentary predominance, across centuries and jurisdictions, parliaments have ceded much ground to the other branches of government, to the extent that there are now significant questions about the continuing relevance of the doctrine of exclusive cognisance. This paper will first examine what is meant by exclusive cognisance before considering areas in which it has been modified, surrendered or never fully enjoyed. It concludes with some speculation about where the doctrine may continue to have some traction in the future.

WHAT DO WE MEAN BY EXCLUSIVE COGNISANCE?

The language of parliamentary privilege presents many challenges for the general reader because of unavoidable connotations of exclusivity and elitism. As a term, "exclusive cognisance" tends to alienate through connotations of fustiness and

1 *Sue v Hill* [1999] HCA 30 at [251] per Kirby J. Comparable views about competing interests and the balance being struck in favour of Parliament were expressed in *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) at 337.

self-importance that are inimical to modern concepts of representative democracy. "Cognisance" itself has various meanings, first in relation to knowledge, secondly in legal senses including taking authoritative notice of something or having jurisdiction, and thirdly in the sense of a distinguishing device or mark. Its relevance in a parliamentary context is closest to the legal senses in meaning.

While some parliamentary texts avoid the term altogether,[2] others link it to concepts of the independence of Houses to perform their constitutional role and the consequential right to control their own affairs. *House of Representatives Practice*, for example, refers to the term in this context:

> The right inherent in each House to exclusive cognisance of matters arising within it has evolved through centuries of parliamentary history and is made clear in the provisions of the Constitution.[3]

Some authorities describe the concept as a "power", one of several underpinning the capacity of a House to function as such. *New South Wales Legislative Council Practice*, for example, lists the power of the Houses to regulate their own affairs among powers of the Houses in NSW.[4]

Other authorities refer to the exclusive jurisdiction of a House over its internal affairs or its exclusive right to control its own proceedings under the umbrella of "privileges" or "powers and privileges".[5]

Whether it be called a power, privilege or right, exclusive cognisance might be translated as "the exclusive jurisdiction of a House over its internal affairs, including its own proceedings". The most recent UK Joint Committee on Parliamentary Privilege explained it as a "corollary of Parliament's immunity from outside interference" in that "those matters subject to parliamentary privilege fall to be regulated by Parliament

2 *Odgers' Australian Senate Practice* is one example—so far.

3 B.C. Wright and P.E. Fowler (eds), *House of Representatives Practice*, 6th edition, Department of the House of Representatives, Canberra, 2012, p. 36 [references omitted].

4 Lynn Lovelock and John Evans (eds), *New South Wales Legislative Council Practice*, The Federation Press, Sydney, 2008, p. 81. At the outset, it is worth noting that the NSW Houses operate on a different footing to the legislatures in most other Australasian jurisdictions whose powers, privileges and immunities are defined by reference to those of the UK House of Commons as at specified dates. Statutory powers aside, without an adoption by reference, it has been held that the NSW Houses possess only those powers and immunities that meet the common law test of reasonable necessity for the performance of their functions (Lovelock & Evans, pp. 56-7). *Barton v Taylor* (1886) 11 AC 197 confirmed the right of a legislative body "of protecting itself from all impediments to the due course of its proceedings" including by regulation of internal affairs (Lovelock & Evans, p. 81). The extent to which the NSW Houses can lay claim to *exclusive* cognisance, however, will be modified by the limitations that flow from the common law foundation of their powers which are only those that are reasonably necessary for the Houses to perform their functions under a framework of representative democracy and responsible government. The reasons for this position are historical although, from time to time, consideration has been given to changing it. See Stephen Frappell, "A Case for a Parliamentary Privileges Act for New South Wales", *Australasian Parliamentary Review*, Autumn/Winter 2015, Vol. 30 No. 1, pp. 8-25.

5 See, for example, David McGee (ed), *Parliamentary Practice in New Zealand*, 3rd edition, Dunmore Publishing Ltd, Wellington, 2005, p. 608; Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, pp. 177-8; Gareth Griffith, "Parliamentary Privilege: First Principles and Recent Applications", NSW Parliamentary Library Research Service, Briefing Paper 1/09, 2009, p. 2.

alone".[6] Other definitions are broader and include a number of elements, identified in *House of Representatives Practice* as follows:

> The complete autonomy of each House, within the constitutional and statutory framework existing at any given time, is recognised in regard to:
> – its own procedure;
> – questions of privilege and contempt; and
> – control of finance, staffing, accommodation and services.[7]

While exclusive cognisance might appear as inward looking, its effect is actually twofold: to protect the capacity of a House to function by excluding interference from external sources; and to control the extent and manner in which those outside the Parliament—and particularly the courts—use or make reference to its proceedings. The first element was summarised succinctly by Sir Edward Coke in the 17th century: "whatever matter arises concerning either house of Parliament, ought to be discussed and adjudged in that house to which it relates, and not elsewhere".[8] An aspect of the first element is the privilege of freedom of speech, given brief statutory form in the *Bill of Rights 1689*, but another facet is usefully described in the current edition of *Erskine May*:

> Closely related to the claim to freedom of speech in and underlying the Bill of Rights is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure. This is equally the case where the House in question is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or where (like a bill) it is the joint concern of both Houses. The principle holds good even where the procedure of a House or the rights of its Members or officers to take part in its proceedings depends on statute.[9]

Under this doctrine, the courts will not review acts or omissions of the Houses and their committees collectively, or of individual members as members.

The second element is the traditional practice that no reference be made to parliamentary proceedings in court without leave of the House concerned. It is also reflected in resolutions or standing orders of some Houses which require leave to be sought for officers of a House to give evidence elsewhere. For example, Senate standing order 183 provides:

> A senator or officer of the Senate, or a person involved in recording the proceedings of the Senate or a committee, may not give evidence elsewhere in respect of

6 Joint Committee on Parliamentary Privilege, *Report of Session 2013-14*, HL Paper 30, HC 100, p. 7.
7 *House of Representatives Practice,* p. 36 [references omitted].
8 Sir Edward Coke, 4th *Institutes*, 15.
9 Sir Malcolm Jack et al (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edition, LexisNexis, 2011, p. 227.

> proceedings of the Senate or the committee, without the permission of the Senate, or, if the President is authorised to give that permission, of the President.[10]

While the practice is theoretically linked to Article 9 of the Bill of Rights, mere reference to reports of proceedings in court has never been regarded as contrary to Article 9 where no inferences were sought to be drawn from the material.[11] Courts already have a duty to ensure that the tendering of such records or the examination of parliamentary officers does not lead to questioning or impeaching of parliamentary proceedings. The need for such a practice has therefore been questioned in several jurisdictions and subsequently relaxed.[12]

This is but one respect in which exclusive cognisance has been modified but not so as to significantly affect the powers or immunities of a House. In the next section, the paper sketches other ways in which exclusivity has been modified, including where it never operated, or operated only to a limited extent. Examples used are illustrative rather than comprehensive.

LIMITING EXCLUSIVE COGNISANCE

The three areas of autonomy identified in *House of Representatives Practice*, provide a useful structure for examining how the doctrine of exclusive cognisance has been modified.

In addition to procedures, questions of privilege or contempt, and internal affairs, a fourth traditional area, the right of a House to determine its own constitution, has been extensively modified in many jurisdictions by the enactment of statutes to deal with questions arising from disputed elections, qualifications of members or the existence of vacancies in representation.

For the Commonwealth Houses, the Constitution and the *Commonwealth Electoral Act 1918* provide for the determination of most of these questions by specified procedures (for example, for holding by-elections for the House of Representatives or filling casual vacancies in the Senate) or by the courts.[13] In addition, section 8

10 The equivalent standing order of the House of Representatives is standing order 253. A resolution of the House of Commons of 1818 on which standing orders such as these are based, required leave of the House for the attendance in court of officers to give evidence about proceedings: Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, Parliamentary Paper No. 219/1984, pp. 66-67.

11 Joint Select Committee on Parliamentary Privilege, *Final Report*, p. 229, n44.

12 A 1980 Resolution of the UK House of Commons was one such relaxation, although the same resolution made it clear that the statutory protection afforded by Article 9 was not affected (*Erskine May*, p. 229). Another example is Senate Privilege Resolution 10, agreed to on 25 February 1988, which declares that leave of the Senate is not necessary for the admission into evidence, or reference to, records or reports of proceedings, or evidence relating to such proceedings.

13 For accounts of the transfer of this jurisdiction to the courts, see the unanimous decision of the High Court sitting as the Court of Disputed Returns in *Re Wood* [1988] HCA 22 at [1]-[45]; and *Sue v Hill* [1999] HCA 30, joint decision of Gleeson CJ, Gummow and Hayne JJ at [3]-[27], separate decision of Gaudron J at [106]-[157]. McHugh J and Kirby J dissented on the Court's jurisdiction to hear the matter.

of the *Parliamentary Privileges Act 1987* removed the power of the Houses to expel one of their members, leaving questions of membership to be determined ultimately by the electors.[14] Only when it comes to re-establishing the Senate rotation under section 13 of the Constitution does the Senate have a residual role (and, in effect, a free hand) in determining how it will divide senators into the two classes of short and long-term senators, although section 282 of the Commonwealth Electoral Act provides a mechanism for the order of election of senators in a simultaneous dissolution election to be established should the Senate choose to employ a method based on that system.[15] In contrast, provisions of the Victorian Constitution and electoral law, for example, preserve some traditional powers of the Houses in this area.[16]

Having been so substantially modified, this aspect of exclusive cognisance will not be further considered.

Procedures and proceedings

(i) standing orders

We assume that the authority of a House to make and interpret its own rules of procedure is paramount but there are some significant limitations attributable to the provisions of written Constitutions.

The Australian Constitution, in section 50, gives each House the power to make rules and orders with respect to:

(i) The mode in which its powers, privileges, and immunities may be exercised and upheld;

(ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

The powers, privileges and immunities of each House, conferred by section 49, are those of the UK House of Commons, until the Parliament declares otherwise. There are, however, some other constitutional provisions which limit the freedom of the Houses to determine their own rules and orders. For example, the quorum of each House is prescribed by the Constitution (in sections 22 and 39) and may be changed only by legislation. Certain features of the choice and tenure of Presiding Officers are set out in sections 17 and 35.

14 On the power to expel, see Queensland Ethics Committee, *Report No. 139*, November 2013, Part 3: "The Cumulative Effect of Findings of Contempt".

15 For further detail, see Rosemary Laing and Harry Evans (eds), *Odgers' Australian Senate Practice*, 13th edition, Department of the Senate, Canberra, 2012, pp. 129-30.

16 Section 61A, *Constitution Act 1975* (Vic) preserves a limited right of a House to deal with minor or inadvertent disqualification questions. Section 133 of the *Electoral Act 2002* (Vic) provides that a question about a disputed election may be determined only by the Court of Disputed Returns unless the House concerned determines that section 61A applies. An allegation that a member has become subject to a disqualification after election may be referred to the Court under section 143 of the Electoral Act but a House may choose to deal with the matter under section 61A or under its general power to determine its own composition which it possesses because of the adoption of UK House of Commons powers as at 1855 (section 19, *Constitution Act 1975* (Vic)). Greg Taylor, *The Constitution of Victoria*, The Federation Press, Sydney 2006, p. 275.

Section 23, which provides for the Senate President to have a deliberative vote only, for questions to be determined by a majority and to be resolved in the negative when votes are equally divided, has had a profound impact on Senate procedures. Section 23 has sometimes been invoked to argue against special majorities required by some standing orders, although the Senate has not taken an entirely consistent position on these matters.[17] The equivalent provision for the House of Representatives (section 40) gives the Speaker a casting vote only. These limitations are fundamental to the character and functions of the Houses as envisaged by the Founders.

Things could have been different. In the form proposed in the draft constitution bill brought by Tasmanian Attorney-General, Andrew Inglis Clark, to the 1891 Sydney convention, section 50 would have required standing orders to be approved by the Governor-General.[18] Clark had transposed the equivalent provision from the colonial Tasmanian Constitution Act and had apparently missed the threat to the Houses' independence posed by the need for external approval. Although part of the Parliament in one mode, the Governor-General was also to be the head of the executive branch of government. The need for his approval was therefore a potential fetter on the exclusive cognisance of a House over its own affairs. For a House such as the Senate, where it was recognised that the executive government may not command a majority, the degree to which approval of standing orders might involve executive government input, let alone interference, posed an unacceptable risk. Clark's draft was amended at an early stage, perhaps at the instigation of more perceptive parliamentarians.[19]

Some state constitutions retain colonial vestiges in having Governors approve the standing orders of the Houses.[20] In these circumstances, it might be difficult to sustain a claim for exclusive cognisance in relation to rules and procedures were it not for the underlying ability of Houses to suspend their standing orders when needed and without question by any external body. Provision for external approval is nonetheless an anachronism and an unnecessary fetter on the freedom of Houses to determine their own standing rules of procedure.[21]

17 Most special majority requirements were removed in a major review of standing orders in 1989. See Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, pp. 441-2, 549, 568. On the disputed interpretations, see J.R. Odgers, *Australian Senate Practice*, 6th edition, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, pp. 393-9. On special majorities, also see Taylor, *The Constitution of Victoria*, p. 300.

18 Clark's 1891 draft Constitution Bill is reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, pp. 80-93. See clauses 14 and 51.

19 For an account of the evolution of sections 49 and 50 of the Australian Constitution, see Rosemary Laing, "Andrew Inglis Clark: A Dim View of Parliament?" in Papers on Parliament No. 61, *'The Truest Patriotism': Andrew Inglis Clark and the Building of an Australian Nation*, Department of the Senate, Canberra, May 2014, pp. 5-14. The author's view is that Clark had greater interest in what became Chapters II and III than in the legislature, important though he recognised it was.

20 For example, section 15, *Constitution Act 1902* (NSW), section 17, *Constitution Act 1934* (Tasmania), section 55, *Constitution Act 1934* (SA) ; compare section 11, *Parliament of Queensland Act 2001* (Qld), section 34, *Constitution Act 1889* (WA).

21 The same principle applies to the appointment and removal of parliamentary staff by Governors.

(ii) legislative processes

Some inroads on exclusive cognisance have been made by constitutional requirements affecting the legislative process, including manner and form provisions [22] and procedures for dealing with financial legislation. The financial powers of the Senate, for example, are determined by section 53 which identifies classes of bills which may not be introduced in the Senate and which provides for the Senate to make requests for amendments to bills which it is unable to amend. The financial powers of the Senate were a sticking point in reaching agreement on the terms of the Federation. Although limitations on the Senate's financial powers were the price of Federation, an important *quid pro quo* was that failure to comply with these provisions would not be justiciable. As is appropriate in a bicameral system, disputes on section 53 issues are a matter for negotiation between the Houses.

On the other hand, failure of the Houses to comply with the legislative processes prescribed by section 57 of the Australian Constitution may bring the proceedings of the Houses into the jurisdiction of the courts.[23] In the only instance of a joint sitting held pursuant to section 57, in 1974, one of six laws passed was successfully challenged in the High Court for its failure to comply with section 57.[24] In the case of the *Petroleum and Minerals Authority Act 1974*, the required three month interval had not elapsed between its first rejection by the Senate and its second passage by the House of Representatives. The law was therefore held to be invalid. The High Court made it clear at the time, that its jurisdiction depended on the existence of a law whose constitutionality could be challenged. The Court had earlier declined to interfere in the process to convene the joint sitting.[25]

(iii) judicial review of legislation

In the UK, judicial review of legislation for validity is seen as an area of potential encroachment by the courts into Parliament's domain. The report of the 2013–14 Joint Committee on Parliamentary Privilege referred to an increase in the incidence of references made in court to parliamentary proceedings and categorised them into three areas:

- reference to statements made by a minister in Parliament as an aid to interpretation to resolve ambiguity (following the decision in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593);
- the historical exception doctrine involving references to parliamentary proceedings to establish matters of history without questioning the content in any way;

22 See, for example, *Marquet v Attorney-General (WA)* (2002) 193 ALR 269.

23 Section 57 is the so-called double dissolution provision which establishes a mechanism for resolving legislative deadlocks between the Houses, first by reference to the people to elect new members to both Houses and, secondly, by means of a joint sitting on the disputed bill or bills.

24 *Victoria v Commonwealth and Connor* (1975) 134 CLR 81.

25 *Cormack v Cope* (1974) 131 CLR 432.

- judicial review cases where courts have, according to the Joint Committee report, gone too far, in error, in referring to parliamentary proceedings and using them to draw inferences and conclusions.

Despite a general concern, the UK report concluded that, in the absence of unacceptably intrusive court proceedings, as experienced in Australia in the 1980s (and since, in New Zealand), there was insufficient justification for following the antipodean approach and enacting a Parliamentary Privileges Act.

There is little doubt, however, that the Commonwealth Privileges Act, perhaps in combination with other statutory provisions, has effectively stopped Australian courts from "going too far".

In 1984, the insertion of section 15AB in the *Acts Interpretation Act 1901* put beyond doubt the capacity of courts to use extrinsic aids to confirm or determine the meaning of statutory provisions in cases of ambiguity, including relevant parliamentary committee reports, explanatory memoranda and ministers' second reading speeches, and any relevant material in the minutes or records of debate in each House. Subsequently, when the Parliamentary Privileges Act was passed in 1987, in part to declare the meaning of terms used in Article 9 of the Bill of Rights, section 16 included the following clarification:

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

With written constitutions operating in all States and at Commonwealth level and the legislative powers of the Commonwealth specified in the Constitution, judicial review of legislation for constitutional validity is a well-established function, as noted by the High Court on many occasions:

> Of course, the framers of a constitution may make the validity of a law depend on any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding within Parliament the courts must take it under their cognisance in order to determine whether the supposed law is a valid law …[26]

Questions of privilege and contempt

Whereas the House of Commons once claimed sole right to determine all matters relating to parliamentary privilege, the landmark case of *Stockdale v Hansard* (1839) 112 ER 1112 settled the principle that parliamentary privilege was a branch of the

26 *Clayton v Heffron* (1960) 105 CLR 214 at 235.

ordinary law whose existence and extent was for the courts to determine, while leaving all questions of its application to the House concerned.

Since then, the question of whether the penal jurisdiction of a House should be transferred to the courts has been of perennial interest. In the 1984 report of the Commonwealth Joint Select Committee on Parliamentary Privilege, for example, the committee considered a range of options but concluded that the penal jurisdiction must remain with the Parliament.[27]

Influential in this conclusion was the committee's recommendation to abolish defamatory contempts which had hitherto taken up much time and attention of the Houses. The recommendation took away many of the objections of traditional opponents of Parliament as prosecutor, judge, jury and gaoler in its own cause, namely, the press which would henceforth have greater freedom to criticise members of Parliament without risking contempt. The main reason for retaining the penal jurisdiction of the Houses, however, was the value of that sanction as the ultimate guarantee of Parliament's independence and its free and effective working".[28] The inherent flexibility of Parliament, its ability to rely on a wide range of considerations not available to a court and to temper the penalties it could impose, the value of maintaining the separation of powers between the legislature and the judicature, and the desirability of Parliament taking responsibility for imposing penalties for contempt—along with the attendant opprobrium—were also cited as reasons for Parliament retaining its penal jurisdiction.

Despite its immediate genesis in certain decisions of the NSW Supreme Court, the Commonwealth *Parliamentary Privileges Act 1987* was also an opportunity to implement recommendations of the Joint Select Committee.

There was a certain irony about the Act that did not go unnoticed by expert commentators. At the same time as it asserted the independence of the Parliament by reiterating Article 9, the Act modified the exclusive cognisance of the Commonwealth Houses in significant—and perhaps problematic—ways. It created criminal offences of unauthorised disclosure of *in camera* evidence and improper intimidation or penalisation of witnesses, and allowed an exception to the Article 9 immunity in order to prosecute such offences, thus continuing a pattern, started by the UK *Witnesses (Public Inquiries) Protection Act 1892* and followed by the early Commonwealth laws establishing joint committees on public works and public accounts, of allowing the courts to determine matters going to the privileges of the Houses. On the one hand, the Houses were retaining their authority to impose penalties for contempt. On the other, they were giving the courts a parallel jurisdiction to try particular offences

27 Joint Select Committee on Parliamentary Privilege, *Final Report*, see discussion at pp. 90-94.

28 Joint Select Committee on Parliamentary Privilege [Commonwealth], *Final Report*, October 1984, Parliamentary Paper No. 219/1984, p. 91.

protecting the operation of committees.[29] As former Senate Clerk, Harry Evans wrote at the time:

> By enacting criminal remedies to protect its proceedings, the Parliament, in effect, and, it may be said, unwittingly, has made an inroad on the immunity of its proceedings from question in the courts.[30]

The exception in subsection 16(6) of the Act also applied to offences in other Acts establishing committees:

> In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

Ceding jurisdiction to the courts to deal with certain offences involving witnesses and other committee proceedings was not the end of the matter. In relation to the exercise by a House of its penal jurisdiction, the Joint Select Committee had recommended that the High Court be able to review the committal of a person to prison for contempt, or for failure to pay a fine for contempt.

Taking its cue from the High Court's judgment in *Fitzpatrick and Browne*,[31] the Commonwealth Privileges Act included section 9:

> Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

Section 9 operates to enable a court to review whether the ground for imprisonment of a person is sufficient at law to amount to an offence as defined by section 4:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Together, these provisions provide for limited judicial review of imprisonment of a person by a House for contempt. Although they appear to constitute a significant modification by the Commonwealth Houses of their exclusive cognisance to determine such matters conclusively for themselves, they effectively embody the principle that has been tacitly accepted since the *Stockdale v Hansard* cases, that the courts

29 This process has advanced much further in the USA; see, for example, Morton Rosenberg and Todd B. Tatelman, *Congress's Contempt Power: Law, History, Practice and Procedure*, Congressional Research Service, July 24, 2007.

30 Harry Evans, "Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament", *The Table*, Vol. LVI, pp. 21-36 at p. 26.

31 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

determine the existence and extent of a privilege, leaving all other matters to the House concerned.

Because the Commonwealth Houses adhere to the principle that the contempt jurisdiction should be used sparingly and only for the reasonable protection of the Houses against improper acts tending substantially to obstruct them in the performance of their functions, there has not been an occasion for these provisions to be tested. Significantly, the provisions entail no waiver of parliamentary privilege that would permit the reviewing court to stray into matters protected by section 16 of the Act so, in essence, the court may only consider whether the person's conduct was capable of constituting an offence as defined by section 4, not whether it did.

Control of finance, staffing, accommodation and services

The final area to be considered briefly in the context of exclusive cognisance (although it warrants a separate paper) is control of parliamentary administration and the internal affairs of a House.

In one sense, control of finance can be dealt with swiftly since few Houses truly control their ability to set their own budgets.[32] There may be rare exceptions, and some jurisdictions have developed, or are developing, mechanisms to shore up a semblance of independence, but the brutal reality is that executive governments hold the purse strings. Parliamentary budgets are usually only a minor feature of a much bigger executive government budget picture. Executive government control over resourcing of parliaments is a significant brake on claims to exclusive cognisance.

In other areas, the story is different, with recent signs that there may be more to the doctrine of exclusive cognisance, as it concerns the internal affairs of Parliament, than we have hitherto acknowledged.[33]

Unlike the freedom of speech privilege, which is based on statute,[34] the internal affairs immunity is based in common law. Its boundaries fall to the courts to determine. According to Enid Campbell:

> What are to be regarded as the internal affairs of houses of parliaments which are for them alone to administer, free from external constraints, must surely depend on what activities the houses (and their agents) need to be able to control in order to carry out their institutional functions.[35]

32 For a survey, although somewhat dated, of budget setting arrangements by various members of the Inter Parliamentary Union, see Appendix 3 of the report of the Senate Select Committee on Parliament's Appropriations and Staffing, Parliamentary Paper 151/1981, pp. 41-44.

33 A point made by Gareth Griffith in "Parliamentary Privilege: First Principles and Recent Applications", NSW Parliamentary Library Research Service, Briefing Paper 1/09, 2009, p. 34.

34 Article 9 of the Bill of Rights; see also section 16, *Parliamentary Privileges Act 1987* (Cth), section 10, *Parliamentary Privilege Act 2014* (NZ).

35 Enid Campbell, *Parliamentary Privilege*, The Federation Press, 2003, p. 188.

Using the common law test of necessity (for the most part), the courts have had little difficulty in reaching the right outcome about the status of "internal affairs" and whether they are a matter for the House concerned or the ordinary law.

The linkage of the internal affairs immunity with the parliamentary precincts has been a notorious source of confusion about the status of the latter. In the case of *R v Graham-Campbell; Ex parte Herbert* [1935] 1 KB 594 the humorist writer A P Herbert laid a criminal information against members of the House of Commons Kitchen Committee for selling alcohol without a licence. In a decision that has never been challenged in a higher court, Lord Hewart CJ ruled that the court would not hear the complaint because the matter fell within the exclusive cognisance of Parliament. The decision has been taken as authority for the proposition that the ordinary law of the land does not apply in the precincts, a conclusion which is much broader than the decision actually supports.

Jurisdictions have come to different conclusions about parliamentary precincts. The 2013 report of the UK Joint Committee on Parliamentary Privilege, referring to the Herbert case, recommended that the Houses adopt procedures to reiterate and formalise the presumption that legislation does not apply to Parliament unless it expressly provides otherwise.[36]

On the other hand, in Australia, the decision in *Rees v McCay* (1975) 26 FLR 228 rejected the plaintiff's argument that the ordinary law of the land did not apply to Parliament House and its precincts, where Parliament enjoyed exclusive cognisance in the regulation of its own affairs. Rees was attempting to fight a parking fine incurred under the ACT Motor Traffic Ordinance by parking his car at the front of [Old] Parliament House. The court had no hesitation in rejecting his argument. While Parliament enjoyed certain privileges which protected its ability to carry out its functions, and while the courts would not inquire into aspects of the operation of Parliament, there was no abrogation of the ordinary law.

The confusion created by the Herbert case may have been one factor behind the recommendation of the Commonwealth Joint Select Committee on Parliamentary Privilege that the precincts be delineated and the application of laws therein clarified.[37] Consequently, section 15 of the *Parliamentary Privileges Act 1987* declared, for the avoidance of doubt, that the law of the ACT applies in any building in which the Commonwealth Parliament meets, and in the precincts as defined in the *Parliamentary Precincts Act 1988* (subject to section 49 of the Constitution and the 1987 Privileges Act).[38] Otherwise, the Precincts Act gives clear authority to the Presiding Officers to

36 HL Paper 30, HC 100, pp 54-7.

37 Recommendation 31, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, PP 219/1984, p. 142.

38 The explanatory memorandum to the Parliamentary Privileges Bill 1986 stated that clause 15 was "unnecessary because it is clear that the powers, privileges and immunities of the Houses do not involve any general abrogation of the law in Parliament House, but the clause is included because of persistent, though ill-founded, doubts about this".

control and manage the precincts, subject to any order of either House.[39] Subsection 6(2) makes the power to control and manage the precincts subject to resolutions of either House and section 12 provides that nothing in the Act derogates from the powers, privileges and immunities of each House, its members and committees under any other law. Jurisdiction is exclusive—but only within the wider constitutional and statutory framework.

For the most part, apart from some minor immunities, whether something happens in the precincts or not is irrelevant to whether it may be treated by a House as a contempt.[40]

On both sides of the globe, recent cases concerning MPs' expenses and the extent to which the incurring of expenses was covered by parliamentary privilege have reached similar conclusions, rejecting the proposition that the administration of members' expenses was sufficiently connected to the proceedings of Parliament to invoke the exclusive jurisdiction of the House and therefore exclude the ordinary law. In *R v Chaytor and others* [2010] UKSC 52, the Supreme Court held that neither Article 9 of the Bill of Rights nor the exclusive jurisdiction of the House of Commons prevented the criminal prosecution of members of Parliament charged with submitting fraudulent expenses claims.

Similarly, the ACT Supreme Court dismissed an application for a stay of proceedings against a former Speaker of the House of Representatives made on the grounds that an inquiry whether the Speaker was travelling on parliamentary business fell within the exclusive jurisdiction of the House. In rejecting the application, the Court distinguished between parliamentary business, a term used in the relevant Remuneration Tribunal Determination, and proceedings in Parliament, and found that there was no necessary connection between the business transacted by the Speaker and the proceedings of the House or any of its committees.[41]

Employment cases have been somewhat more encouraging for proponents of the exclusive cognisance doctrine. The 2005 case of *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 concerned certain employment rights of the Speaker's chauffeur and whether the Canadian Human Rights Commission had jurisdiction to hear Mr Vaid's complaint against his employer. The employer challenged the Commission's jurisdiction, arguing that parliamentary privilege permitted each House to conduct their employment relations without interference. Both the Federal Trial Court and the Federal Court of Appeal rejected this argument, holding that parliamentary privilege did not apply. In order to sustain such a claim, it would be necessary to "show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by

39 In addition, section 29 of the *Australian Capital Territory (Self-Government) Act 1988* empowers either House by resolution to declare that an ACT enactment does not apply to that House, or its members, or in the precincts.

40 See Senate Committee of Privileges, 160th Report, *The Use of CCTV Material in Parliament House*, December 2014, paragraphs 2.53-55 and 3.10-19 for the rejection of an argument that surveillance carried out under a code of practice authorised by the Presiding Officers under their authority to control and manage the precincts could not constitute improper interference with a senator.

41 *Slipper v Magistrates Court of the Australian Capital Territory* [2014] ACTSC 85.

the assembly or its members of their functions as a legislative and deliberative body … that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency" (at [4]).

The *Vaid* principles (although not the test of necessity) were applied in an appeal to the Full Bench of the South Australian Industrial Relations Court in a case concerning whether a committee secretary of the Legislative Council had been underpaid overtime (*President of the Legislative Council (SA) v Kosmas* [2008] SAIRC 41).[42] In considering the staff of a House of Parliament, the Full Bench notionally divided them into two groups: those directly engaged in the business of the House and those indirectly engaged, like Mr Vaid and like any staff engaged in the management function regarding the provision of services to a House, whose employment would not attract any claim of parliamentary privilege that could exclude the jurisdiction of the industrial relations court.[43]

The court found that the work of a committee secretary was so closely and directly associated with the fulfilment of a key function of the legislature as to exclude the jurisdiction of the Industrial Relations Court because of parliamentary privilege. While this outcome is perhaps surprising, it is consistent with the observation in *Vaid* that the claimed privilege "has been authoritatively established in relation to certain employees of the House of Commons at Westminster". It therefore operates in most Australian jurisdictions by virtue of their adoption of House of Commons powers, privileges and immunities at particular dates. The officers to whom the immunity has been taken to apply are those officers of the House who carry out functions in the direct service of the House, including executing its orders. Such officers may be identified in the standing orders of a House, although there is little jurisprudence about the composition of the group. It may mean that officers of a House may be subject to the exclusive jurisdiction of their Houses for some things and statute law for others, but where there is any conflict between the two, the jurisdiction of the House, on the reasoning in *Kosmas*, would prevail.

CONCLUSION

This partial survey undertaken suggests that while there may be some oxygen left in the doctrine of exclusive cognisance, it has been fundamentally altered in Australia, at least, by a written constitution and by legislation such as the *Parliamentary Privileges Act 1987* which gives the courts a limited power of review.

Curiously, it is in the potential conflict between parliamentary rights and immunities on the one hand, and legislation regulating administrative matters affecting parliaments

42 See the analysis of this case by Gareth Griffith, "Parliamentary Privilege: First Principles and Recent Applications", pp. 31-35.

43 See also *Bear v State of South Australia* (1901) 48 SAIR 604 in which a single judge of a State Industrial Court ruled that an injury to a waitress in the parliamentary dining room did not come within the exclusive jurisdiction of the House.

(including employment law or laws imposing administrative obligations) on the other, that the doctrine may find some room to develop further. Unless the Parliament has explicitly legislated to abrogate its privileges or—on some views—a necessary implication can be drawn, then, as Kirby J observed, "In ascertaining the Parliament's purpose in a matter connected with its privileges, no court should strain legislative language to claim a jurisdiction which has not been clearly vested in it".

With patchy jurisprudence, perhaps the most that can be said is that the jury is still out on the continuing relevance of exclusive cognisance.

Information and Parliamentary Democracy: The Battle of Privileges

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Information is pivotal to the proper functioning of representative democracy and Parliament.[1] Parliamentarians can obtain information through many methods, including inquiries by parliamentary committees. As parliamentary committees have extensive powers to call for people and documents to come before them, they have the capacity to thoroughly investigate issues of government administration, policy and service delivery.[2] Thus any impediments to the free flow of information to parliamentary committees should be viewed with concern and carefully examined.

In 2014, the Community Development and Justice Standing Committee of the Legislative Assembly (CDJC), of which this author is a member, conducted an agency review hearing with Western Australia (WA) Police. Specifically, the CDJC looked into the conduct of the police investigation of traffic incidents involving the then Member for Vasse in early 2014.[3]

In their investigation, the police sought advice from the State Solicitor's Office (SSO) as to whether there was sufficient evidence to prefer charges against the then Member for Vasse. The SSO provided written advice dated 31 March 2014. The CDJC sought a copy of the advice from the WA Police Commissioner Dr Karl O'Callaghan.

The Police Commissioner's initial response, on the advice of the SSO, was to claim that the advice of 31 March 2014 was subject to legal professional privilege and if the CDJC wanted the advice, it would need to summons it pursuant to s 5 of the *Parliamentary*

1 B. Duffy and D. Blunt, "Information is Power: Recent Challenges for Committees in the NSW Legislative Council", *45th Presiding Officers' & Clerks' Conference*, Apia, Samoa, 30 June – 4 July 2014, p 1.

2 The WA Parliament's website has the following to say: "Committees are delegates of the Houses of Parliament – the Legislative Council and Legislative Assembly. Service on committees is a responsibility equal to service in the House. Committees carry out a great deal of the detailed work of each of the Houses. Committees are one of the tools to assist the Houses of Parliament in their functions to legislate; monitor and review legislation; review administration and expenditure; gather information; and publicise issues. The practice of delegating to committees of members is part of the established procedure of most representative parliamentary bodies. Committees have been appointed for almost as long as the institution of Parliament itself has existed. In Western Australia, the modern Legislative Council committee system has been in operation since 1989..." Refer to < http://parliament.wa.gov.au/webcms/webcms.nsf/content/home-committee-system-of-the-legislative-council-and-legislative-assembly> accessed 1 October 2015.

3 Refer to Western Australia, Legislative Assembly, Community Development and Justice Standing Committee, *Review of the Police Investigation into Traffic Incidents Involving a Member of Parliament: WA Police Agency Review*, Report No 5, June 2014.

Privileges Act 1891 (WA). However, after various discussions between the Police Commissioner and the SSO and the Police Commissioner and the CDJC, the Police Commissioner agreed to provide the said advice to the CDJC.

The above scenario raises the issue of whether a parliamentary committee has the power to compel production of documents that would elsewhere be protected by legal professional privilege. In other words, does parliamentary privilege in Western Australia trump legal professional privilege? The author argues that the answer is "yes".

This article commences with a brief overview of parliamentary privilege and legal professional privilege. Then the central argument will be developed, namely that the Parliament of Western Australia has powers to compel the production of documents, regardless of whether the documents would otherwise normally attract legal professional privilege. The article concludes with some brief comments on policy or public interest reasons for this.

PARLIAMENTARY PRIVILEGE

Parliamentary privilege is an essential part of our parliamentary democracy. This is because it ensures that parliamentarians are able to freely engage in debates, and the privilege protects Parliament's internal operations from judicial interference.

In defining what is meant by parliamentary privilege, it is common to refer to *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.[4]

Thus it is an immunity from the ordinary law, an exemption from the general law, which is a right of the Houses of Parliament, their members, officers and committees. As *Erskine May* notes, the privilege is not personal or individual in source, it applies to Parliament as a collective rather than to individual members. Parliamentary privileges are those of the House as a whole, thus individual members can only claim privilege to the extent that any denial of their rights or threats made to them would inhibit the functioning of the House.[5] Although individual members enjoy the contents of the privilege individually they do not enjoy the rights and immunities that make up parliamentary privilege in their personal capacity but only as members of

4 C. Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st Edition, London, Butterworths (1989) p. 640.

5 R. Blackburn and A. Kennon with Sir M. Wheeler-Booth, *Parliament: Functions, Practice and Procedures*, London, Sweet and Maxwell (2003) p.123.

parliament discharging the collective functions of the Houses of Parliament.[6] As noted by Campbell: "The special rights, powers and immunities collectively known as parliamentary privileges serve one essential purpose, that being to enable houses of parliament and their members to carry out their functions effectively."[7]

LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege is a common law legal right that protects disclosure of confidential oral or written communications between a lawyer and a client made for the dominant purpose of seeking or providing legal advice or for utilisation in legal proceedings. Thus in order for communications to attract legal professional privilege they must: be confidential; be made in the course of the lawyer-client relationship; and be made for the dominant purpose of seeking or providing legal advice and/or for use in existing or anticipated legal proceedings.

The overarching justification for legal professional privilege is that it serves the public interest by aiding the application of the rule of law.[8] The purpose of the privilege was articulated in *Grant v Downs*:

> The rationale of this head of privilege, according to the traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by their legal advisors, the law being a complex and complicated discipline.[9]

To assist legal practitioners in facilitating the administration of justice, they must enjoy open and frank communications with their clients. Clients are more likely to engage in open and honest communications, and disclose all relevant matters if they are confident of the confidentiality of their communications with their lawyer.[10] Thus legal professional privilege enables a person to resist the disclosing of information or production of documents to a third party, which would otherwise be required to be disclosed.

In an excellent paper on legal professional privilege, Australian Federal Court Justice John Gilmour wrote: "The existence of privilege is not subject to a balancing exercise in respect of public interest. Unless privilege has been waived by the person entitled to it, or has been abrogated by statute it is absolute."[11]

6 I. Macphail, "Is Parliamentary Privilege Incompatible with a Modern View of the Public Interest?", *Australasian Parliamentary Review,* (2010) 25 p 162 at pp. 162-165.
7 E. Campbell, *Parliamentary Privilege*, Annandale, Federation Press (2003) p.1.
8 *Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121, 129.
9 (1976) 135 CLR 674.
10 *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.
11 Footnotes omitted. Refer to The Hon. Justice John Gilmour, "Legal Professional Privilege: Current Issues and Latest Developments", Law Society of Western Australia, "Legal Professional Privilege: Current Issues and Latest Developments" Seminar, Perth (13 March 2012) p.1 at p. 8.

THE BATTLE

In the context of the factual scenario presented in the introduction, the aspect of parliamentary privilege that is at play here relates to a power attached to or part of the privilege; the power that a parliamentary committee, in this case the CDJC, has to compel the production of documents, including legal advice. Legal professional privilege, in the context before us, is not related to power, but an immunity, a legal capacity to resist the production of legal advice. Obviously the privileges are in conflict here, the power of the CJDC under parliamentary privilege to compel the production of the SSO legal advice to the WA Police Commissioner, vis-a-vis the Police Commissioner's use of legal professional privilege to resist the "request" for the production of the said document. The conflict means that one privilege must yield to the other.

As we are dealing specifically with the WA jurisdiction, what is the source of the parliamentary privilege that the CDJC seeks to rely on? Section 36 of the *Constitution Act 1889* (WA) establishes the foundation for parliamentary privilege in WA, which provides for the legislature "by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively."

The privileges, immunities and powers (hereinafter "privileges") of the two Houses of Parliament in WA are defined by the *Parliamentary Privileges Act 1891* (WA). Section 1 of that Act provides:

> The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise –
>
> (a) the privileges, immunities and powers set out in this Act; and
>
> (b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.[12]

Thus s 1 of the *Parliamentary Privileges Act 1891* (WA) enacts a House of Commons equivalency "as at 1 January 1989". There is no evidence that in respect of parliamentary privilege's relationship with legal professional privilege there is any material difference in the position of the House of Commons in 1989 and now.

Sections 4, 5 and 7 of the *Parliamentary Privileges Act 1891* (WA) are the pertinent provisions in relation to the factual scenario presented in the introduction to this article. Section 4 authorises each House or parliamentary committee to order the attendance of persons and production of documentation with s 5 providing for the issuing of a summons to give effect to s 4, and s 7 deals with objections to complying with demands or orders under ss 4 and 5.

12 Similar provisions are in place in all Australian jurisdictions apart from New South Wales.

Section 7 of the *Parliamentary Privileges Act 1891* (WA) permits objection "on the ground that [providing an answer or production of a document] is of a private nature and does not affect the subject of inquiry."[13] However, it is important to note that if such an objection is made under s 7, the objection must be referred to the relevant House, which will "excuse" or "order" [the provision of an answer of the production of a document] "as the circumstances of the case may require".[14]

Section 7 of the *Parliamentary Privileges Act 1891* (WA) overrides what would otherwise be legal professional privilege. As explained below this accords with the House of Commons position, and in explaining this position there is no more authoritative source than *Erskine May*.

As s 1 of the *Parliamentary Privileges Act 1891* (WA) provides, it is the House of Commons position of 1 January 1989 that is relevant. According to the 21st edition of *Erskine May* published in 1989, there was "no restriction on the power of committees to require the production of papers by private bodies or individuals, provided that such papers are relevant to the committee's work as defined by its order of reference."[15] Further, *Erskine May* writes that a witness is:

> bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, … because the matter was a privilege communication to him, as when a solicitor is called upon to disclose the secrets of his client; … Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority.[16]

The statement in relation to the solicitor's obligation to "disclose the secrets of his client" has its source in the parliamentary debate of the House of Commons on 4 March 1829, in committee, in relation to the *East Retford Disfranchisement Bill*.[17] Of particular relevance to the issue before us is the contribution of Robert Peel, the Home Secretary and Leader of the House who agreed as to "the legal rule, consistent with justice and equity": while also saying:

> on the other hand, it was not meant to be denied that as the witness before the committee was to be protected from the consequences of his answers his case was

13 Section 7 in full reads: "If any person ordered to attend or produce any paper, book, record, or other document to either House, or to any Committee of either House, shall object to answer any question that may be put to him, or to produce any such paper, book, record, or other document on the ground that the same is of a private nature and does not affect the subject of inquiry, the President, or Speaker, or Chairman of the Committee, as the case may be, shall report such refusal, with the reason thereof, to the House, who shall thereupon excuse the answering of such question, or the production of such paper, book, record, or other document, or order the answering or production thereof, as the circumstances of the case may require."

14 Also worth noting is s 51 of the *Constitution Acts Amendment Act* (WA) which protects officers and officials (including police officers) from any action or legal proceedings for anything done under the direction of the presiding officer of either House, standing orders or other order or resolution of either House or under the *Parliamentary Privileges Act 1891* (WA) itself.

15 Boulton, *Erskine May* p. 630.

16 Ibid., p. 680.

17 Parl Deb (1828) 18, c 966-975.

> taken out of the general rule; for if the witness could refuse to answer any question put to him, no investigation by the House could take place. In that respect, the House differed from the courts of law; and he remembered the case of a witness, an attorney who was examined at that bar, who refused to divulge the secrets of his client; but that was overruled, and the House declared that the rules of the law courts did not apply; that for the ends of public justice it was necessary that he should answer, he being protected from the consequences. On these grounds, he was compelled to answer.[18]

The above-cited contribution of Mr Peel tells us two things. First, that legal professional privilege and the privilege or rule against self-incrimination provide valid grounds for refusing to answer a question in a court of law. But secondly, neither is a valid ground to refuse to answer a question in a House or in a parliamentary committee. Mr Peel's pronouncements as cited here have not been qualified or dispensed with.

In the Houses of Parliament in WA and in its committees, such as the CDJC, legal professional privilege cannot stifle the obligations imposed by parliamentary privilege for legal advice provided to a witness before it from being disclosed. Thus the power, pursuant to parliamentary privilege, that compels production of documents and answers to questions, cannot be lawfully resisted by invoking legal professional privilege. This is contrary to the rules applicable in courts of law, but here we are not dealing with a court of law but a Parliament that operates in a representative democracy context with all the privileges enjoyed in the House of Commons as of 1 January 1989.

CONCLUDING COMMENTS

As previously stated, legal professional privilege is a common law doctrine that can only be abrogated by clear statutory intention.[19] The general view is that the interests of justice are best served by the production of all relevant information, but legal professional privilege also advances the same interests of justice, because as noted by Dawson J in *Commissioner of Australia Federal Police v Propend Finance* the privilege "exists in order to preserve the confidential relationship between client and legal adviser, a relationship which is best fostered and preserved for the better working of the legal system."[20]

It should also be noted that the functioning and purposes of courts of law are different to the workings and purposes of the Houses of Parliament and its committees. Courts of law deal with justiciable disputes brought to the court by parties and in which legal advisors and advocates play a prominent role. In contrast, legal advisors and advocates are in the main absent from parliamentary proceedings (although at times play a role

18 Ibid.
19 Refer to *Commissioner of Australia Federal Police v Propend Finance* (1997) 188 CLR 501 at 540-541 per Gaudron J.
20 Ibid; 520 per Dawson J.

on invitation of Parliament), whereas Parliament and parliamentary committees deal with legislation and administration of public affairs including delivering of government services rather than justiciable disputes. Thus there should not be any great surprise that the rationale for legal professional privilege does not necessarily apply to Parliament and its committees.

But protection of witnesses appearing in the House or before a parliamentary committee is provided by the privileges of the House of Commons as enshrined in Article 9 of the *Bill of Rights 1689*, which provides "that the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Article 9 of the *Bill of Rights 1689* is made applicable by s 1 of the *Parliamentary Privileges Act 1891* (WA) as held in *Halden v Marks*.[21] And in *Prebble v Television New Zealand Ltd*, their Lordships stated:

> that parties to litigation … cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House…[22]

Article 9 of the *Bill of Rights 1689* allows to a significant extent, members of Parliament and witnesses before parliamentary committees to speak freely and produce documents without fear of such information being used against them in a court of law or elsewhere outside Parliament. In some respects, Article 9 acts similarly to legal professional privilege, facilitating the flow of information in Parliament and before its committees by reducing possible legal prejudicial consequences of such information.

The rationale for parliamentary privilege trumping legal professional privilege is sound. And the law as formed in the House of Commons and applicable to WA under the *Parliamentary Privileges Act 1891* (WA) means that legal professional privilege is not an immunity against the production of documents, even written legal advice by a lawyer to a witness before a parliamentary committee.

21 [1995] 17 WAR 477 at 461.

22 [1995] 1 AC 321 at 336. Their Lordships did add: "However this principle does not exclude all references in court proceedings to what has taken place in the House. … [There] can no longer be any objection to the use of Hansard to prove what was done and said in Parliament as a matter of history. Similarly it is accepted that the fact a statute had been passed is admissible in court proceedings. Thus, in the present action, there cannot be any objection to it being proved what the plaintiff or the Prime Minister said in the House. … It will be for the trial judge to ensure that the proof of these historical facts is not used to suggest that the words were improperly spoken or the statute passed to achieve an improper purpose." Ibid.

Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect

Wayne Martin[1]

The Hon Wayne Martin AC, Chief Justice of Western Australia

The core responsibilities of the legislative and judicial branches of government are well defined and easily recognised. But there are some areas in which responsibilities might be thought to overlap, or even be contestable. The boundaries of responsibility have traditionally been maintained by an ethic of mutual respect. This paper assesses the extent to which that ethic continues to adequately regulate relationships between the two branches of government and to inform the propriety of conduct at or near the boundaries between the relative responsibilities of each branch by examining:

- the impact of court proceedings upon the proceedings of Parliament and vice versa;
- the adjudication and punishment of contempt of Parliament;
- the extent of the Parliaments' power to control judicial officers, and the extent of the courts' power to control parliamentary officers; and
- the interpretation and invalidation of legislation by the courts, and the Parliaments' power to legislatively control the courts.

THE SEPARATION OF POWERS

Systems of government based upon those developed at Westminster are relative latecomers to the notion of the separation of powers. It is true that the writings of Baron de Montesquieu significantly influenced structures of government developed in the 18th and 19th centuries in many countries, including notably the United States of America and France. However, it was not until the 20th century that the separation of powers became entrenched in Australia through the structure adopted for the Constitution of the Commonwealth, and the courts of England and Wales were not formally separated from the legislative and executive branches of government until this century. Ironically, it was a misunderstanding of the system of government that existed in 18th century England that had inspired Montesquieu's advocacy of the separation of powers.

Perhaps the relative novelty of institutional, as opposed to a theoretical, separation of powers, coupled with the continuing practice of vesting responsibility for the executive

1 I am indebted to Dr Jeannine Purdy for her very considerable assistance in the preparation of this article. However, responsibility for the opinions expressed, and any errors, is mine alone.

branch of government in members of the legislature has contributed to a degree of popular cynicism with respect to its reality and efficacy. Take for example the following recent exchange, from the televised satirical mock interview series, between Messrs Clarke and Dawe:

Clarke: The separation of powers is the vital constitutional distinction between the Parliament, the executive and the judiciary.

Dawe: And they're all completely separate?

Clarke: No, they're not. But it's a lovely idea isn't it?

Dawe: Terrific idea.

Clarke: Beautiful, beautiful idea.

Dawe: Does it work?

Clarke: No. Not in the estimation of the Parliament and the executive … that's the trouble. That's what we're working through.[2]

The tri-partite structure of government gives rise to three bi-partite relationships. This article is only concerned with the relationship between the legislative and judicial branches of government. Even then, any attempt to comprehensively assess or analyse that relationship would require a work of much greater dimensions than those which have been allotted to this paper. Rather, this article will only address one particular aspect of the relationship, being the extent to which the ethic of mutual respect between the legislative and judicial branches of government continues to regulate the ongoing relationship between those branches of government and to inform the propriety of conduct at or near the boundaries between the relative responsibilities of each branch.

MUTUAL RESPECT

The basic responsibilities of the legislative and judicial branches of government can be easily described and recognised. The core function of the legislative branch is to enact laws and the core function of the judicial branch is to enforce those laws and the common law of Australia. However, there are a number of areas of government activity in which the responsibilities of each branch might be thought to overlap, or even to be contestable. In those areas, there are legal structures which define the boundaries of responsibility of each of the two branches of government with which this article is concerned. In Australia those legal structures are to be found in written constitutions, augmented by the common law. By tradition, the practical operation of those structures has been facilitated by the respect which each of the legislative and judicial branches has shown for the responsibilities and actions of the other, and the mutual desire to avoid situations in which one branch might be thought to be trespassing upon, or even usurping the legitimate responsibilities of the other. As Chief Justice French observed:

2 John Clarke & Brian Dawe, 'The new sliding scale of ethics. Officially launched this week' (broadcast 18 June 2015) available: www.abc.net.au/news/2015-06-18/clarke-and-dawe--the-new-sliding-scale-of-ethics/6556308

> The relationship between the courts and the Parliament is defined by Commonwealth and State Constitutions and the common law. To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.[3]

This article will assess the extent to which this ethic of mutual respect continues to effectively regulate relationships between the legislative and judicial branches of government, using four areas of intersection between the work of the two branches as the canvas upon which the assessment will be painted. Those four areas are:

(a) the impact of court proceedings upon the proceedings of Parliament and vice versa;

(b) the adjudication and punishment of contempt of Parliament;

(c) the extent of the Parliaments' power to control judicial officers, and the extent of the courts' power to control parliamentary officers; and

(d) the interpretation and invalidation of legislation by the courts, and the Parliaments' power to legislatively control the courts.

MAGNA CARTA

Before turning to those specific areas of intersection, however, as this year is the 800th anniversary of the execution of the first version of *Magna Carta* (Great Charter) at Runnymede outside London on 19 June 1215, it would be churlish not to make some mention of the impact which that document has had upon the relationship between the judicial branch and the other branches of government, notwithstanding that in 1215 there was no legislature, the legislative and executive functions of government were united in the King, and the King appointed judicial officers at his pleasure. I approach this topic with some trepidation, however, because as Lord Jonathan Sumption observed earlier this year, so much has been written and said about *Magna Carta* that it is impossible to say anything new about it that is not mad—and even if one says something mad about it, it is quite likely to have been said before, even quite recently.[4]

As the Hon James Spigelman AC has pointed out, a proper appreciation of the significance of *Magna Carta* requires the Charter to be viewed in the context of the previous attempts to contain the feudal powers of the King by invoking historical constraints upon the exercise of those powers said to be drawn from the time of the Saxon Kings. It must also appreciate the use to which the Charter was put several

3 Chief Justice Robert French AC, Paper presented at the Queensland Supreme Court Seminar, Brisbane, 4 August 2012, and also published as 'The Courts and Parliament' (2013) 87 *Australian Law Journal* 820 (at 830).

4 Lord Sumption, Supreme Court of the United Kingdom, 'Magna Carta Then and Now' (Address to the Friends of the British Library, 9 March 2015) 1.

hundred years later, particularly by Lord Coke for much the same purpose—namely, an attempt to constrain the absolute power of the monarchy.[5]

William I, known in English history as William the Conqueror but in French history as Guillaume le Bâtard, promised on his coronation in 1066 to restore the laws of Edward the Confessor, delegitimising the rule of his own predecessor, Harold. William's son, Henry I, executed a Charter upon his coronation in 1100, in which he, like his father, promised to restore the law of Edward the Confessor except to the extent that the law had been properly amended by William I, with the advice of the Council of Barons. This delegitimised the laws passed by Henry's immediate predecessor, his older brother, William Rufus. Similarly, when Henry I's grandson, Henry II, was crowned, he acknowledged 'the concessions and grants and liberties and free customs' which had been acknowledged by his grandfather, thereby delegitimising the actions of his predecessor, Stephen. However, neither of Henry II's sons, Richard I or King John, formally acknowledged the concessions made by their father or great-grandfather.[6] As Spigelman commented, 'political promises are like that' and the fact that Henry I's promises were not kept 'did not detract from the creation of a myth of a golden past'.[7]

It was in that context that, in 1215, the rebellious Barons who had taken control of London required King John to acknowledge the various constraints upon his feudal powers listed in the first version of the Great Charter as the price for their continuing support for his rule. At the risk of gross oversimplification, the general thrust of the Charter was to require the King to acknowledge that he was subject to the law and custom of the land and could not act upon whim or caprice.

Almost 400 years later, after his appointment as Chief Justice of the Court of Common Pleas in 1606, Sir Edward Coke placed great reliance on the Charter for a number of purposes, none of which would have been contemplated by its authors (said to have included the Archbishop of Canterbury) or its signatories. One of those purposes was the assertion of the dominance of the common law courts over the various other courts and tribunals then competing for jurisdiction, including most particularly the ecclesiastical courts. That dominance was achieved by the issue of prerogative writs by the common law courts in order to control proceedings in the other courts and tribunals. The source of the power to issue those writs was said by Coke to lie in *Magna Carta*, and the guarantees of due process which he asserted were to be found within its terms.[8]

Coke also denied the power of the King to sit as the ultimate judge or to construe the statutes, and he asserted that only judges could decide legal cases. Moreover, as the precursor to the great battle for supremacy between the King and the Parliament which followed, Coke boldly asserted the institutional autonomy of the judicial branch from the monarch. Indeed, Coke went even further in *Bonham's case*:[9]

5 James Spigelman, '*Magna Carta* in its Medieval Context' (Banco Court, Supreme Court of New South Wales, 22 April 2015) 21.
6 Note 5, 3-6.
7 Note 5, 5, 6.
8 James Spigelman, 'Lions in Conflict: Ellesmere, Bacon and Coke – The Prerogative Battles' (The Second Patron's Address, Academy of Law, Sydney, 4 October 2013).
9 [1572] Eng R 106; [1610] 8 Co Rep 107(a); 77 ER 638.

> in many Cases, the Common Law doth controll Acts of Parliament, and somtimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void.

In *Kable's case*,[10] Justice Dawson suggested that such views did not survive the revolution of 1688, or at least did not survive for very long after the revolution, as a result of 'the complete acceptance by the courts that an Act of Parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind'.[11] However, since those observations were made, perhaps encouraged by the invalidation of statutes in countries in which the legislature's powers are constrained by a written constitution, and the subordinacy of domestic legislation to the treaties to which the United Kingdom acceded in return for membership of the European Union, a more recent decision from that country suggests that the views expressed by Coke in *Bonham's case* can no longer be regarded as heretical.[12] I return to this issue later, but first examine some of the more conventional areas in which responsibilities of the courts and the legislature might be thought to overlap, or even be contestable.

1. THE IMPACT OF COURT PROCEEDINGS UPON THE PROCEEDINGS OF PARLIAMENT AND VICE VERSA

The cordiality of the relationships between Parliament and the courts is sometimes tested when statements are made or events take place in the course of parliamentary proceedings which are relevant to proceedings before the court. In such circumstances, at least two issues potentially arise. First, can evidence be given in court of statements made or documents produced during parliamentary proceedings (the exclusionary principle)? Second, to what extent should parliamentary proceedings be modified or curtailed because of possible prejudice to pending court proceedings (the *sub judice* rule)?

The first question concerns the ambit of action appropriately taken by a court, and the second question concerns the ambit of action appropriately taken by participants in parliamentary proceedings.

The Exclusionary Principle

Following the Parliament's victory over the monarch in the great constitutional struggles which took place during the 17th century in England, freedom of speech within the course of parliamentary proceedings was enshrined in Article 9 of the *Bill of Rights 1689*, which provides:

> That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.[13]

10 [1996] HCA 24; (1996) 189 CLR 51.
11 *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24 [13]; (1996) 189 CLR 51, 73-74.
12 *Jackson v Attorney General* [2005] UKHL 56, [102].
13 *I Will & Mar*, Sess 2, ch 2 (spelling and capitalisation modernised).

All Australian parliaments have equivalent provisions.[14]

Consistently with the ethic of mutual respect to which I have referred, courts have consistently given a wide interpretation to these provisions. The freedom conferred is absolute and is not defeated by malice or fraud. The freedom applies to causes of action arising from events taking place outside parliamentary proceedings, as well as to causes of action arising from events which took place within parliamentary proceedings. The protection applies to members and officers of the Parliament, and also to non-members participating in parliamentary proceedings. The protection extends to any attempt to use statements or events which occurred in the course of parliamentary proceedings for a purpose adverse to any participant in those proceedings, whether directly or indirectly and through whatever means. As the Privy Council observed:

> parties to a litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggestion (whether by direct evidence, crossexamination, inference or submission) that action or words were inspired by improper motive or were untrue or misleading.[15]

The protection applies to civil proceedings[16] and to criminal proceedings brought against members or former members of Parliament.[17]

The breadth of the ambit of the operation of these provisions recognised by the courts has resulted in its protection being described as 'the single most important parliamentary privilege'.[18] The breadth of the protection provided by provisions modelled on Article 9 of the Bill of Rights has arguably been expanded even further by the Commonwealth Parliament as a result of its enactment of s 16(3) of the *Parliamentary Privileges Act 1987* (Cth). That subsection provides:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

14 Commonwealth of Australia Constitution s 49; *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, sch 2; *Parliament of Queensland Act 2001* (Qld) s 8; *Imperial Acts Application Act 1984* (Qld) s 5, sch 1; *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19; *Imperial Acts Application Act 1980* (Vic) ss 2, 8, sch; *Parliamentary Privileges Act 1891* (WA) s 1; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislative Assembly (Powers and Privileges) Act* (NT) s 6(1); *R v Turnbull* (1958) Tas SR 80, 84—see Australian Law Reform Commission, *Copyright and the Digital Economy* (13 February 2014) [15.33], note 41; Enid Campbell, *Parliamentary Privilege* (2003) 10.

15 *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, 337.

16 *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710.

17 *R v Turnbull* (1958) Tas SR 80; *R v Jackson* (1987) 8 NSWLR 116; *R v Theophanous* [2003] VSCA 78.

18 Joint Committee on Parliamentary Privilege (UK), *First Report* (30 March 1999) [36] cited in Enid Campbell, *Parliamentary Privilege* (2003) 10.

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

As noted by Professor Enid Campbell,[19] in *Prebble v Television New Zealand*, the Privy Council expressed the view that the provision is declaratory of the effects of Article 9 of the *Bills of Rights 1689*.[20] A similar view has been taken in other cases.[21] However, read literally, par (c) of the provision goes rather further than the previously decided cases by prohibiting the drawing of inferences or conclusions irrespective of whether or not they were adverse to the Parliament or any of its members of participants in its proceedings. By contrast, the conventional view of Article 9 has always been that the purpose for which the evidence of parliamentary proceedings is adduced is critical to the operation of the provision. If the evidence is adduced for a purpose which is adverse to the Parliament or any participant in the proceedings before the Parliament, the Article or its contemporary equivalents prevent the evidence being led.[22] The importance of an adverse purpose to the application of the exclusionary principle explains why evidence of parliamentary debates and explanatory memoranda relating to legislation is routinely provided to courts, without objection, when issues arise with respect to the proper construction of legislation. As was observed in *Theophanous*, 'the scope and validity of s 16(3) of the Act have yet to be determined by the High Court'.[23]

Professor Campbell has also pointed out that the cases dealing with the precise ambit and application of Article 9 of the *Bill of Rights* and the provisions modelled on it are not entirely consistent.[24] Because the criterion of exclusion is the imprecise notion of purpose, some variation of outcome in individual cases is inevitable. What is, however, indubitably clear is that the courts have consistently given a very broad interpretation and ambit of operation to these provisions, consistently with the ethic of mutual respect to which I have referred.

The Sub Judice Rule

The *sub judice* rule is a convention or practice according to which members choose not to speak about current court cases during parliamentary debates.[25] As a convention or rule of practice, it is quite different in character to the rule which I have described as the exclusionary principle, which is a rule of law. It is, however, commonly embodied in Standing Orders, such as the following order of the New Zealand House of Representatives:

19 Enid Campbell, *Parliamentary Privilege* (2003) 93.

20 *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, 333.

21 *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710, 718; *Lawrence v Katter* (1996) 141 ALR 447, 481; *Rann v Olsen* (2000) 76 SASR 450 [228] - [229].

22 *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522.

23 *R v Theophanous* [2003] VSCA 78, [67].

24 Note 19, 90-92.

25 Its origins lie in the House of Commons between 1844 and 1963 when 'a convention, or self-denying ordinance' developed whereby matters that were awaiting adjudication in a court of law would not be referred to in the Commons (Paul Carmichael and Brice Dickson, *The House of Lords: Its Parliamentary and Judicial Roles* (1999) 92).

> Matters awaiting or under adjudication in, or suppressed by an order of, any New Zealand court may not be referred to in any motion, debate, or question, including a supplementary question, subject always to the discretion of the Speaker and to the right of the House to legislate on any matter or to consider delegated legislation.[26]

The rationale for the convention has been explained by the Joint Committee on Parliamentary Privilege of the United Kingdom:

> It is important that a debate, a committee hearing, or any other parliamentary proceeding should not prejudice a fair trial, especially a criminal trial. But it is not only a question of prejudicing a fair trial. Parliament is in a particularly authoritative position and its proceedings attract much publicity. The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.[27]

Similar views have been expressed elsewhere.[28] The ethic of mutual respect which underpins the *sub judice* rule was noted by Lord Neuberger, then Master of the Rolls:

> The House of Parliament's *sub judice* rules are an example of the way in which Parliament and the courts are concerned to ensure that each refrains from trespassing on the other's province. Their proper application ensures that the rule of law is not undermined and that a citizen's right to fair trial is not compromised.[29]

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26 House of Representatives, Standing Orders of the House of Representatives (as amended 30 July 2014), Order 115. In determining whether to exercise the discretion to allow for a member to speak on a *sub judice* matter the Speaker must:

(a) [balance] the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes, and

(b) [take] into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government, and the risk of prejudicing a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing.

27 Joint Committee on Parliamentary Privilege (UK), *First Report* (30 March 1999) [192].

28 Legislative Assembly of Ontario, 'No. 80: Votes and Proceedings' (27 October 2008, Sessional Day 88) cited in Lorne Sossin and Valerie Crystal, 'A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials in the 21st Century' (2013) 36(2) *Dalhousie Law Journal* 535, 552.

29 Committee on Super-Injunctions, *Report of the Committee on Super-Injunctions*, *Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) vi.

A stark example of the potential for prejudice to legal proceedings as a result of statements made in Parliament, and the media commentary which very often follows such statements, has been provided by Professor Anthony Bradley QC, who referred to a case:

> … in 1990, when towards the end of the trial of three Irishmen suspected of conspiring to murder the Secretary of State for Northern Ireland (Tom King MP), at which the accused had all remained silent, the Home Secretary announced in the House that the Government intended to change the law on the right to silence; this was followed at once in the media by prominent statements from the Northern Ireland Secretary and (in his retirement) Lord Denning, declaring that far too many guilty men were acquitted because of the right to silence.
>
> The jury convicted the three accused, and McCann was sentenced to 25 years; but the convictions of the three accused were set aside because of these comments on the proposed change in the law.[30]

Notwithstanding the general acceptance of the *sub judice* rule as a rule of practice supported only by Standing Orders, there is nothing which a court can do to prevent contravention of the convention, or to impose any sanction for parliamentary commentary which might prejudice the fairness of a trial or lead to a trial being aborted. This was expressly acknowledged in the course of inquiries concerned with the impact which 'super injunctions' might have upon parliamentary proceedings.[31] In that context, a committee chaired by Lord Neuberger observed:

> Article 9 of the Bill of Rights 1689 recognises and enshrines a longstanding privilege of Parliament: freedom of speech and debate. It is an absolute privilege and is of the highest constitutional importance.
>
> Any attempt by the courts to go beyond that constitutional boundary would be unconstitutional. No super-injunction, or any other court order, could conceivably restrict or prohibit Parliamentary debate or proceedings.[32]

So, the preservation of the fairness of court proceedings from the adverse consequences of inappropriate parliamentary commentary depends upon the maintenance of the ethic of mutual respect.

2. THE ADJUDICATION AND PUNISHMENT OF CONTEMPT OF PARLIAMENT

The doctrine of the separation of powers implicit in the structure of the Constitution of the Commonwealth of Australia has led to it repeatedly being held that the

30 Professor Anthony Bradley QC, Written evidence (13 December 2011) reproduced in: Joint Committee on Privacy and Injunctions – Oral and written evidence (2012) 55. The case was *R v McCann* (1990) 92 Cr App Rep 239.

31 Super injunctions are injunctions which suppress disclosure or publication of the existence of the order suppressing disclosure or publication.

32 Committee on Super-Injunctions, *Report of the Committee on Super-Injunctions, Anonymised Injunctions and Open Justice* (2011) vii.

determination and punishment of criminal guilt is an exclusively judicial function which can only be performed by courts established in accordance with the requirements of Chapter III of the Constitution.[33] However, there is an exception to this principle. That exception comes about because s 49 of the Constitution provides:

> The powers, privileges, and immunities of the Senate and the House of Representatives, and of the members and committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

One of the longestablished privileges of the House of Commons is the privilege of determining whether a contempt of the House has been committed, and the corresponding privilege of imposing punishment upon contemnors. So, notwithstanding that the determination of criminal guilt and the imposition of punishment are quintessentially and exclusively characteristic of the exercise of judicial power, the Commonwealth Parliament, and most other Australian Parliaments,[34] have the power to determine whether any person is guilty of contempt of the Parliament, and if so, to impose punishment. Professor Campbell attributes the development of the power of the English Parliament to punish for contempt to its desire for independence from the Crown, at a time when the judges of the Royal Courts held office at the pleasure of the monarch.[35]

The jurisdiction of the courts to ensure that a power which might result in the loss of a person's rights or liberty is exercised in accordance with the principles of procedural fairness has been recognised for centuries. However, in accordance with the ethic of mutual respect to which I have referred, the courts have traditionally denied any capacity to review the exercise by a Parliament of the power to punish for contempt:

> it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.[36]

So, if a person is committed to prison by a warrant issued by the Parliament and the warrant is on its face consistent with a breach of an acknowledged privilege of the House, the warrant is conclusive and the court cannot look behind the warrant at either the merits of the adjudication or the procedure which was followed.[37]

There has been at least one occasion upon which the respect shown by the courts to the exercise of Parliament's power to punish for contempt has not been reciprocated. In 1689 the House of Commons resolved that several judgments of the Court of King's Bench in cases involving the Serjeant at Arms of the House had violated the privileges

33 See, for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444; [1918] HCA 56; *Magaming v The Queen* [2013] HCA 40, [47], [61].

34 Note 19, 191n 1.

35 Note 19, 191-192.

36 *R v Richards; Ex parte Fitzpatrick and Browne* [1955] HCA 36; (1955) 92 CLR 157, 162.

37 *R v Richards; Fitzpatrick and Browne* [7]; *The Case of the Sheriff of Middlesex* [1840] Eng R 360; 11 AD & E 273; 113 ER 419.

of Parliament. Two former judges of the Court, Sir Francis Pemberton and Sir Thomas Jones were summoned to attend the House to explain why they had rejected the argument of the Serjeant at Arms to the effect that the Court had no jurisdiction to try the cases. After hearing the former judges, the House resolved that they had breached the privileges of the House and ordered that they be taken into custody until Parliament was prorogued. Pemberton and Jones each spent several months in Newgate Prison.[38]

As Professor Campbell notes, this is not the only occasion upon which judges have been summoned before Parliament to account for their judgments. [39] In 1697, Lord Chief Justice Holt and another judge of the King's Bench, Eyre J, were summoned to appear before the House of Lords where they were questioned about one of their judgments. Further, in 1839, there was a body of opinion in the House of Commons to the effect that the judges of the Queen's Bench should be punished by the House for one of their judgments. However, after debate, it was resolved that punitive measures were not appropriate, and 1689 appears to have been the last occasion upon which a judge has been punished by a Parliament for contempt (which is just as well!).

Although the privilege of Parliament to punish contemnors is long established, the courts may exercise limited reviews of the exercise of those powers in certain circumstances. At the Commonwealth level, because particulars of the matters determined to constitute the contempt offence must, by virtue of s 9 of the *Parliamentary Privileges Act 1987* (Cth), be set out in the resolution imposing the penalty and the warrant committing the person, a court may review a decision to impose a penalty of imprisonment to determine whether the conduct or action in question was capable of constituting an offence.[40] If a warrant issued by any of the other Australian parliaments specifies the grounds of commitment, a court may determine whether it is sufficient at law to amount to a breach of privilege,[41] but that is the extent of the courts' power of review.

Professor Campbell argues convincingly, to my mind at least, that it is time to seriously consider extending the courts' capacity to review the exercise of a Parliament's power to punish for contempt. She points to the practical inability of a Parliament to impose the same procedural safeguards and controls which protect persons facing charges in a court of law, and to the well-developed expertise of the courts in reviewing decisions of other tribunals to ensure compliance with the principles of procedural fairness. She also refers to Article 14 of the International Covenant on Civil and Political Rights, which provides that when charged with a criminal offence, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law' and which further provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal'.[42]

38 Enid Campbell, 'Judges at the Bar of Parliament' (1999) 18 *Australian Bar Review* 131, 131.

39 Note 38.

40 Namely, under s 4 of the *Parliamentary Privileges Act 1987* (Cth) that it 'amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member' (see *House of Representatives Practice* (6th edn) chapter 19.

41 *R v Richards; Fitzpatrick and Browne* [7].

42 Note 19, 203-206.

3. THE EXTENT OF THE PARLIAMENT'S POWER TO CONTROL JUDICIAL OFFICERS AND THE EXTENT OF THE COURT'S JURISDICTION OVER PARLIAMENTARY OFFICERS

In the context of considering Parliament's power to adjudicate upon alleged contempts of the Parliament, I have already noted those historical occasions upon which a Parliament has used those powers to require judicial officers to explain their decisions.

Twelve years after Pemberton and Jones were imprisoned as a consequence of their judgment, the *Act of Settlement* of 1701 (Imp) removed the power of the monarch to dismiss judges at will.[43] Instead, judges' commissions were to stand so long as they were of good conduct (*quamdiu se bene gesserint*) and the monarch could only remove a judge from office following an address from both Houses of Parliament. The power has been exercised sparingly, and only one judge has been removed in Australia.[44]

In Australia at least, care would have to be taken to ensure that the manner in which these parliamentary powers are exercised did not interfere with the independent performance of judicial functions. As all Australian courts are part of the system for the exercise of the judicial power of the Commonwealth contemplated by Chapter III of the Constitution, and as independence is an ineluctable characteristic of the judicial power,[45] any parliamentary interference with the independence of a judicial officer would very likely cross constitutional boundaries.

Professor Campbell refers to the interesting question of whether a judge can be required to attend before a parliamentary committee to give evidence relating to the performance of his or her judicial functions.[46] As she notes, at the Commonwealth level it can be argued that the separation of powers implicit in the Constitution of the Commonwealth prevents either House of Parliament from exercising the powers conferred by s 49 of the Constitution to interfere with the judicial powers of the Commonwealth, which are, by the Constitution, reserved to the courts created in accordance with Chapter III. On the other hand, as Professor Campbell notes, it might also be argued that such a limitation upon the investigatory power of the Houses of Parliament might not be consistent with the power of the Parliament to remove judges from office pursuant to s 72 of the Constitution.

43 (*12 and 13 Will 3* c 2) Article III, clause 7.

44 In 1989 Justice Angelo Vasta of the Queensland Supreme Court was removed from office. A small number of judges were removed in colonial times before the modern constitutional provisions were fully in force. In more recent times, parliamentary procedures for removal have been initiated on a number of occasions and in a few instances removal has been debated in Parliament but not carried (Honourable John P Hamilton, 'Judicial Independence and Impartiality: Old Principles, New Developments' (13th South Pacific Judicial Conference Apia, Samoa, 28 June to 2 July 1999); Gareth Griffith, 'Removal of Judicial Officers: An Update' (NSW Parliamentary Library Research services e-brief, 9/2012, April 2012).

45 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 [78]; [2006] HCA 44.

46 Note 38, 143-144.

It seems to me that the more likely reason for a cautious exercise of parliamentary powers with respect to judicial officers would be found in the ethic of mutual respect to which I have referred, rather than fear of constitutional transgression.

There are also occasions upon which the converse issue arises—namely, the issue of the extent to which the courts can interfere with the actions of members and officers of Parliament. Generally speaking, any action by a court which would impede a member or officer of a Parliament in the discharge of his or her duties would constitute a contempt of the Parliament. So, for example, a member of Parliament cannot be lawfully required to attend court at a time at which the Parliament is sitting, as any such requirement would prevent that member from attending to parliamentary duties.

Given the breadth of the privileges of Parliament, and the corresponding breadth of the constraint upon the powers of the court to take any action which could interfere with the workings of Parliament, it is perhaps surprising that on two recent occasions in Western Australia questions have arisen before me as to whether the court should take such an action. In *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex parte Corruption and Crime Commission*,[47] the Corruption and Crime Commission of Western Australia sought an injunction, *ex parte*, to restrain the Parliamentary Inspector of the Commission from presenting a report to the Parliament. The relevant Act constituted the Inspector an officer of the Parliament, with responsibility for assisting a Standing Committee of the Parliament in the performance of its functions. Although it was not necessary, in the context of an urgent *ex parte* injunction, to form a concluded view on the question, I expressed a very serious doubt as to whether a claim of that kind was justiciable given that the relief sought would prevent an officer of the Parliament from discharging his duty to the Parliament. In the result, I refused the injunction on other grounds.

More recently, in *A v Corruption and Crime Commissioner*,[48] the Court of Appeal of Western Australia upheld a decision to dismiss a claim for an injunction to restrain the Corruption and Crime Commissioner from publishing video recordings of events which took place in the custodial area of a police station, and which had been tendered in evidence in a public hearing of the Commission. When I published the reasons of the Court of Appeal, counsel for the appellant sought orders which would have the effect of staying the decision, and preventing publication of the video recordings, until an application for special leave to appeal had been made to the High Court. Counsel for the Commission pointed out that such orders would be futile because later that day the Commission proposed to present its report to the Parliament, and the report included the video recordings, the subject of the proceedings before the Court. Counsel advised the Court that it was the invariable practice of the Parliament to immediately publish reports presented to it by the Commission unless a Presiding Officer made an order to the contrary. In that context, counsel for the appellant questioned whether the Court would entertain an application for an order restraining the Commission from

47 [2008] WASC 305.
48 [2013] WASCA 288.

presenting its report to the Parliament. I expressed the strong tentative view that such an order would be outside the jurisdiction of the Court and, if made, would very likely constitute a contempt of Parliament. In the result, no application for an order of that kind was made.

In summary, although questions do arise from time to time with respect to the capacity of the Parliament and the courts to interfere with the proceedings of the other, those occasions are rare. When such occasions do arise, the relevant entity generally proceeds with great care to avoid any interference with the workings of the other, consistently with the ethic of mutual respect.

4. THE INTERPRETATION AND INVALIDATION OF LEGISLATION BY THE COURTS, AND THE PARLIAMENT'S POWER TO LEGISLATIVELY CONTROL THE COURTS

As I have already noted, the essence of the judicial functions lies in the administration and enforcement of laws passed by the Parliament and of the common law of Australia. In order to perform that function, it is, of course, necessary for the courts to interpret and construe laws passed by the parliaments of Australia. It cannot be denied that this gives the courts the capacity to affect the operation and effect of the laws passed by those parliaments. However, consistently with the ethic of respect, it is well established that the primary obligation of a court construing a statute is to give effect to the intention of the Parliament to be ascertained from the words used by the Parliament in the statute.

In countries with a written constitution, the courts' jurisdiction to enforce the constitution includes the jurisdiction to determine whether a particular law falls within the scope of the legislative power conferred upon the enacting Parliament by the constitution. So in Australia and other countries with written constitutions, it is commonplace for courts invested with the relevant jurisdiction to determine whether laws passed by a Parliament are valid or invalid. Further, as I have noted, even in a country without a written constitution, such as the United Kingdom, the incorporation of treaty obligations into the domestic law of the country can give rise to justiciable issues as to whether a particular law fails to comply with those obligations, in which event it is ineffective.

These powers stand in stark contrast to the observations made by Lord Coke in *Bonham's case* which were thought to contravene the supremacy of Parliament. However, the echoes of *Bonham's case* are clearly apparent in a relatively recent judgment of Lord Steyn, sitting in the House of Lords.[49] He observed:

> … the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the

49 *Jackson v The Attorney General* [2005] UKHL 56.

> ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[50]

However, other members of the House of Lords in *Jackson's case* expressly affirmed the continuing validity of the doctrine of the supremacy of Parliament, and there has been no suggestion that the 'exceptional circumstances' to which Lord Steyn referred have arisen and justify the conclusion that a particular law exceeded the powers of the Parliament.

In addition to the constraints upon legislative power imposed under a written constitution, it is not uncommon for parliaments to legislate that a particular manner and form must be followed before legislation of a particular kind can be validly passed. Commonly those provisions take the form of a prohibition upon the presentation of a Bill for royal assent unless they have been passed by a specified parliamentary majority, or approved by a majority of electors voting at a referendum. When questions arise as to whether those provisions apply to a particular Bill, or whether their terms have been complied with, it now seems generally accepted that those questions can be determined by a court.

However, there have been differences of judicial opinion on the question of whether a court can or should intervene before the legislative process has run its full course. The cases on this question are conveniently collected by Professor Campbell in *Parliamentary Privilege*.[51] In *Cormack v Cope*,[52] members of the High Court expressed differing views on the question of whether the Court should entertain the issues prior to the legislative process having run its full course.

In *Marquet v Attorney-General (WA)*,[53] the Clerk of the Parliaments of Western Australia sought declarations as to whether it would be lawful for him to present two Bills for the Governor's assent, having regard to s 13 of the *Electoral Distribution Act 1947* (WA) which relevantly provided that:

50 *Jackson v The Attorney General* [102].
51 Note 19, 113-118.
52 (1974) 131 CLR 432; [1974] HCA 28.
53 (2002) 26 WAR 21; [2002] WASCA 277.

> It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

The proceedings were commenced before the Bills had been presented to the Governor. All parties and the six *amici curiae*[54] wanted an authoritative judicial ruling on the legal issues involved before the Bills were presented for royal assent. The Court, constituted by five judges, nevertheless gave express consideration to the extent of its jurisdiction, and concluded that the Court had jurisdiction to grant relief prior to presentation of the Bills for royal assent, and that it was appropriate for the Court to grant such relief and to declare that it would be unlawful for the Bills to be presented to the Governor.

When the case went on appeal to the High Court, all members of the Court other than Kirby J expressly reserved their position on the topic of justiciability, noting that no party or the *amici* contested the Court's jurisdiction.[55] Kirby J entertained 'no doubt' as to the justiciability of the proceedings and similarly had 'no doubt' that it was proper for the Full Court to exercise its power to decide the issues brought before the Court and to provide declaratory relief.[56]

In summary, despite Lord Steyn's observation in *Jackson's case*, the courts have consistently adhered to the doctrine of the supremacy of Parliament for hundreds of years, consistently with fundamental concepts of democracy and the ethic of respect to which I have referred. The exercise of jurisdiction to determine whether a particular law is within the powers conferred upon the relevant legislature by a written constitution, or complies with manner in form provisions previously enacted by a legislature is not inconsistent with that ethic, but rather provides a mechanism for ensuring that the constitution and other laws of Parliament are respected and enforced.

However, when one comes to address the converse issue—namely, the extent to which parliaments should legislatively interfere with the independent functioning of the courts, some recent events raise a question as to the degree to which it could be said that parliaments respect the 'proper functions' of the courts, as espoused by Chief Justice French.

Although the essential role of the legislature is to enact laws, traditionally and consistently with the notion of independence of the courts, the courts have been empowered to promulgate subsidiary legislation in the form of court rules to control court procedure. About two years ago, after consulting widely with various people and organisations within the legal profession,[57] the judges of the Supreme Court of Western

54 Who I represented.

55 *Attorney-General (WA) v Marquet* 217 CLR 545; [2003] HCA 67, [8].

56 *Attorney-General (WA) v Marquet*, per Kirby J at [110].

57 See for example, Wayne Martin, 'Judicial Review of Administrative Decisions in Western Australia – Procedural Reform' (Law Summer School 2012, University Club of WA, 24 February 2012).

Australia resolved to simplify and modernise the procedure for applications for judicial review of administrative decisions, in line with changes made in other comparable Australian jurisdictions. Amended Rules of Court were promulgated by the judges.[58] They included a provision specifically relating to the power of the Court to order that a decision-maker whose decision was subject to review by the Court provide reasons for that decision.[59]

There was nothing radical or novel about including such a provision within the amended rules. There is no doubt that the Court has always had power to order parties to legal proceedings to provide any information necessary to enable the Court to determine those proceedings. As Justice Heydon specifically observed in relation to a decision-maker being required to provide reasons for the purposes of court proceedings:

> A decision-maker can be compelled to produce documents revealing the reasons for a given decision, whether by a subpoena duces tecum or a notice to produce. That decision-maker can be compelled by interrogatories to reveal those reasons in writing, and by a subpoena ad testificandum to reveal those reasons in the witness box.[60]

The amended Western Australian rules adopted the same approach with respect to the provision of reasons for decisions which had been challenged in court as the New South Wales procedure promulgated by the Supreme Court of New South Wales some 13 years earlier.[61]

The Joint Standing Committee on Delegated Legislation expressed the tentative view that the Court had exceeded its powers and trespassed into the province of the Parliament by, in effect, requiring all decisionmakers to provide reasons for their decisions. Each of Parliamentary Counsel and the Court rejected this view as the rules only applied to proceedings before the Court;[62] as such it was merely an express enunciation of the Court's longestablished power to order any party to proceedings before the Court to provide information where that information was necessary to enable the determination of the proceedings according to law. Nevertheless, the Committee chose to act upon contrary legal advice,[63] and recommended that the rules be disallowed.[64]

It is of some significance that the Committee did not seek independent legal advice on the issue, but instead chose to rely upon advice provided by the executive

58 *Supreme Court Amendment Rules (2013)* (WA).
59 Order 56, rule 2(5) as enacted by *Supreme Court Amendment Rules (2013)* (WA).
60 *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28, [95].
61 Supreme Court (NSW), Common Law Division – Administrative Law List Practice Note No 119 (2 May 2001); Supreme Court (NSW), Common Law Division – Administrative Law List Practice Note No 3 (16 July 2007) (current).
62 Joint Standing Committee on Delegated Legislation, *Report 66 – Supreme Court Amendment Rules 2013* (October 2013) (Appendix 3, 4).
63 Which I disagreed with in a detailed written review of that advice which was provided to the Committee for its consideration (Note 62, Appendix 3).
64 Note 62.

government,[65] which, of course, had a vested interest in the subject matter of the rules, as the party most commonly defending applications for judicial review of administrative decisions. In its report, the Committee considered that it was more appropriate for the Parliament rather than the Court to determine the validly of the rules as this accorded with the 'principle that noone should be a judge in their own cause'.[66] It was not apparent what weight the Committee gave to the fact that the Court was merely specifying procedures which would facilitate the just disposition of cases before the Court, with a view to providing fairness and justice to all parties.

The effect of the disallowance of the rules has been ameliorated to some extent. The rules were re-made without the provision which had attracted the ire of the Committee, and no objection was taken to that version of the rules,[67] and the Court can continue to rely upon its general case management powers to order the provision of reasons by a decisionmaker in an appropriate case. However, in my view this incident was a significant departure from the ethic of mutual respect between the parliamentary and judicial branches of government.

Another area of tension in the relationships between the Parliament and the courts arises from the increasing enthusiasm in a number of Australian jurisdictions for legislation which significantly restricts the discretion available to courts at the time of sentence,[68] usually by requiring that a particular mandatory minimum term of imprisonment be imposed. The obligation of a court to impose a sentence which is appropriate to the circumstances of the offence and the circumstances of the offender is a long-standing characteristic of the judicial function. The imposition of a mandatory minimum prison term limits the courts' capacity to perform that function. In effect, a mandatory prison term can result in the Parliament determining the sentence which will be imposed, at least in those cases in which a court's sentence, having regard to the circumstances of the offence and of the offender, would have been less than the mandatory term prescribed by the Parliament.

Despite Parliament's curtailment of the discretion as to the punishment to impose, all seven members of the High Court held that statutory prescription of mandatory minimum term of imprisonment for serious crimes did not involve any usurpation of the judicial power which was reposed by Chapter III of the Constitution exclusively in the

65 Which I disagreed with in a detailed written review of that advice which was provided to the Committee for its consideration (Note 62, Appendix 5).

66 Note 62, 13.

67 *Supreme Court Amendment Rules (No 3) 2013* (WA).

68 Lenny Roth, *Mandatory Sentencing Law*s (NSW Parliamentary Library Research services e-brief, 1/2014, January 2014); Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (May 2014) Attachment A.

courts.[69] This was even though the 'punishment of criminal guilt' has been described as 'exclusively judicial in character'.[70]

It may be that in *Magaming*, the High Court has conceded that the constitutional restriction on parliamentary intervention in the sentencing process is set at a bare minimum: so long as a court imposes the sentence, Parliament can deprive it of any role in determining what that sentence should be.[71] In my respectful view, this position can be characterised as judicial deference to the sovereignty of Parliament, rather than as an example of the ethic of mutual respect. The ethic of mutual respect would result in greater parliamentary restraint in the exercise of the legislative power to restrict judicial discretion by requiring courts to impose mandatory minimum sentences.

CONCLUSION

This analysis of four areas of intersection between the governmental functions exercised by the Parliament and the courts suggests that, while there may on occasion be departures from the ethic of mutual respect, in the main it continues to have a significant bearing upon the actions of each branch of government. However, greater parliamentary intervention in the exercise of the courts' discretion to impose a sentence appropriate to the circumstances of the offence and of the offender is concerning for a number of reasons,[72] and may prove to be a contemporary tendency towards the erosion of this ethic.

69 *Magaming v The Queen*. The other member of the Court, Gageler J, did not consider that a law which imposed a mandatory minimum sentence upon all offenders convicted of a particular offence would contravene any constitutional principle. However, in his minority view, a law which empowered an official (the Director of Public Prosecutions) to decide whether to charge some members of a class of offenders with an offence which did not have a mandatory minimum penalty, and to charge other offenders within that same class with an offence which did carry a mandatory penalty impermissibly transferred power with respect to the imposition of sentence from the judiciary to the executive.

70 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27; [1992] HCA 64.

71 *Magaming v The Queen* [27].

72 See, for example, Hon Justice Stephen Rothman AM, 'Equal Justice, Mandatory Sentencing and the Rule of Law' (Keynote Address, Legal Aid Commission Conference, 2 July 2014); Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process' (2000) 22 *Sydney Law Review* 585; Nicholas Cowdrey AM QC 'Mandatory sentencing' (Sydney Law School, Distinguished Speakers Program, 15 May 2014); Lenny Roth, *Mandatory Sentencing Laws* (NSW Parliamentary Research Service e-brief 1/2014, January 2014).

Parliament and Law Reform—the Role of the Australian Law Reform Commission Over Forty Years

Rosalind Croucher

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ESTABLISHMENT OF THE ALRC

The Australian Parliament gave birth to the Law Reform Commission of Australia in 1973, the legislation commencing on 1 January 1975.[1] It was an easy birth, with unanimous support of all parties and both Houses of Parliament.[2] From the outset it became known as the 'Australian Law Reform Commission', and in 1994 it was recommended that this become its formal name.[3]

The ALRC currently operates under the *Australian Law Reform Commission Act 1996* (Cth) (ALRC Act). The ALRC sits within the Attorney-General's portfolio as an independent agency. 'Independent' defines all aspects of the role: the strength and enduring contributions of the ALRC are also anchored in its independence. The work program is set by the Attorney-General in the form of Terms of Reference with a view to reforming Commonwealth laws and harmonising Commonwealth, State and Territory laws. On completion of each inquiry, the report is presented to the Attorney-General, who must table the report within 15 sitting days of Parliament.[4] From this point it is for Government to implement the recommendations in each report.

The primary function of the ALRC, set out in s 21 of the ALRC Act, is to advise the Parliament and Australian Government on the systematic development and reform of areas of the law referred to the ALRC by the Attorney-General.[5] Under the Australian Government outcomes and programs framework, the ALRC has one outcome, namely:

1 *Law Reform Commission Act 1973* (Cth).

2 The history of the legislation is set out in House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), Ch 2. See further, Australian Law Reform Commission, *Submission to the House of Representatives Standing Committee Inquiry into the Role and Functions of the Law Reform Commission of Australia* (1993), Volume 1, Appendix 1—A Brief History of the Australian Law Reform Commission.

3 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—the Challenge Continues: a Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), Rec 2.

4 *Australian Law Reform Commission Act 1996* (Cth) s 23.

5 See also *Australian Law Reform Commission Act 1996* (Cth) s 20(1), which contemplates a role for the ALRC in suggesting references to the Attorney-General.

> informed government decisions about the development, reform and harmonisation of Australian laws and related processes through research, analysis, reports and community consultation and education.[6]

APPROACH TO LAW REFORM

The approach to law reform at the ALRC was set by its foundation Chairman, the Hon Michael Kirby AC CMG. Kirby had virtually a blank slate upon which to write: the 'power to do all things necessary or convenient to be done for or in connexion with the performance of [the ALRC's] functions'.[7] His approach to law reform in practice was, as he has said, 'significantly different from overseas commissions':

> We took our proposals to the general public to whom the law ultimately belongs. We used radio and television shamelessly. This was very difficult for a naturally shy person like me.
>
> Because our methodology from the start was distinctively Australian, our approach was congenial to a country of robust individualists.[8]

Kirby's objective was to provide, through the processes of consultation, an 'institutional voice' for those beyond 'the big end of town', particularly 'the poor and the powerless'.[9]

In the introduction to the large tome written to mark Kirby's retirement from the High Court in 2009, *Appealing to the Future—Michael Kirby and His Legacy*, Dr Ian Freckleton QC said that 'law reform Kirby-style was different'. It was 'more inclusive, more energetic and with a broader vision'.[10] The ethos of institutional law reform established under Kirby has remained very much the distinguishing characteristic of the ALRC's methodology—particularly the development of law reform proposals only after broad community consultation.

After its first twenty years, the then President of the ALRC, Alan Rose AO, remarked:

> Institutional law reform provides a rare opportunity for individuals to communicate their desires for changes in the law to an independent body that can do something with the information. The ALRC's processes allow it to take an apolitical, detached and independent approach in evaluating and balancing the views of lobbyists and special interest groups.[11]

And at the 30-year mark, the then President, Emeritus Professor David Weisbrot AM, referred to the *sine quo non* of a law reform commission being the 'deep commitment

6 Australian Law Reform Commission, Annual Report 2013–2014, Report 125, 17.
7 *Law Reform Commission Act 1973* (Cth) s 8.
8 Ibid.
9 Ibid.
10 Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Thomson Reuters, 2009), 14.
11 Alan Rose, 'Reform and Renovation—Reassessing the Role of the ALRC [1995] *ALRC Reform Journal* 2.

to undertaking extensive community consultation as an essential part of research and policy development'.

Now, at the 40-year mark, the success of the approach of the ALRC is manifest over a history of 126 reports; the relationships established and nurtured with a wide range of stakeholders and participants; and the respect in which its work is held by the courts, by Government, and by the international community of law reform agencies. It is not alone in working towards law reform, but its role is distinct, enduring and different.

PARLIAMENT AND LAW REFORM

The ALRC does not have a monopoly on law reform at the Commonwealth level. Law reform happens in many places. My predecessor, David Weisbrot, described the law reforming landscape in Australia as 'a crowded field',[12] which includes joint ministerial councils; committees in both Houses of the Federal Parliament; departmental and inter-departmental committees; bodies providing specialist advice—like the Family Law Council; Royal Commissions and other *ad hoc* bodies appointed to investigate matters of public concern;[13] as well as—last, but by no means least—law reform commissions.[14] Another former President of the ALRC, Alan Rose AO, referred to the 'federal official law-making family', in which he included the Parliament, the executive, federal officials in departments and agencies, and the judiciary.[15]

At the time of writing this article, the ALRC is in the final stages of an inquiry into encroachments in Commonwealth laws on 'traditional rights, freedoms and privileges'. The second chapter of the Interim Report, released on 3 August 2015, provides an overview of all of the processes of legislative scrutiny, including the very important role that parliamentary committees play—a sort of law reform 'in advance'—and the ongoing monitoring role of bodies such as the Independent National Security Legislation Monitor. In a contribution to a collection of essays to mark the 30th anniversary of the ALRC, Senator Marise Payne wrote of the 'proud history' of both Houses of Parliament 'as proponents of law reform'.[16]

While this article focuses on the relationship between the ALRC and Parliament, it is to complement the understanding of the other places that law reform happens. It is also to highlight the value of institutional law reform bodies, like the ALRC, in advancing law reform by the fact that they are independent bodies and able to reflect fully, consult extensively, analyse deeply, and recommend powerfully.

12 David Weisbrot, 'The Future for Institutional Law Reform' in *The Promise of Law Reform,* B Opeskin and D Weisbrot (eds) (2005), 18, 20.

13 Weisbrot included in his list the Administrative Review Council, which, as of 2014, is no more.

14 See also the chapter by Marise Payne, 'Law Reform and the Legislature' in *The Promise of Law Reform,* B Opeskin and D Weisbrot (eds) (2005), 302–313.

15 Alan Rose, 'Reform and Renovation—Reassessing the Role of the ALRC [1995] *ALRC Reform Journal* 2.

16 Marise Payne, 'Law Reform and the Legislature' in *The Promise of Law Reform,* B Opeskin and D Weisbrot (eds) (2005), 313.

NO 'FREE LUNCH'

The foundation Chairman of the ALRC, the Hon Michael Kirby AC CMG, observed that 'No one owes a law reform agency a free lunch'.[17] The ALRC, like all other areas of government spending, is subjected to routine scrutiny through the processes of Parliament itself, especially the scrutiny undertaken by the Senate Standing Committee on Constitutional and Legal Affairs as part of the budget estimates processes.

Periodically the relationship between Parliament and the ALRC becomes more intense, the glare of Parliament being turned onto the heart and soul of the agency. This has happened on three occasions through parliamentary committees. Other times it has occurred through bureaucratic inquiries, conducted, for example, by the Treasury.

Challenging our existence can be helpful—to a point. In periods of economic constraint, and a desire of governments to restrain public spending, it is a natural thing to look at the public service, and structures of departments and agencies and to explore things that might appear untidy, wasteful, or even unnecessary. Agencies that are very small are a natural target. Functions that look like they *could* be done elsewhere naturally prompt questions. Governments that place a premium on centralised control are naturally suspicious of functions that sit outside central control—especially those that are independent. A questioning of such matters is not a problem for law reform agencies. It reinvigorates a sense of who and what we are, and the essential conditions on which our work is best conducted—and of most value—to government, in an extended sense, and to law.

1994 REVIEW

In 1994 the House of Representatives Standing Committee on Legal and Constitutional Affairs conducted 'the first comprehensive parliamentary review of the Law Reform Commission of Australia in its almost 20 years of existence'.[18] The Committee considered the 'optimum role' for the Commission 'as a separate and permanent law reform agency' and its relationship to other relevant bodies.[19] More particularly, as Parliament had set up the Commission, it was for Parliament to consider if it was working as intended: 'is it operating effectively and if its functions are the most appropriate for the future'.[20]

The Committee concluded that the Commission was:

17 Michael Kirby, 'Law Reform—Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 10. The address can be accessed here: <http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_2jun08.pdf>, 11.

18 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), iv.

19 Ibid, ix, Terms of reference.

20 Ibid, [1].

> an important source of independent advice for the government because of its capacity for accessing expert and representative opinion. Its direct relationship with the Attorney-General means it fulfils a need for advice to the Attorney-General independent from that of the department and others. The objectivity of the Commission also derives from the wide consultation that the Commission undertakes in each reference, as there is a democratic imperative in such open processes.
>
> Together, the national character and the independence of the Commission encourage a more systematic development of the law in Australia.[21]

The Committee looked at the roles of other statutory and non-statutory bodies that advised the Federal Government. It noted where joint projects had been undertaken and that duplication should be avoided, but that there was 'value in providing a range and diversity of advice to the government'.[22] The Committee recommended the continuance of the ALRC's 'high quality, well researched and well documented reports'.[23] But there were issues identified that required some resolution in recommendations, 'aimed at correcting impediments to the smooth operation of the Commission and facilitating its value to the Australian community'.[24]

The Committee focused on issues relating to the implementation of the ALRC's recommendations; the reputation of the Commission in the eyes of those outside government; and the record of the Commission in completing references by stipulated dates.[25]

The Committee acknowledged that implementation was a matter that was not in the ALRC's hands, given that it is the Government that is usually responsible for implementation, hence 'the processing of reports' was affected by 'political, resource and time constraints that have nothing to do with the merits of the recommendations'.[26] The implementation rate at the time was said to be 60% and that was acknowledged as 'adequate'. Implementation is a vexed and complex matter—and is a recurring theme in reflections on the value of the contribution of the ALRC.[27] (As of June 2014, over 88% of ALRC reports had been substantially or partially implemented).[28]

21 Ibid, [29]–[30].
22 Ibid, [60]. See Ch 8.
23 Ibid, Rec 3.
24 Ibid, iv.
25 Ibid, [9].
26 Ibid, [11].
27 See, eg, Part D of *The Promise of Law Reform,* B Opeskin and D Weisbrot (eds) (2005), 'Outputs and Outcomes'. See also, Rosalind Croucher, 'Re-imagining Law Reform—Michael Kirby's Vision, Human Rights and the Australian Law Reform Commission in the 21st Century', The 9th annual Michael Kirby Lecture, Southern Cross University, Coolangatta, 9 July 2015. Published on the ALRC website: www.alrc.gov.au. The section on 'Pebbles in a Pond', provides a wider consideration of measuring impact.
28 Commonwealth of Australia, Australian Law Reform Commission, *ALRC Annual Report 2013–2014*, Report 125, 26–27.

The Committee considered that the 'record of the Commission in terms of measurable output has been impressive',[29] and praised its methodology of consultation. It accepted the importance of expert consultants to the ALRC and 'suggested that guidelines about the processes used by the ALRC could be provided to people who, not being members of staff, were still interested in or involved in its work.[30] It is certainly very much part of current ALRC practice to provide information to the public and to those directly involved in the ALRC's work, about processes and expectations. For example, in 2013, the guides, 'Law reform process' and 'Making a submission' were made available on the ALRC website in Easy English and in 21 different community languages, including Auslan.[31]

Meeting deadlines was a key issue targeted in the 1994 inquiry, stating that 'a failure to deliver reports on time is an impediment to effectiveness'.[32] It was recognised that this was not all the ALRC's fault. The Committee recommended 'that the Commission should not be burdened with more work than it can possibly do. The Attorney-General should ensure that the Commission should not be given a reference unless the Commission has the resources necessary to commence work promptly and continue'.[33] But the Committee also considered that it was 'necessary to impose a greater time discipline on the Commission'.[34] Responding to such concerns has involved tighter timeframes stipulated in the Terms of Reference, and greater and continuing cooperation with the Attorney-General and Attorney-General's Department in discussing matters such as the resourcing of each inquiry. As a strategy, this works well—so long as it is adhered to. As the Committee concluded, 'regular consultation between the Commission and the Attorney-General is the most important way to ensure the successful completion of an inquiry in terms of both setting an acceptable deadline and meeting it once set'.[35]

The title of the 1994 report, 'Law Reform—the Challenge Continues', reflected a number of issues summarised in the Foreword by the Chair of the Committee, Mr Daryl Melham MP. There was the challenge of 'environment', in that 'law reform commissions share the function of proposing law reforms with a plethora of specialist review and reform bodies which were less numerous twenty years ago'. The most ominous challenge was as to existence:

29 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), [3.4.3].

30 Ibid, [18]. Rec 9.

31 See http://www.alrc.gov.au/law-reform-process.

32 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), [21].

33 Ibid, Rec 13.

34 Ibid, [3.9.11]. This was to be achieved by the Commission keeping the Attorney-General informed about the progress of inquiries (Rec 14) and that the Commission must formally request an extension of time if unable to meet an agreed reporting deadline (Rec 15).

35 Ibid, [21].

> The role of law reform has been challenged as never before. The Victorian Law Reform Commission and the Law Reform Commission of Canada were abolished in 1993. The Law Reform Committee of South Australia no longer exists.[36]

These have proved to be continuing themes. They were to be central to the inquiry into the resources and functioning of the ALRC in the Senate inquiry conducted in 2010. But there was another inquiry in the meantime that tackled a crucial issue that went to the independence of the ALRC in a very real way. It focused on the relationship between the Attorney-General and the President of the Commission.

1997 REVIEW

On 29 September 1997, a major controversy broke as to whether then Attorney-General the Hon Daryl Williams MP had suppressed a submission from the ALRC to a Parliamentary Committee regarding the Howard Government's Wik amendments (its '10-Point-Plan') to the *Native Title Act*. The ALRC submission was highly critical of constitutional aspects of the draft legislation. Shadow Attorney-General, Senator Nick Bolkus, alleged that the Attorney-General had sought to dissuade the ALRC from making a submission. In a doorstop interview at Parliament House that day, Senator Bolkus said: 'It's quite apparent that the Federal Government is now at war with one of the most senior and respected of public servants in Australia, Alan Rose'. Alan Rose AO, a former Secretary of the Attorney-General's Department, was then President of the ALRC. On 2 October 1997, Senator Bolkus referred the matter of possible improper interference to the Committee of Privileges.[37]

What had led up to this inquiry? On 3 July 1997, a form letter was sent from the Wik Task Force, seeking comments from the ALRC on the draft Native Title Amendment Bill. This is the kind of request that comes regularly into the President's in-tray. A month later, the ALRC provided a submission to Senator Minchin, Parliamentary Secretary to the Prime Minister, with a copy to the Department of Prime Minister and Cabinet. No copy was provided to the Attorney-General.[38]

The Attorney-General was, to coin a phrase, 'not amused'. He wrote to Alan Rose, pointing out the ALRC's functions under its Act, 'are confined to matters referred to it by the Attorney-General', and that he, as Attorney-General, should have been consulted

36 Ibid, iv.

37 The Terms of Reference are set out in the Report: Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997). See also, *Journals of the Senate*, 2 October 1997, 2611. The report can be accessed here: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/1996-99/report_73/~/link.aspx?_id=7FF471DF80414E4994F474EBAA930ED2&_z=z>.

38 Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997), [1.10].

before the ALRC provided comments to Government 'on a matter which is unrelated to any current Reference on which the Commission is working'.[39]

Rose apologised to the Attorney-General for not providing a copy of the submission, but said that the ALRC's decision to make the submission was on the basis that many of the issues associated with native title have a 'real and continuing connection' to many of the matters dealt with in the ALRC's customary laws report.[40]

Sydney Morning Herald journalist Richard Ackland got onto it.[41] The Acting Deputy Secretary of the Attorney-General's Department wrote a letter to the newspaper's Editor.[42] Well known cartoonist, Alan Moir, did a cartoon. The phones and fax machines (the then primary means of communication) were running hot between Canberra and Sydney.

The Attorney-General's Department (through the Acting Deputy Secretary Richard Moss) expressed it simply, in asking if the ALRC 'had a death wish'—if it pressed on and made a submission on 'such a controversial issue'.[43] The ALRC decided to withdraw from the inquiry.[44] The nub of the disagreement was a matter that went to the ALRC's independence.

The Privileges Committee concluded that the decision of the ALRC to withdraw was the ALRC's and was not 'induced', 'by force or threat, or by other improper means', and there was therefore no contempt found. But the Privileges Committee considered that it was necessary for the Legal and Constitutional Legislation Committee to take a long hard look at the powers and functions of the ALRC.[45] This began in 2003, but petered out.[46] It was not until the 2010 inquiry that such matters surfaced again.

Where independence is the guiding mantra of the ALRC, the relationship with Government is necessarily a sensitive one for law reform bodies—as this episode confirms. If you overreach it, and lose the confidence of government as a result, then, as Professor Michael Tilbury (a very experienced Law Reform Commissioner) observed, a law reform commission 'is effectively functionless for the period that government is in power'.[47]

39 Ibid, [1.11].
40 Ibid, [1.13].
41 *Sydney Morning Herald*, 5 December 1997.
42 Published 12 December. See Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997), [1.22].
43 Ibid, [1.21].
44 Although Rose was invited to give oral evidence at a committee hearing on the Wik amendments ([1.21]), the ALRC decided not to press ahead: ibid, [1.15]–[1.18].
45 Ibid, [2.36].
46 Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (April 2011), [1.11]. The report can be accessed at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/report/index>.
47 Michael Tilbury, 'Why Law Reform Commissions?: a deconstruction and stakeholder analysis from an Australian perspective' (2005) 23 *Windsor Yearbook of Access to Justice* 339.

Ensuring there are 'no surprises' for the Attorney-General is a different concept entirely from taking direction, which is anathema to independence. As a former Law Commissioner and Special Consultant to the Law Commission of England and Wales, Martin Partington, observed, independence 'does not mean that law reform bodies should work in isolation from government'.[48]

Having a regular, respectful and informative communication loop is good practice—and an eminently sensible policy.[49] This is part of what Patricia Hughes, Executive Director of the Law Commission of Ontario and former Professor and Dean of Law, University of Calgary, Alberta, described as being 'nimble'.[50]

In England, reforms introduced in 2010 formalised the relationship between the Lord Chancellor and the Law Commission, setting out how government departments and the Law Commission should work together 'to deliver law reform in the most effective way possible'.[51]

While the ALRC does not have a formal protocol, we maintain an active communication loop with the Attorney-General's Department and with the Attorney-General.[52] Following the Rose/Wik episode, the practice of the ALRC is to restrict commentary to matters that the ALRC has worked on over the years (not just current inquiries), using the parliamentary inquiry process to draw to the attention of particular committees what our reports recommend, and perhaps highlighting where there are differences with our recommendations in the proposed legislation.

In a presentation made in 2008 in Alberta, former Chair of the ALRC, Michael Kirby noted that one difficulty for the job of law reform was law reformers being 'constantly torn between getting too close to politicians and the media, in order to attract interest in, and action on their proposals, or keeping too great a distance, in order to avoid

48 Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press: 2014) 84.

49 The 1994 inquiry commented on the necessity for the ALRC and the government 'to have an effective working relationship not only during the term of inquiries but also during the processing or implementation of reports': House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), [13].

50 Ibid, 103.

51 *Law Commission Act 2009* (UK) and see *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 29 March 2010 (HC 499): < http://lawcommission.justice.gov.uk/docs/Protocol_Lord_Chancellor_and_Law_Commission.pdf/>. The protocol came into force on 29 March 2010. The protocol covers the various stages of a law reform project: before a project commences—in determining the programme of law reform; at the outset of the project; during the currency of the project and after a project is completed: see chapters 4 and 5 of Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press: 2014) for good accounts.

52 The 1994 inquiry recognised the importance of this in recommending that departments having responsibility for administering the law which is the subject of a Commission report, consult with the ALRC in the first instance within six months of the tabling of the report and later as necessary, with a view to preparing a response to that report: House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), Rec 4. See also Recs 7 and 8.

seduction and so as to maintain product differentiation in the creation of reforming ideas'.[53] It is a delicate line—but a vital one. Distrust is not helpful to independence.

2010–2011 REVIEW

Significant reductions to the ALRC's budget in the financial year 2010–2011 and thereafter, and significant changes in the governance structure and financial management to commence from 1 July 2011, prompted an inquiry by the Senate Legal and Constitutional Affairs References Committee over the summer of 2010–2011, with the Committee delivering its report in April 2011.[54] The Committee focused in particular on the role, governance arrangements and statutory responsibilities of the ALRC and 'the adequacy of its staffing and resources to meet its objectives'.

In reflecting upon the Senate inquiry, Michael Kirby considered that it revealed 'a rather discouraging scene in terms of the real support being provided by the executive government and the Parliament for the ALRC'.[55] In my opening statement in giving evidence to the Committee on 11 February 2011, I found another way to convey this 'discouraging scene':

> with respect to the question of whether our current appropriation is adequate, I have to say 'no'. I kept thinking of an analogy to describe the impact of the budget cuts—described by some as 'savings'—and the image that kept returning was that of the Black Knight in the film, *Monty Python and the Holy Grail*. After he lost one arm defending his turf he said, 'Tis but a scratch!'; after the other one was lopped off, 'Just a flesh wound!'. After both his legs were also chopped off he still managed to say, defiantly, 'The Black Knight Always triumphs!'. Ridiculous, but fitting. The reduction in budget to the ALRC makes us feel like that poor knight.
>
> The ALRC, like the knight, cannot 'triumph'—run on reputation—forever.[56]

The Senate inquiry generated 23 submissions, including from the Attorney-General's Department, the Federal Court, the Australian Academy of Law, a number of state law reform commissions, legal bodies and community organisations and individuals. It was reassuring to see that the vast majority supported the importance of the ALRC as an independent law reform body, with appropriate levels of funding, to continue to produce the high quality work that has characterised the Commission. The Federal Court of Australia, for example, highlighted that, 'Since its creation in 1975, the ALRC has become the leading law reform agency in Australia, and a leader in the common law world'.

53 Michael Kirby, 'Law Reform — Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 20. Referring to P North: 'Law Reform: Problems and Pitfalls' (1999) 33 *UBC Law Review* 37, 45.

54 The report is on the Australian Parliamentary website: www.aph.gov.au.

55 Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press: 2014), 36.

56 The opening remarks are included in the transcript of the hearing on 11 February 2011 and on the ALRC website: http://www.alrc.gov.au/publications/alrc-brief-february-2011/senate-committee-inquiry-alrc.

> The ALRC is critically important to the development of legal policy in Australia. It has a proud history of undertaking important reviews and inquiries into key areas of law and making significant recommendations to unify and improve Australia's laws.[57]

The Committee saw great force in such submissions and concluded that the ALRC could not continue to play this role 'on a shoestring budget'.[58] The Government produced its own conclusions at the end of the Inquiry, reiterating its 'strong support' for the ALRC's work.[59] However its support did not extend to a desire to restore the ALRC's appropriation.[60]

2011–2012 REVIEW

The *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, led by Stephen Skehill AO, a former Secretary of the Attorney-General's Department, came hard on the heels of the conclusion of the 2010 Senate inquiry. Commissioned by the then Minister for Finance and Deregulation, Senator the Hon Penny Wong, the review was due to conclude in November 2011, and reported in January 2012. Given its source, its focus was on 'value for money for the Government'. Financial viability was in its sights.

Given the cuts to the ALRC, it was tempting to think: 'just when you think it's safe to go back into the water …'.[61] This inquiry took the ALRC into the trenches, well and truly, in defence of our independence, indeed in defence of our existence as an independent agency.

Our independence—and separateness from the Attorney-General's Department—became no mere catch-cry but the *raison d'être* for our structure and even our location. Given the provenance of the inquiry, 'efficiency' was one of the matters we had to establish. Our argument was, in essence, that because of the ALRC's reputation for internationally recognised best practice methodology in law reform, we had generated an enormous efficiency. Through the ALRC's reputation and the standing of its Commissioners, we are able to leverage enormous expertise and contributions—all

57 Submission 22 in the online records of the Senate Committee, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/submissions (accessed 23 September 2015).

58 Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (8 April 2011), [6.26].

59 The Response was tabled on 8 July 2011.

60 In the 1994 Inquiry, the then Deputy Secretary of the Attorney-General's Department, Stephen Skehill, considered that the ALRC was 'well resourced': House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), [3.10.2]. The Committee noted that the budget of the ALRC was 'comparable with the budgets of other Commonwealth Law Reform Agencies': [3.10.4].

61 There were distinct echoes for me of defending Faculties of Law—generally speaking small, even very small, Faculties in Universities—as distinct entities at Universities. I was Dean of Law at Sydney University from the beginning of 1997 to March 1998 and at Macquarie University from November 1999 to February 2007, when I took up my appointment at the ALRC.

honorary/pro bono—that inform the ALRC's work. In responding to the *Review of Small Agencies*, the ALRC provided evidence of the value of the contribution made to the ALRC inquiry process by members of the legal community, from business and academia, as part of their participation in advisory committees, expert panels and through the consultation process. Based on the ALRC estimates, the monetary value, estimated conservatively, that could be placed on this participation in two recent inquiries amounted to $498,000 per annum of pro bono contribution.[62] The Inquiry concluded that:

> such bodies are often able to access, at no or minimal cost, input and advice that could not be expected to be made available to a Department of State on the same basis. Based on ALRC undertaking two to three inquiries per annum this would equate to approximately $400,000 to $600,000 per annum in pro bono contributions to inquiries. The Review doubts that 'free goods' of anything like this value would be available to the Department if it were to assume the role of the ALRC. It is the very independence of the ALRC from the Executive that is understood to be a significant attractor for those who freely make their expertise and time available to it.[63]

2014 COMMISSION OF AUDIT

As Parliament gave birth to the ALRC, so Parliament can bury it. As the 1994 review committee commented, '[t]he statutory nature of a law reform agency does not of course preclude it being abolished'.[64] Set up by statute, the ALRC can be abolished by statutory repeal, or by reduction or removal of funding. There is a danger of disappearance, either in law or in fact, that is always a shadow on the horizon for institutional law reform bodies. We *are* vulnerable. We *are* mortal.[65] The Law Reform Commission of Canada, for example, was established as a federal body, like the ALRC, in 1971. It was disbanded in 1993 (as was noted in the 1994 review), and its successor, the Law Commission of Canada, although created by statute in 1997, did not have its funding renewed in 2006.[66] In 2013, Western Australia's Law Reform Commission disappeared into that State's Attorney-General's department.

62 The estimation was based on hourly rates, extrapolated from those advised to the ALRC by certain participants and included expenditure for both appearances at the meeting itself and a small allowance for time to prepare and comment outside the meeting time. Travel time for interstate participants has been excluded.

63 Wong Yan Lung identifies this as an important aspect of the functioning of the HKLRC, in which the members of the Commission and its sub-committee members are volunteers. He refers to the importance of wider pro bono support: 'we are indeed fortunate to have strong goodwill and support from the legal fraternity and those in other sectors who are ready to contribute their expertise and time for the public good': *Reforming Law Reform*, 46.

64 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), [4.2.2].

65 To pick up the passage from Michael Kirby, 'Law Reform — Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 10.

66 Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform*, (Hong Kong University Press, 2014), 92.

In 2014, the National Commission of Audit, initiated by the then Treasurer, the Hon Joe Hockey MP, included in its report a list of 'Principal bodies for rationalisation'—a word that sends shivers down the spine of law reformers world-wide. The list included bodies that were to be abolished, those to be merged and those that were to be consolidated into departments.[67] The ALRC appeared in that last category. Nothing has happened—so far. I truly hope that it is not a case of '*Plus ça change, plus c'est la même chose*'.

To be subsumed into the Attorney-General's Department would remove the *raison d'être* for the ALRC's demonstrated and continuing success over four decades as an independent body prepared to give frank and fearless advice, that starts with questions, not answers, and operates outside of the Parliament and of Government. To go down this path would also fly in the face of the considered conclusions of four inquiries, three of which were conducted by parliamentary committees, each of which acknowledged the value of independence in action in the ALRC. The economic efficiency of the ALRC's operations was also underscored in the Skehill review, undertaken through Treasury.

Parliament *can* abolish the ALRC, but Parliament *should not*.

PARLIAMENT, IMPACT AND THE FLAME OF IDEAS

How does Parliament judge that we are doing well? 'Implementation' data is one way, but it is not all about statistics. A lack of implementation, of itself, does not mean failure. It is not even a very good guide to performance.[68]

While implementation statistics tell one picture, other lenses give a wider and more enduring sense of impact. In a collection of essays published in 1983, Michael Kirby reflected that 'the role of the ALRC in promoting community debate and professional acceptance of the needs of reform may be a more lasting and pervasive contribution to law reform in Australia than any particular project'.[69] In 2008, twenty-five years later, he expressed this as 'the flame of ideas' kept alight by permanent law reform bodies. As he explained

> The flame of law reform affirms a central concept of the rule of law itself: legal renewal. As I repeatedly saw in Cambodia in work I did there for the United Nations, one of the greatest causes of corruption in the world is the absence of regular machinery to modernise and change the law to accord with contemporary values

67 National Commission of Audit, *Towards Responsible Government. The Report of the National Commission of Audit—Phase One* (2014), Annexure C. The report is at <http://www.ncoa.gov.au/report/phase-one/index.html> accessed 28 January 2015.

68 A sentiment echoed by Michael Tilbury in 'Why Law Reform Commissions?' (2005) 23 *Windsor Yearbook of Access to Justice* 313–341, 327.

69 Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983), 19. Kirby noted however that, 'because public discussion about law reform may raise expectations of reform and the acceptance (in community, professional and administrative attitudes) of the necessity of change' this was a constraint on law reform – the seventh in his list: 19.

> and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done.[70]

In helping to keep the flame of ideas alight at the ALRC we have adopted new technologies to expand our modes of communication and our community reach. When Kirby was Chairman, he used cassette tapes to convey messages. We now use their contemporary equivalent, 'podcasts'.[71] We tweet. We offer 'ePubs'. We publish all submissions on our website. We use wikis—even using one to assist in building a catalogue of encroaching laws through crowd sourcing in the Freedoms Inquiry.[72] We have over 9,000 Twitter followers and this year we were selected as a finalist in the Excellence in eGovernment awards—an admirable outcome for a small agency! We accompany all our reports with a short précis version, as a separate Summary Report.[73] Through a commitment to, and practice of, accessibility, we help to fan the flame.

My personal conviction, after nearly nine years at the ALRC, is that an assessment of the contribution that law reform work makes must be seen through different lens, as Michael Kirby urged. The impact stretches far beyond the reports in and of themselves.[74] Here one must necessarily have a long view. The assessment of the contribution must be seen in the light of legal history. Law reform publications—especially the final reports—provide an enormous contribution to legal history, through the mapping of laws and policy opinions as at a particular moment in history. When I was working on my PhD, I found the reports of the UK Real Property Commissioners of the 1830s a most valuable resource. Each law reform commission report not only reviews the past, it also maps the present—as well as making recommendations for the future. In reviewing the submissions and consultations the reports also provide a snapshot of opinion on the issues being considered—again providing a highly important contribution to legal history, to judicial officers in their judgments, and to policy makers and parliamentarians alike in informing changes to law.

A good example is the inquiry undertaken by the ALRC into the recognition of Aboriginal Customary Laws, completed in 1986—almost 30 years ago.[75] That was a mammoth nine-year inquiry, the ALRC's 31st report—running to over 1,000 pages. It remains

70 Michael Kirby, 'Law Reform: Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 29–30.

71 Such as the podcast on 3 March 2012 by Professor Terry Flew Podcast, Commissioner, on the recommendations made in the Classification Review's Final Report: <www.alrc.gov.au/news-media/2011-2012> at 9 October 2012; and the podcast I did on 17 December 2010 on Indigenous issues and consultation in the Family Violence Inquiry: <www.alrc.gov.au/news-media/family-violence/podcast-indigenous-issues-and-consultation-family-violence-inquiry> at 9 October 2012.

72 An Inquiry to identify and consider encroachments in Commonwealth laws on 'traditional rights, freedom and privileges', and whether such encroachments are justified: <www.alrc.gov.au/inquiries/freedoms/terms-reference> at 25 November 2015. The reporting date for this Inquiry is December 2015.

73 They have to satisfy one simple practical principle: that they will fit in a briefcase and be capable of being read on the plane between Sydney and Canberra: 'Defending Independence' (2014) 34(3) *Legal Studies* 515–535, 533. This was a review essay written as an extended book review of *Reforming Law Reform.*

74 In my Michael Kirby lecture I describe this under the heading 'Pebbles in a Pond'.

75 *Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986).

one of the most-visited reports on the ALRC website—and since 2010, when we started counting these things, visited nearly 200,000 times.[76] It is also the 4th most downloaded of all our reports—over 5,500 times, counting just our website alone.

This kind of interest, and especially in work such as the Customary Laws report, continuing now almost 30 years after the report was completed, signifies a dimension of importance of the ALRC's work and its impact, even where specific recommendations may not yet have found their way into specific legislative action. Significantly, the reflections in the Customary Laws report were ones we returned to in the Native Title inquiry. The report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, was launched on 29 June this year.

The authoritative character of the analysis in each report means that, as Kirby observed on the 30th anniversary of the ALRC,

> courts and academic institutions are increasingly turning to law reform reports as a significant, intensive and accurate source of legal authority, principle and policy. In this way, even if unimplemented by the Parliament, a law reform report can influence the development of the law by the courts, and also by officials and other agencies.[77]

As the Federal Court observed in a submission to the 2010 inquiry:

> The Court benefits greatly from the ALRC's reports, research and analysis of complex areas of law within federal jurisdiction. … More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented. ... In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute and developing the common law.[78]

The law reform process itself also has both an immediate, and a long-lasting impact. The success of the consultation process is that it is *personal*. Commissioners personally lead the consultations with a wide range of stakeholders in each inquiry. Respectful relationships are established and built through the 12 months or so of an inquiry, often continuing from inquiry to inquiry. The nature of these relationships also account in large part for the pro bono contributions referred to earlier.

76 Specifically, it has been visited by 85,831 unique users 194,804 times. Two chapters of the Customary Laws Report also have the highest 'unique page views': 'Changing Policies Towards Aboriginal People' (Customary Laws 1986 (128,435 upv); 'Impacts of Settlement on Aboriginal People' (Customary Laws 1986) (77,681 upv).

77 Michael Kirby, 'Are We There Yet?', *The Promise of Law Reform* (Federation Press, 2005), 433–448, 439. See also the observations of David Weisbrot: 'Law Reform, Australian-Style', *Appealing to the Future* (Thomson Reuters, 2009), 607–637, 625.

78 The submissions are found at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/submissions>. The Federal Court's submission is Submission 22. In 2003 Kirby said that the 'willingness of contemporary judges' to use ALRC reports 'is a notable achievement': Michael Kirby, 'The ALRC—A Winning Formula' (2003) *Reform* 58–63: <http://www.austlii.edu.au/au/journals/ALRCRefJl/2003/11.html>.

Building relationships is one way in which the reputation for independence is nurtured and protected. You have to have the confidence of stakeholders that their opinions carry weight, that they will be listened to and evaluated respectfully—with the outcomes not determined in advance. Respectful relationships with government and stakeholders across the spectrum of interests in any inquiry enables the impact of an inquiry to continue over the years.[79]

The relationship between Parliament and the ALRC is a multi-layered one: as parent, protector, challenger—and potential executioner. It is sustained by respectful engagement and respectful distance, as befits an independent statutory agency. The ALRC in the 21st century has as much of a role now as it had at its birth. It has earned the respect in which it is held, both nationally and internationally. But it is not something that I, my predecessors and my successors, can ever take for granted. We have a high reputation to maintain. We have demonstrated our independence. We must continue to demonstrate the right to keep it.

79 Relationships are built not just with stakeholders, but also with other law reformers. Many come to visit, to learn by watching and being mentored in our processes—like our colleagues from Samoa and the Solomon islands. On occasion we are enlisted to provide hands-on training, as for example in Papua New Guinea and Botswana (in both cases led by my predecessor, David Weisbrot). We have hosted many visitors at the ALRC, like those from Vietnam, Thailand, South Korea and China, wanting to know about our processes and practices.

Parliamentary Privilege Developments in New Zealand: The Good, the Bad and the Ugly

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INTRODUCTION

New Zealand has been a pathfinder for the common law jurisdictions that operate under the protection of Article 9 of the *Bill of Rights 1688*.[1] It has produced two of the leading decisions on the scope of Article 9,[2] and, last year, its Parliament enacted a comprehensive reform of the law of parliamentary privilege. The *Parliamentary Privilege Act 2014* (NZ) had dual purposes: to undo the effect of an unfortunate decision of the New Zealand Supreme Court,[3] and to reaffirm and clarify the scope of Parliament's freedom of speech privilege. Article 9 reads:

> That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

This article recounts the leading case law developments and records the primary changes that the *Parliamentary Privilege Act 2014* introduced. This Act aligns the law of Australia and New Zealand as several of the Act's provisions were modelled on the Australian *Parliamentary Privileges Act 1987* (Cth).[4] The leading decisions examined are: *Prebble v Television New Zealand Ltd*,[5] *Jennings v Buchanan*,[6] and *Attorney-General v Leigh*.[7] Each decision addressed the scope and application of Parliament's freedom of speech under Article 9. In addition, this article examines the Court of Appeal decision in *Awatere Huata v Prebble*,[8] which addressed Parliament's companion privilege of exclusive cognisance (Parliament's right to regulate its own internal proceedings). This decision contained speculative rather than conclusory reasoning but it charts the direction of change—towards a narrowing of the privilege.

1 *Bill of Rights 1688* 1 Will & Mar, Sess 2, c 2.
2 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321(PC); *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.
3 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.
4 See below for discussion of the decision in *R v Murphy* (1986) 5 NZWLR 18 (NSWSC), which was the catalyst for the *Parliamentary Privileges Act 1987* (Cth).
5 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC).
6 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.
7 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.
8 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC and CA).

PREBBLE V TELEVISION NEW ZEALAND

(a) The decision

Prebble was a Privy Council decision on appeal from New Zealand. It concerned events from over 20 years ago but it remains the leading authority on the scope of Article 9. The plaintiff was a Minister of the Crown in the Fourth Labour Government (1984–1990) under Prime Minister David Lange. He sued the defendant for alleged defamation arising out of a current affairs programme about the plaintiff's actions as Minister for State-Owned Enterprises. The Government had actively promoted the corporatisation and/or privatisation of the State's commercial trading functions (airways, postal services, railways, etc), and the plaintiff claimed that the programme portrayed him as having conspired to sell off the State's assets at under-valued prices in return for donations to the Labour Party.

The defendant denied the claims but also pleaded truth, fair comment, qualified privilege, and mitigation of damages on account of the plaintiff's unenviable reputation as a politician. Several of the particulars the defendant pleaded referred to the plaintiff's and other ministers' speeches in the House of Representatives and to words or actions within the ambit of "proceedings in Parliament" (as that phrase is used in Article 9). The Court of Appeal held that all of the particulars pertaining to the House and its proceedings were covered by Article 9 and absolutely protected from judicial scrutiny. However, these particulars, the Court held, could not sensibly be struck out with a view to the action continuing. The particulars were neither minor nor inconsequential to the alleged defamation but "very close to the core of this highly political case".[9] Consequently, the Court resolved that the only just recourse was to stay the action.

On appeal, the Privy Council agreed with the Court of Appeal's ruling on the application of Article 9 (all of the particulars pertaining to the House and its proceedings were inadmissible) but reversed the decision to stay the proceedings. The interests of justice did not warrant that recourse as the defendant had relied on a large number of other matters in support of the allegation of conspiracy, to which parliamentary privilege had no application.

(b) Critique

(i) Judicial correction

Lord Browne-Wilkinson seized the opportunity that *Prebble* offered to revisit an erroneous ruling he had made 19 months earlier in *Pepper (Inspector of Taxes) v Hart*.[10] His Lordship had held that Article 9 was limited in scope and only protected Members

9 *Television New Zealand v Prebble* [1993] 3 NZLR 513 (CA) at 522.
10 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

of Parliament who, in the absence of Article 9, would have been exposed to legal liability for their statements in the House. This ruling was palpably incorrect.[11]

The reach of Article 9 extends beyond members of Parliament. All persons—strangers, petitioners, submitters, witnesses, parliamentary staffers and others—are protected from any repercussions arising from proceedings in Parliament. Nor need persons be exposed to criminal or civil liability. His Lordship, in effect, excised from Article 9 the protection against *questioning*. The privilege belongs to the House in its institutional capacity in order to prevent courts, statutory bodies or inquisitorial authorities from questioning its proceedings and intruding on its exclusive domain. So, in *Prebble*, Lord Browne-Wilkinson reinstated the protection against questioning by ruling inadmissible attempts to show that parliamentary statements were "inspired by improper motives or were untrue or misleading".[12] Article 9 had a broader purpose than simply protecting members from criminal or civil action. Rather, its purpose was to ensure that members and witnesses may speak freely in Parliament without fear of repercussion: "to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say".[13] However, even this concession might be too narrowly expressed. "Questioning" embraces more than attempts to show that a parliamentary statement was inspired by improper motive or was untrue. Arguably, proceedings in Parliament are questioned whenever counsel or the courts draw inferences, findings or conclusions from them.[14]

(ii) Lord Browne-Wilkinson's "wider principle"

Lord Browne-Wilkinson's acknowledgement of a "wider principle" under the law of parliamentary privilege has caused some confusion. His Lordship stated:[15]

> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is just one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.

The latent ambiguity in that statement has led some courts to view Parliament's freedom of speech privilege as being wider than what Article 9 guarantees.[16] The "wider principle" is sourced in the common law but it does not add to or transcend Article 9, and is not an independent basis for ruling inadmissible proceedings in Parliament. Article 9 is in no need of embellishment or supplementation as a constitutional

11 See PA Joseph "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 573-575.
12 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.
13 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 334 (emphasis in original).
14 See PA Joseph "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 574.
15 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 332.
16 See *Hamilton v Al Fayed* [1993] 3 All ER 317 (CA) at 333-334; *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [10]; *Toussaint v Attorney-General (Saint Vincent and the Grenadines)* [2007] UKPC 48, [2007] 1 WLR 2825.

bulwark.[17] Rather, Lord Browne-Wilkinson's "wider principle" acknowledges the mutual respect and restraint owed by Parliament and the courts, and the existence of further privileges (the right of exclusive cognisance, the power to punish for breach of privilege or contempt, etc) that the courts are equally astute to respect. The concept of a wider principle should be construed as embracing all of the protections that collectively comprise Parliament's privileges. Each of these privileges is based on the principle of comity and the mutual respect and restraint that joins the branches.

New Zealand has given explicit recognition to the principle of comity in the rules defining the courts' and Parliament's institutional relations. In 2011 the House of Representatives strengthened its sub judice rule, prohibiting reference in debates to matters under or awaiting adjudication in the courts. That prohibition is made subject to the discretion of the Speaker, who, in exercising the discretion, must weigh the "constitutional relationship of mutual respect that exists between the legislative and judicial branches of government".[18] In addition, the *Parliamentary Privilege Act 2014* directs the courts to interpret the Act in a way that promotes the principle of comity and "the mutual respect and restraint that is essential to [the courts' and Parliament's] important constitutional relationship".[19] Lord Browne-Wilkinson's "wider principle" encapsulates this constitutional imperative but does not embellish or supplement Parliament's freedom of speech.

(iii) To impeach or question

Article 9 does not render inadmissible in court everything that is said or done in parliamentary proceedings. *Prebble* established that what is crucial is the purpose for which the evidence of Parliament's proceedings is sought to be adduced, not its origin or source as part of the parliamentary record. Article 9 excluded evidence only where the purpose for leading it was to *impeach* or *question* what was said or done in Parliament. The Privy Council criticised the failure of some courts to distinguish between the right to prove the occurrence of parliamentary events, and the embargo on questioning their propriety or veracity.[20] There was no objection to the use of *Hansard* or the House records to prove what was said or done in the House or a committee as a matter of historical fact.[21]

Parties to litigation who adduce the House records for the following purposes do not trip the Article 9 embargo. They may wish to: support a particular statutory construction,[22] establish that something was said or done in the House as a matter of

17 For judicial endorsement, see *Attorney-General v Mair* [2009] NZCA 625 at [146], per Baragwanath J, quoting the writer's *Constitutional and Administrative Law in New Zealand* (3rd edn, Brookers, Wellington, 2007) at [12.4.1(7).

18 Standing Orders of the House of Representatives (2011), SO 112.

19 *Parliamentary Privilege Act 2014*, s 4(1)(b).

20 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

21 *See the Parliamentary Privilege Act 2014*, s 15(1) for the codification of this principle.

22 *Howley v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA); *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA); *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL).

historical fact,[23] prove that a member was present in the House on a particular day,[24] substantiate that a published account was a fair and accurate report of proceedings in Parliament,[25] or establish that a newspaper report was referring to persons who had been named in the House.[26] Conversely, it is impermissible to lead evidence of Parliament's proceedings to: establish that a defendant was actuated by malice,[27] prove the truth of allegations made about a member's conduct in the House,[28] establish that a member had misled the House,[29]or show that a member's statements in the House were inspired by improper motive or were untrue or misleading.[30] Article 9 prohibited attempts to pursue those ends in court, "whether by direct evidence, cross-examination, inference, or submission".[31]

(iv) Waiver

The Court of Appeal ruled that the plaintiff's action should be stayed, "unless and until the House of Representatives and any individual members concerned waive [the] privilege".[32] The Clerk to the House of Commons also acknowledged the possibility of waiver in exchanges preparatory to litigation in *Pepper v Hart*. The Clerk informed the Attorney-General that the proposed use of *Hansard* in those proceedings required leave of the House of Commons so as to avoid a breach of its privilege.[33] This communication contemplated that the Commons might, by granting leave, waive its privilege of freedom of speech.

Use of the word "privilege" to describe the legal protection gives traction to the possibility of waiver (privileges can ordinarily be waived) but the word in this context is a misnomer. Article 9 does not confer any privilege as might be waived.[34] Parliament's freedom of speech has statutory foundation and no person or body can override the laws of Parliament.[35] New Zealand's House of Representatives is a publicly constituted body and, like all other public bodies, it is bound by the law.[36] In *Duke of Newcastle v Morris*,[37] Lord Hatherley LC held that a privilege of Parliament, established by common

23 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 (DC) at 531; *Mundey v Askin* [1982] 2 NSWLR 369 (NSWCA); *Henning v Australian Consolidated Press Ltd* [1982 2 NSWLR 374 (NSWSC) ; *Blackshaw v Lord* [1984] 1 QB1 (CA).

24 *Amman Aviation Pty Ltd v Commonwealth of Australia* (1988) 81 ALR 710 (FCA).

25 See New Zealand's *Parliamentary Privilege Act 2014*, ss 18 and 20 re-enacting the defence of qualified privilege for the communication of a fair and accurate report of, or extract from, proceedings in Parliament. See formerly the *Defamation Act 1992*, s 16(1).

26 *Hyams v Peterson* [1991] 3 NZLR 648 (CA).

27 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 (DC).

28 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 336, criticising the decision in *News Media Ownership v Finlay* [1970] NZLR 1089 (CA).

29 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 335.

30 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

31 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC) at 337.

32 *Television New Zealand v Prebble* [1993] 3 NZLR 513 (CA) at 522.

33 See PA Joseph "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 574.

34 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [61].

35 *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bowles v Bank of England* [1913] 1 Ch 57 (ChD).

36 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13].

37 *Duke of Newcastle v Morris* (1869-70) LR 4 HL 661 at 668.

law and affirmed by statute, cannot be abrogated except by express words in a statute. A resolution of the House, even if unanimous, could not achieve that purpose.

JENNINGS V BUCHANAN

(a) The decision

Jennings v Buchanan[38] was a further Privy Council decision on appeal from New Zealand. This decision endorsed the application of the principle of effective repetition under the law of defamation. Words spoken outside the House may be actionable where they adopt, affirm or endorse defamatory words earlier spoken in the House. The plaintiff, a Member of Parliament, had made potentially defamatory statements under cover of privilege and later commented in a media interview that he did not resile from what he had said. By adopting or affirming statements made inside the House, the defendant stepped outside the protection of Article 9. The cause of action was the extra-parliamentary statement, not the intra-parliamentary words which were privileged. Each repetition of a defamatory statement is a fresh publication that creates a fresh cause of action.[39] *Hansard* was admissible to establish what the defendant had said in the House, provided counsel did not attempt to examine, comment on, or draw inferences from the evidence. It was immaterial that adducing *Hansard* might also expose the truth or honesty of words spoken in the House.[40]

(b) Critique

Lord Bingham of Cornhill delivered the decision of the Privy Council in an uncharacteristically under-whelming judgment. Much of it comprised lengthy quotations from *Prebble v Television New Zealand Ltd*,[41] the *Report of the Joint Committee on Parliamentary Privilege* (1999)[42] and the decisions of courts from sundry jurisdictions. The decision confirmed that the effective repetition principle applied in the parliamentary context, notwithstanding Parliament's freedom of speech under Article 9. This erroneously discounted the protection that Article 9 affords.

Effective repetition is an established principle under the law of defamation, but in the parliamentary context, it is excluded because the words deemed to be effectively repeated are privileged under Article 9 and protected from scrutiny.[43] This differs from

38 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

39 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [12].

40 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [15] quoting from *Laurance v Katter* (1996) 141 ALR 447 (Qld CA) at 490.

41 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC).

42 *Report of the Joint Committee on Parliamentary Privilege* HL Paper 43-I; HC Vol 214-I (30 March 1999) at [42], [49] and [91].

43 See PA Joseph "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 LQR 568 at 580ff. The remainder of this critique is based on the writer's text *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at 453-454.

the typical effective repetition case, where there is no legal impediment to the deemed repetition. *Jennings v Buchanan* exemplifies why the principle is excluded. The words "I do not resile from what I said" are innocuous. To impute defamatory intent, the plaintiff must adduce what was said in the House which the defendant is considered to have affirmed or adopted. But to do that is to "question" proceedings in Parliament. An action in defamation carries the defamatory sting that the defendant was lying, or was careless or economical about the truth. Falsity is presumed (the defendant bears the onus to establish truth as a defence),[44] so the plaintiff is automatically taken to attack the veracity of the parliamentary statement that is endorsed or adopted. Truth is a defence to defamation.[45] Consequently: [46]

> If the member's words in debate were true, there could be no actionable defamation, no matter how damaging the words were to the plaintiff's reputation. The member might endorse the words with impunity, or repeat them verbatim, and incur no legal liability (subject to the defendant successfully establishing truth as a defence). The effective repetition principle dictates that the plaintiff must attack the member's parliamentary words in breach of the legal protection of art 9. In *Leigh v Attorney-General*, it was inherent in the allegation of defamation that the Minister's words spoken in the House were false: 'That is apparent from the pleadings which aver that the Minister's comments repeated the defamatory sting of the [defendant's] written and oral statements.' The Court held that Article 9 prevented the plaintiff from alleging that the parliamentary words were false, which is what a plaintiff must do to succeed under effective repetition.

The decision in *Jennings v Buchanan* is not only legally aberrant. It also has a corrosive effect on political and parliamentary free speech. Members will actively avoid giving media comment where they have made potentially defamatory statements in debates. The courts have readily construed members' extra-parliamentary statements as having effectively repeated words spoken in the House.[47] The effective repetition principle might also inhibit parliamentary speech. Members may refrain from making damaging statements in debate, or hedge or qualify their statements, for fear of triggering the effective repetition principle in media interviews. Members come under intense media pressure to defend or explain their political statements. After the decision in *Jennings v Buchanan* had been delivered, the Clerk of the House of Representatives formally warned members of the potential to incur liability for statements that can be linked to debates in the House.[48]

44 *Defamation Act 1992* (NZ), s 8(3).

45 *Defamation Act 1992* (NZ), s 8.

46 PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.5.5(2)(b)]. The decision referred to in the quotation is reported as *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148 and the quotation from that decision is at [49].

47 *Beitzel v Crabb* [1992] 2 VR 121 (VSC); *Laurance v Katter* (1996) 141 ALR 447 (Qld CA); *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

48 Personal statement of David McGee, then Clerk of the House of Representatives, to the writer.

(c) Reform

In 2005 the Privileges Committee recommended that Parliament exclude the effective repetition principle in its application to the House.[49] The Clark Government (2002–2005) announced that legislation would be introduced following the 2005 elections,[50] but nothing eventuated. The Australian legislatures likewise announced that they would introduce legislation, implementing a unified response across Australia.[51] But, as in New Zealand, nothing eventuated. The Privileges Committee repeated its recommendation in 2009, expressing disappointment at the lack of resolve,[52] and the Standing Orders Committee endorsed the Privileges Committee recommendation.[53] Something more pressing was required, and the decision of the Supreme Court in *Attorney-General v Leigh*[54] provided that "something". In 2012 the Privileges Committee initiated an inquiry into *Leigh's* case and, the following year, it recommended that Parliament introduce legislation for the general reform of the law, including the abolition of the effective repetition principle in its application to Parliament.[55] Under s 11(d)(e) of the *Parliamentary Privilege Act 2014* (NZ), evidence must not be offered or received concerning proceedings in Parliament for the purpose of establishing or supporting any liability, remedy or relief sought in judicial proceedings. The Act's purpose section explicitly refers to the decision in *Jennings v Buchanan* and the effective repetition principle, and identifies its abolition as one of the Act's "subsidiary purposes".[56]

ATTORNEY-GENERAL V LEIGH

"In *Attorney-General v Leigh*, the Supreme Court engaged in exploratory reasoning that rewrote in unintended ways the scope of Parliament's freedom of speech."[57] The writer has critiqued this decision[58] and appeared before Parliament's Privileges Committee to explain the flaws in the judgment, and why legislation was necessary to negate

49 Report of the Privileges Committee, *Question of Privilege Referred 21 July 1998 Concerning Buchanan v Jennings* [2005] AJHR I17G at 19.

50 New Zealand Press Association Report (1 June 2005).

51 See Report of Procedure and Privileges Committee of the Western Australian Legislative Assembly, *Effective Repetition: Decision in Buchanan v Jennings* (Report No 3, April 2006).

52 Report of the Privileges Committee *Question of Privilege Relating to the Exercise of the Privilege of Freedom of Speech by Members in the Context of Court Orders* (I17A, May 2009) at 21-22.

53 Report of the Standing Orders Committee *Review of Standing Orders* (I18B, September 2011) at 6, 27-28.

54 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

55 Report of the Privileges Committee, *Question Concerning the Defamation Action Attorney-General and Gow v Leigh* (I17A, June 2013) at 38.

56 *Parliamentary Privilege Act 2014* (NZ), s 3(2)(d).

57 PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.5.12].

58 PA Joseph "Constitutional Law" [2012] NZ L Rev 515 at 527-533; PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.5.12].

the effect of the decision.[59] This commentary reproduces the writer's analysis in *Constitutional and Administrative Law in New Zealand*.[60]

(a) The decision

The plaintiff was on contract to the Ministry for the Environment. Labour Party member (and now Labour Member of Parliament), Ms Claire Curran, was appointed to oversee her work, and the plaintiff ended her contract prematurely. Questions were later asked whether Ms Curran's engagement had been politically motivated, and a written question for oral answer was tabled in the House. The responsible Minister sought a briefing from a deputy secretary of the Ministry, and the Minister answered the parliamentary question in the House that day.

The plaintiff issued defamation proceedings against the deputy secretary, claiming he had defamed her in his briefing to the Minister (given the Minister's critical statements in the House). The defendant argued that the briefing to the Minister was part of a proceeding in Parliament and protected from action by Article 9. The Supreme Court, upholding the decisions below, rejected the defendant's argument. It was not necessary for the Court to extend the protection of parliamentary privilege as the defendant could plead the defence of qualified privilege under the law of defamation. Unlike the parliamentary privilege defence, the defence of qualified privilege was defeasible upon proof that the defendant was motivated by ill-will or took improper advantage of the occasion of publication.[61] It must be "necessary", the Court held, "for the proper and efficient conduct of the business of the House for the occasion in question to be classified as one of absolute privilege".[62]

(b) Critique

(i) Wrong test

The necessity test was applied in error. Previously, the focus was on the limiting language of Article 9: in particular, on the breadth of the phrase "proceedings in Parliament" and the meaning of the verbs "impeached or questioned".[63] But in *Leigh*, the Supreme Court introduced a common law test of necessity which it borrowed from the Canadian and United Kingdom decisions in *Canada (House of Commons) v Vaid*[64] and *R v Chaytor*.[65] This caused the decision-making to misfire because neither of those decisions involved Parliament's privilege of freedom of speech in debate. Each

59 See Privileges Committee Report, *Question Concerning the Defamation Action Attorney-General and Gow v Leigh* (I17A, June 2013).

60 PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.5.12].

61 *Defamation Act 1992* (NZ), s 19. See also the *Parliamentary Privilege Act 2014* (NZ), s 18.

62 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [5].

63 See *Fowler & Roderique Ltd v Attorney-General* [1981] 2 NZLR 728 (HC) at 731; *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL); *Prebble v Television New Zealand Ltd* [1994] 1 AC 321 (PC).

64 *Canada (House of Commons) v Vaid* 2005 SCC30, [2005] 1 SCR 667.

65 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684.

decision was concerned to delineate the scope of Parliament's exclusive cognisance (its right to regulate its own internal proceedings), which is sourced in the common law, not statute.[66] A common law test might logically be used to delineate a common law privilege but not a privilege defined by statute.

In *Chaytor* Lord Phillips PSC distinguished the privileges of freedom of speech and exclusive cognisance.[67] Parliament's freedom of speech protected its core or essential business, and its right of exclusive cognisance protected words or actions that required protection to enable Parliament to discharge its core or essential business. The privileges protected different things, had different legal foundations and invited different forensic tests. In *Leigh* the error was to transpose the common law test (necessity) to Parliament's freedom of speech, which has statutory foundation. Its scope must be fixed through ordinary processes of statutory interpretation, not considerations of necessity.

(ii) Proceedings in Parliament

The Supreme Court discounted the phrase "proceedings in Parliament" which, until *Leigh*, had anchored the scope of Article 9. Tipping J did not ask whether the deputy secretary's briefing to the Minister was part of a proceeding in Parliament and protected by Article 9. A written question for oral answer by the Minister in the House had been lodged with the Clerk of the House. Under the Standing Orders, notices of questions must be lodged between 10.00 am and 10.30 am on the sitting day in question.[68] The lodging of the question created a proceeding in Parliament and all that followed sequentially was part of that proceeding. The deputy secretary's briefing was at the Minister's request (ministers invariably seek briefings before answering parliamentary questions) and was part of an unbroken chain of events that led to the Minister's statement to the House that afternoon.

Curiously, the Court acknowledged this chain of events. "Mr Gow [the deputy secretary]," the Court observed, "briefed the Minister both orally and in writing and the Minister used the information supplied to him to answer the parliamentary question."[69] Parliamentary privilege should have applied causing the action to be struck out. Ministry officials or parliamentary staffers who facilitate the core business of the House engage in proceedings in Parliament and are protected under Article 9. At least questions cannot arise in the future as to whether such persons are protected under Article 9. The *Parliamentary Privilege Act 2014* enacted an extended definition of the phrase "proceedings in Parliament" and removed any doubts as to the scope of the protection.[70]

66 In *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684, Lord Phillips PSC addressed the Article 9 privilege but discounted its application.

67 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 at [47].

68 Standing Orders of the House of Representatives 2011, SO 378.

69 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [1].

70 See the commentary below on the *Parliamentary Privilege Act 2014*.

(iii) Scope of the privilege collapsed

Leigh's decision collapsed the scope of Parliament's freedom of speech to an unknown extent. The privilege, one surmised, protected members for their words or actions in the House or in committee, but other persons engaged in parliamentary proceedings seemingly forfeited the protection. The Court's reasoning advanced two sides of the same coin. First, it was unnecessary to grant the defendant absolute privilege in order to protect the core business of the House. Secondly, it served the public interest that the defendant would be protected by qualified privilege under the law of defamation. This defence operated as a *dis*incentive for ministry advisors who might be motivated by ill-will or would take improper advantage of the occasion of publication. Proof of ill-will or improper advantage defeats the defence to an action in defamation.

The same reasoning might apply to witnesses before select committees or persons who petition Parliament. If *Leigh* is to be our exemplar, such persons would not put at risk Parliament's core business. As with the deputy secretary in *Leigh*, those persons would be compelled to advance the defence of qualified privilege. Parliamentary staffers might also be exposed to action. The Clerk of the House is intimately connected with the business of the House. When the Clerk accepts a member's written question for a minister's oral answer in the House, the Clerk "publishes" it on the order paper for the day's sitting. If, unbeknownst to the Clerk, the question contains a defamatory sting, would parliamentary privilege protect the Clerk? It would seem not. The Clerk would be protected by qualified privilege and be compelled to plead at trial a defeasible defence.

(iv) Chilling effect

The chilling effect of the necessity test was a major concern. Exposing ministry officials, parliamentary staffers or committee witnesses to legal action would unquestionably chill the free flow of information, so vital in the parliamentary context. In *Leigh* Tipping J thought any chilling effect "inherently unlikely".[71] Would the defendant (the deputy secretary) share his confidence? Would he have been as forthcoming post-*Leigh*? Once bitten, twice shy. The damage *Leigh* inflicted on Parliament was incalculable. The thought of legal action would unquestionably cause persons to be economical in their communications. Ministers rely implicitly on their officials' briefings when they rise to their feet during question time, and they have every right to believe they have been fearlessly and fully informed.

AWATERE HUATA V PREBBLE

(a) The decision

Awatere Huata v Prebble[72] involved New Zealand's controversial "party-hopping" legislation. A spate of party defections tarnished the first Parliament (1996–1999)

71 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [21].
72 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC & CA); *Awatere Huata v Prebble* [2005] 1 NZLR 359 (HC & CA).

elected under the Mixed-Member Proportional voting system, and the *Electoral (Integrity) Amendment Act 2001* (NZ) sought to impose new disciplines. Under this Act, a member vacated his or her seat where the member resigned from the party membership and gave notice to the Speaker, or where a party leader gave notice that a party member "has distorted, and is likely to continue to distort" Parliament's election-night proportionality. The new s 55A inserted in the *Electoral Act 1993* (NZ) was tied to a sunset clause which caused it to terminate following the 2005 elections.

In *Awatere Huata* the question was whether the member had, by her actions, distorted the proportionality of the House. Awatere Huata was a member of Parliament for the ACT Party, which suspended her and then expelled her from the party. She had offered her proxy vote to the Party, although this was refused, and she had voted with ACT on all but one issue. The Court of Appeal held that Awatere Huata had not distorted proportionality but this finding was reversed on appeal. The Supreme Court held that proportionality had been affected and that Awatere Huata's seat could be declared vacant under s 55A.

(b) Issues of exclusive cognisance

The rulings on the *Electoral (Integrity) Amendment Act 2001* are of principally historical interest, given the Act's sunset clause. However, the Court of Appeal's rulings on Parliament's exclusive cognisance privilege are of continuing relevance.[73] In the High Court, the ACT Party argued that invocation of the party-hopping legislation was within Parliament's exclusive cognisance and was non-justiciable. The House, not the courts, must rule on whether proportionality had been distorted. However, this argument failed in the High Court and the respondents did not pursue it in the Court of Appeal. Despite this, the Court of Appeal resolved (4:1) that it was bound to rule on the question. Section 242 of the *Legislature Act 1908* gave the privileges of the House statutory force and deemed them to be part of the general law of New Zealand. It was not necessary to plead privilege as all courts and judges were required to take judicial notice of them.[74]

The majority (McGrath, Glazebrook and O'Regan JJ) held that the *Electoral (Integrity) Amendment Act 2001* did not trigger the exclusive cognisance privilege. The statutory sequence was external to Parliament's internal workings. No resolution of the House was required (the Speaker simply informed the House of a vacancy) and the House was not engaged at any stage of the statutory process. The involvement of the ACT caucus did not constitute a proceeding in Parliament (contra *Rata v Attorney-General* (1997) 10 PRNZ 304 (HC)), and communications between the ACT leadership and the Speaker were external to the proceedings of the House. The Court overruled *Rata*, which had held that caucus meetings were proceedings in Parliament and covered by privilege. Caucus meetings are party-political meetings and have never been a function of Parliament.[75]

73 The Supreme Court proffered no views on the Court of Appeal's privilege rulings.

74 See now the *Parliamentary Privilege Act 2014*, s 8.

75 See D McGee, Parliament and Caucus" [1997] NZLJ 137; PA Joseph "Constitutional Law" NZ L Rev 197 at 219-220.

The majority undertook an expansive review that indicated a narrowing of the exclusive cognisance rule. Their Honours affirmed a ruling which had always been taken to represent the law. In *Bradlaugh v Gossett*,[76] Stephen J held that the House of Commons had jurisdiction to interpret statutes applying to its own internal proceedings. The courts had no basis for intervening, even if the House applied the statute in error.[77] The Court of Appeal then emphasised the distinction Stephen J drew: between statutes having exclusively intra-parliamentary application and statutes establishing rights exercised "out of and independently of the House".[78] Statutes of the latter type, said Stephen J, remained within the jurisdiction of the courts to administer, even if they coincidentally applied to Parliament's proceedings. The question was where to draw the line between the two types of statute.

The majority cited the Niue Court of Appeal decision in *Kalauni v Jackson*,[79] as a counterpoint to the decision in *Bradlaugh v Gossett*. The issue was whether three members of the Legislative Assembly had vacated their seats, and the Niue Court upheld the jurisdiction to intervene. The rights they were asserting related not simply to the internal workings of the Assembly or to actions the Assembly might take to discipline members: "Rather the rights they assert are rights under the general law of Niue and rights, moreover, of the highest importance in a democratic society."[80]

Kalauni v Jackson realigned the balance between courts and Parliament. Traditionally, disputed membership issues had been subsumed within the exclusive cognisance rule. *Bradlaugh v Gossett* concerned the right of an elected member to take his seat in the Commons, and the court held it could not inquire into a resolution of the House that the member (a declared atheist) could not take the oath or affirm under the governing legislation. However, the reasoning in *Kalauni v Jackson* would have produced a different result. A member who is prevented from sitting in the House cannot exercise the rights of membership of elected members. Preventing the member extinguished both the member's right to represent the constituents and the constituents' right to be represented.

The majority in *Awatere Huata* left it open whether *Kalauni v Jackson* represented the law of New Zealand. Nevertheless, the judicial inclination is clear: most legislation applying to the House will be justiciable, as establishing rights that can be asserted under the general law.

76 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 278.
77 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 280-281.
78 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 282.
79 *Kalauni v Jackson* [2001] NZAR 292 (Niue CA).
80 *Kalauni v Jackson* [2001] NZAR 292 (Niue CA) at 297-298.

PARLIAMENTARY PRIVILEGE ACT 2014

(a) Referral of question of privilege

The decision in *Leigh* was delivered on 16 September 2011.[81] On 27 September 2011, the Speaker of the House of Representatives referred to the Privileges Committee a question of privilege raising serious concerns for the House.[82] The Privileges Committee met and held over the question for the new Parliament that would assemble after the November 2011 elections. The Privileges Committee subsequently appointed invited expert evidence from selected organisations and persons, and from the privileges committees of the Australian Parliament, the British House of Commons and the Canadian Senate. The Committee compiled a detailed report which it presented to the House in June 2013. The report recommended that Parliament enact a suite of reforms to negate the effect of *Leigh*, to confirm and clarify the scope of Parliament's freedom of speech, and to effect sundry other reforms. The writer had advocated this recourse in oral and written submissions which were presented at the request of the Committee.[83]

(b) Suite of reforms

Leigh was the catalyst for the *Parliamentary Privilege Act 2014* but its provisions cover a range of matters. The reforms include:

- the enactment of a direction to interpret the Act in a way that promotes: the objectives listed in the Act's purpose section, the principle of comity and the mutual respect and restraint that joins the legislative and judicial branches, and the integrity and independence of the House and its committees;[84]
- the enactment of an avoidance-of-doubt definition of "proceedings in Parliament" as that phrase appears in Article 9;[85]
- the provision of statutory guidance on how to interpret "impeaching" or "questioning" as those words appear in Article 9;[86]
- the abolition of the effective repetition principle under the law of defamation as it had been applied to proceedings in Parliament;[87]

81 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.
82 Report of the Privileges Committee, *Question Concerning the Defamation Action Attorney-General and Gow v Leigh* (I17A, June 2013), Appendix B.
83 Letter of PA Joseph to the Chair of the Privileges Committee, Hon Christopher Finlayson QC, dated 19 October 2012, annexing the writer's published critique. PA Joseph "Constitutional Law" [2012] NZ L Rev 515 at 527-533.
84 Sections 4 and 7.
85 Section 10.
86 Sections 11 and 15.
87 Section 11(e).

- the consolidation of the provisions of the Legislature Act 1908, the *Legislature Amendment Act 1992* and s 13 of the Defamation Act 1992 so far as those provisions related to the law of parliamentary privilege;[88]
- the conferral of a power on the House to impose a monetary fine for contempt of Parliament;[89]
- the conferral of a power on the House to administer oaths or affirmations to witnesses giving evidence before select committees;[90]
- a confirmation that the House has no power to expel its members;[91] and
- the consolidation and clarification of the law of qualified privilege regarding media reporting of Parliament and the official broadcasts of its proceedings.[92]

(c) Definition of "proceedings in Parliament"

The phrase "proceedings in Parliament" is the crux of Article 9 and Parliament's freedom of speech. Section 10 of the Act enacted a "for the avoidance-of-doubt" definition of the phrase,[93] and s 11 identified five impermissible purposes in seeking to adduce evidence in court. These two sections replicate, in parts verbatim, section 16 of the *Australian Parliamentary Privileges Act 1987* (Cth), on which the sections were modelled.

Virtually identical circumstances led to the enactment of the Australian and New Zealand statutes. The Commonwealth Parliament enacted s 16 to negate the precedent effect of the rulings of the New South Wales Supreme Court in *R v Murphy*.[94] During the trial Hunt J had allowed in evidence of the proceedings of a Senate committee to enable counsel to question the veracity of a witness's evidence to it. Hunt J also ruled that inferences might be drawn from counsels' submissions that were based on statements made by the committee. The Australian Act was introduced to undo the damage that those rulings caused. In *Prebble v Television New Zealand Ltd*,[95] the Privy Council observed that that Act "declares what had previously been regarded as the effect of art 9 and [s 16] contains what … is the true principle to be applied".

The operative parts of s 10 read:

> **10 Proceedings in Parliament defined**
>
> (1) **Proceedings in Parliament**, for the purposes of Article 9 of the Bill of Rights 1688, and for the purposes of this Act, means all words spoken and actions done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee.

88 Sections 8, 9, 17-21 and 24-31

89 Section 22. See PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.14.2].

90 Section 24.

91 Section 23. Section 55 of the *Electoral Act 1993* had earlier overridden the former privilege: see PA Joseph *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters, Wellington, 2014) at [13.7].

92 Sections 18-21.

93 Section 3(2)(c) identified this purpose in setting out the objects of the Act.

94 *R v Murphy* (1986) 5 NSWLR 18 (NSWSC).

95 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 8.

(2) The definition in subsection (1) must be taken to include the following:

(a) the giving of evidence (and the evidence so given) before the House or a committee:

(b) the presentation or submission of a document to the House or a committee:

(c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee:

(d) the formulation, making, or communication of a document, under the House's or a committee's authority (and the document so formulated, made, or communicated):

(e) any proceedings deemed by an enactment (or a thing said or produced, or information supplied, in an inquiry or proceedings, if an enactment provides the thing or information is privileged in the same way as if the inquiry or proceedings were) for those purposes proceedings in Parliament.

(3) 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, words spoken or acts done for purposes of or incidental to the transacting of reasonably apprehended business of the House or of a committee must be taken to fall within subsection (1).

(4) In determining under subsection (1) whether words spoken or acts done 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.

(5) **Necessity test includes**, but is not limited to, a test based on or involving whether the words or acts or may be (absolutely, or to a lesser degree or standard) necessary for transaction of the business.

Section 11 defines what is meant by "questioning" proceedings in Parliament, contrary to the direction under Article 9. The opening words of the section follow closely the Australian wording under s 16 of the *Parliamentary Privileges Act 1987* (Cth), while paras (a) to (c) reproduce its provisions verbatim:

11 Facts, liability, and judgments or orders

In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purposes of, all or any of the following:

(a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:

(b) otherwise questioning, or establishing the credibility, motive, intention, or good faith of any person:

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:

(d) proving or disproving, or tending to prove or disprove, and fact necessary for, or incidental to, establishing any liability:

(e) resolving any matter, or supporting or resisting judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

Section 16 of the Australian Act contains no provisions comparable to paras (d)-(e). These paragraphs were inserted to exclude the application of the effective repetition principle under the law of defamation. The purpose section specifically referred to the decision in *Jennings v Buchanan*,[96] as exemplifying the principle in operation.[97]

CONCLUSION

New Zealand has contributed to the common weal in the area of parliamentary privilege. Some developments have been good (*Prebble v Television New Zealand Ltd* and the *Parliamentary Privilege Act 2014*), some bad (*Jennings v Buchanan*), and some ugly (*Attorney-General v Leigh*). The decision in *Prebble v Television New Zealand Ltd* remains the leading authority on the scope and application of Article 9, which is the primary focus under the law of parliamentary privilege. On the other hand, *Leigh* demonstrates how quickly things can go awry when courts engage in exploratory reasoning in areas that were once thought settled. *Leigh* was an aberrant decision of very real concern. Yet, even untoward developments can produce constructive outcomes.

The *Parliamentary Privilege Act 2014* effected the long-awaited consolidation and reform of the law of parliamentary privilege. Provisions long ago introduced to the statute book languished in enactments that resembled a legislative patchwork. The *Legislature Act 1908* (NZ), in particular, contained a handful of scattered, out-of-date provisions that desperately needed modernising and consolidating. When Parliament responded to *Leigh*, it did not squander the opportunity to make the law relevant and accessible. The *Parliamentary Privilege Act 2014* reaffirmed and clarified Parliament's privileges but without attempting a comprehensive codification.[98] This was a sensible and pragmatic approach to avoid the courts intruding further into the parliamentary domain. Overly-prescriptive legislative reform would have left the door ajar for the courts to impose their views on the appropriate scope of parliamentary privilege. The reform settled upon leaves the law on this side of the Tasman in reasonable shape.

96 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.
97 Section 3(2)(d).
98 Section 3(2)(a).

Parliament, Executive and the Courts: Laws of Separation, Conventions of Mutual Respect and Outstanding Flashpoints[1]

Neil Laurie[2]

Neil Laurie, Clerk of the Parliament, Queensland Parliament

Because the Westminster system of government developed over hundreds of years, it is a system that is laden with conventions. That is, it is a system of government light on statute law and heavy on generally accepted standards, practice and custom.

In most Westminster jurisdictions outside of the United Kingdom, some of the standards, practices or customs have become acknowledged or entrenched in statute law. Legislation, usually a written constitution, has supplemented convention to formalise or ensure recognition and enforcement of some conventions. However, even in those Westminster jurisdictions with a written constitution, conventions continue to play a significant role. Case law has regularly recognised the conventions of government in the context of understanding the constitutional arrangements of the Commonwealth and the States.[3]

Any understanding of the separation of powers in our system of government must not only consider the legal frameworks of separation, but also consider the conventions of mutual respect that underpin that separation.

HISTORICAL CONTEXT—BEFORE THE BILL OF RIGHTS AND THE ACT OF SETTLEMENT

The three arms of government: Parliament, executive and judiciary are now well recognised in our system of government. This was not always the case. Legal separation and mutual respect developed out of hundreds of years of conflict and reform. To forget the struggle and reasons for that separation is to risk unnecessary conflict into the future.

Whilst the English Parliament probably first began as a forum for expressing and hearing grievances, it also acted as a court of justice. Moreover, Parliament was the

1 An earlier version of this paper was presented at the 45th Presiding Officers and Clerks Conference Samoa 30 June – 5 July 2014.

2 The author would like to thank Ms Danielle Cooper or her assistance in collating news reports referred to in this article.

3 See for example: *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; (1992) 177 CLR 106; *Egan v Willis* [1998] HCA 71; 195 CLR 424.

King's court, which was the highest court, therefore, it was called the High Court of Parliament. From the time of about Edward I (1239–1307), petitions stating grievances were regularly sent to the High Court of Parliament for redress. (Thus the petition as we know it today, originally started as judicial pleadings.)

Slowly Parliament developed into a permanent advisory body constituted by two parts: the Peers or the Lords, who had a vested right to attend Parliament; and the Commons, who represented the counties and boroughs and assumed the responsibility for presenting petitions, airing grievances and commencing actions to impeach. However, the Parliament still retained its judicial character into the early nineteenth century. Impeachment was the greatest weapon of the House of Commons against the executive. Impeachment, an action taken in the High Court of Parliament, was essentially an accusation of a public offence—usually taken against Ministers of the Crown. One House, the Commons, would commence the action for impeachment (essentially find and prosecute the crime), and the other House, the House of Lords, would hear and determine the impeachment.

Eventually, the business of Parliament became less concerned with airing grievances and administering justice and more concerned with taxation, legislation and politics generally. Concurrently, the royal courts became more diffused and professional. By at least the thirteenth century the common law courts of Kings Bench, Common Pleas and Exchequer were in existence and their jurisdictions delineated. Later, the court of Chancery developed to bypass or mitigate the harsh practices of the common law courts.[4]

During the Tudor period the authority of Parliament as a law-making body steadily grew. Henry VIII's breach from the Roman Catholic Church meant that the legitimacy of his Crown no longer depended on the influence and authority of the Catholic Church. Rather, the right to the Crown depended upon the recognition of the statutes, which facilitated the split from Rome and the fusion of the English Church and State. The Reformation Parliament's use of statute—implementing unprecedented structural and political change—transformed its primary function from a court to a legislative body. Because the Crown for the first time based its legitimacy upon statutes passed by the Parliament, the Crown itself had to accept the legitimacy and authority of the Parliament as a law-making body.

However, both the Parliament and the courts effectively remained under the yoke of the monarchy. The Stuart Kings did not respond positively to the intrusion of Parliament into affairs that it considered were its province by divine right and used the courts to check the power of members and the Parliament. The Stuart Monarchs regularly used the courts to frustrate the Parliament and punish its members. A number of cases demonstrated that the courts did not recognise either the right to freedom of speech in Parliament or the right of Parliament to be master of its own proceedings. In 1512

4 The English Courts and the Rise of Equity, Professor Jim Corkery School of Law Bond University, the National Legal Eagle http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1042&context=nle

in *Strode's Case*[5] a Member of Parliament, Strode, was fined by the Stannary Court of Devon for introducing bills in the Commons with respect to a matter that the court considered within its jurisdiction. The Commons responded by the passing of the *Privilege of Parliament Act 1512* which held that all suits and proceedings against Strode and every other Member of Parliament *then or thereafter for any bill, speaking, reasoning or declaring of any matters concerning the Parliament to be treated or communed of, be utterly void and of no effect*. [6]

In 1629 Sir John Eliot and two other members of the Commons were prosecuted and convicted for uttering seditious words in Parliament and defying the King's order that the House be adjourned. (The two members of the House had forced back and held the Speaker down on his chair when he tried to leave the Chamber.) The court of Kings Bench held that freedom of speech in Parliament only protected a member against civil action and did not extend to absolve them from criminal proceedings.[7]

Eliot's Case emphasised the need for the absolute privilege of freedom of speech and hardened the Common's view that parliamentary proceedings should not be adjudicated anywhere but Parliament itself. For good reason the Parliament was suspicious of the courts, which were at that time appointed and dismissed by the King alone.

In 1637 in *R v Hampden*[8] the legality of Charles 1's taxing without Parliament's consent by the use of 'ship money' was heard before all 12 judges in the Court of Exchequer Chamber as there were fears that some judges may find against the King. Nine (9) of the 12 found in favour of the tax.

Despite Parliament's victory in the Civil War, the execution of Charles 1, and the protectorate of Oliver Cromwell, events demonstrated that Parliament had still not convinced the monarchy nor the courts that it was master of its own proceedings. For example, in 1682 the Serjeant-at-Arms of the Commons was successfully sued for damages by a person who the House had committed for a breach of privilege, and whom the Serjeant had taken into custody.[9]

The *Bill of Rights 1689* was in effect the price extracted by the Parliament from William and Mary in return for the Crown and was an integral part of the 'Glorious Revolution'. For the first time the privilege of freedom of speech was contained in a more substantial form than ancient tradition. It was also acknowledged that the Crown could not tax or spend without the consent of the Parliament.

However, it is clear that the *Bill of Rights 1689* did still not satisfy the Parliament. Thus the *Act of Settlement 1701*—primarily an Act to ensure the protestant Hanoverian succession—extracted further important matters of separation, including:

5 (1512) 4 Parl Hist 85, 1 Hatsell 85.
6 Sir Charles Harders, 'Parliamentary Privilege – Parliament versus the Courts: Cross-examination of Committee Witnesses', *Australian Law Journal*, 67, 1993, 109 at 113.
7 Sir John Eliot's Case (1630) Croke Car 181-182; 3 State Tr 309-310.
8 (1637) 3 St Tr 825.
9 *Jay v. Topham* (1682) 12 State Trials 522.

- That no person who had an office under the monarch, or received a pension from the Crown, was to be a Member of Parliament. (This was obviously inserted to reduce royal influence over the House of Commons, but was repealed before enactment as it was realised it was too wide. So in 1707 a further statute was passed which prohibited certain office holders from being Members of Parliament and prevented members from accepting new offices—those created post-1705—without standing for re-election.)[10]
- Judges' commissions were to be valid *quamdiu se bene gesserint* (during good behaviour) and could only be removed for misbehaviour by both Houses of Parliament. The obvious purpose was to ensure judicial independence from the Crown.
- That no pardon by the monarch or the Ministers of the Crown was to save someone from being impeached by the House of Commons.

Appendix 1 attempts to summarise the modern equivalents of these laws in Queensland.

SEPARATION OF POWERS—PARLIAMENT, THE EXECUTIVE AND COURTS

The term 'separation of powers' is derived from the work of a Frenchman Baron de Montesquieu, a political philosopher. In *The Spirit of the Laws* (1748)[11] Montesquieu described the separation of political power among a legislature, an executive, and a judiciary. After visiting England and observing its political system, Montesquieu discerned a separation of powers in the British constitution among the monarch, Parliament and the courts of law.

British Constitutional writer, L.S. Amery[12] argued that writers such as Montesquieu had misinterpreted the English constitution by formulating a doctrine of separation of powers that regarded the Parliament as a "purely legislative creature". Amery rightly pointed out that the separate powers were "interlocking in Parliament itself".[13] The notion of the division between the executive and legislative functions, are "abstractions bearing no relation to the reality of our political life".[14]

Amery considered that:

> Parliament is not, and has never been, a legislature in the sense of a body specially and primarily empowered to make laws. The function of legislation, while shared

10 *Succession to the Crown Act 1707.*
11 Charles, Baron de Montesquieu, "The Spirit of Laws: Volume 1 ", 1793 (Free - Google Books, Low Resolution) https://books.google.com.au/books?id=5zZJAAAAMAAJ&redir_esc=y
12 L. S. Amery, 'The Nature of British Parliamentary Government', in Companion Parliament: A Survey, Allen and Unwin, London, 1952.
13 Note 9 at pp.44-45.
14 Note 12.

> between "King, Lords and Commons in Parliament Assembled", has always been predominantly exercised by Government which, indeed, has never allowed Parliament, as such, to take any initiative in one of its most important fields, that of finance. The main task of Parliament is still what it was when first summoned, not to legislate or govern, but to secure full discussion and ventilation of all matters, legislative or administrative, as the condition of its assent to Bills, whether introduced by the Government or by private Members, or its support to the executive action of Ministers.[15]

The reality of the Westminster system of government is that there is no strong tradition of separation between the executive and legislature; a distinction even harder to discern in Australian jurisdictions where party political allegiances make domination by the executive over the Parliament a "norm".[16]

Montesquieu did, however, rightly emphasise the importance of the independence of the judiciary in a system of government, and that the independence has to be real and not just apparent.[17] In Montesquieu's view the judiciary was generally seen as the most important of powers which needed to be independent and unchecked and was potentially the most dangerous of the three branches of government if corrupted. By 1748, the date of Montesquieu's work, the separation and independence of the judiciary of the United Kingdom was clearly discernible. Such separation and independence would not have been recognised a mere century earlier.

PARLIAMENT AND THE COURTS FROM THE 18TH CENTURY—UNTIL STOCKDALE V. HANSARD

The eighteenth and very early nineteenth century was an era whereby parliamentary supremacy and the privileges of Parliament and its individual members were pushed to the extreme. It was said that "the most trifling civil injuries to members, even trespass committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been the subject of inquiry under the head of privilege".[18]

It appears that the *Act of Settlement* had the effect of changing the attitude of the courts completely as regards parliamentary privilege. In *Regina v. Paty*,[19] 11 out of 12 judges refused to interfere in the commitment of the defendant on the Speaker's

15 Note 12.
16 Especially in unicameral parliaments with single member constituencies such as Queensland whereby government usually has a large majority.
17 Note 11.
18 *Stockdale v. Hansard* (1839) 9 Ad & El 1 pp.1116-1117. That case involved an action for libel involving the accurate reporting of defamatory material which had been tabled in the House of Commons and authorised for printing by a resolution of the House.
19 (1704) 2 Ld Ryam 1105.

warrant, for attempting to bring action against a member who had disallowed his vote in a general election. Gould J. stated:

> If this had been a return of a commitment by an Inferior Court, it had been naught, because it did not set out a sufficient cause of commitment: but this being the commitment by the House of Commons, which is superior to this Court, it is not reversible for form ... We cannot judge of the privileges of the House of Commons, but they are to debate that among themselves.[20]

The nineteenth century saw earlier claims by the Commons become untenable in the courts. *Stockdale v. Hansard*,[21] marks a watershed. That case established that parliamentary privilege, whilst it should be adjudged only by the Parliament, was part of the general law of the United Kingdom. Therefore, a court could inquire into whether a matter could be affected by privilege. It was also held that the privileges of the Parliament could not be extended by mere resolution of the House. In order to extend parliamentary privilege legislation was required. Since *Stockdale v. Hansard*, a carefully maintained peace has been nurtured by the courts and the Parliament. However, the period also saw a recognition by the courts that there were some matters where the jurisdiction of the Commons "*was absolute, exclusive and beyond redress by the common law*".[22]

THE MORE RECENT SETTLEMENT

Little has changed since *Stockdale v. Hansard.* There is an easy relationship between Parliament and the courts, both being aware of their respective role and avoiding conflict.[23] The trust has been such that parliaments have forsaken their traditional role as a court of disputed returns and transferred that power to the courts.

There have been a few aberrant examples. In *R. v Murphy*[24] a trial judge of the New South Wales Supreme Court interpreted the traditional privilege of Article 9 of the *Bill of Rights* (freedom of speech in Parliament) in such a narrow way[25] that it provoked a legislative response from the Australian Parliament[26] and other State jurisdictions.[27]

20 Note 18 at pp. 1107. Dissenting was Holt C.J., stated that: " if the votes of both Houses could not make a law, by parity of reasoning they could not declare the law".

21 Note 18.

22 C. J. Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, London, 21st edition, pp. 150. ("Erskine May", 21st edition). It must be noted that by 1837, the year of *Stockdale v. Hansard*, the doctrine of responsible government was being firmly established and the power of the House of Commons to move for impeachment had fallen into disuse. The last action for impeachment was in 1805.

23 See generally, G. Lock, 'Parliamentary Privilege and the Courts: The Avoidance of Conflict', *Public Law*, Spring 1985, p. 64.

24 64 ALR 498.

25 So as to enable evidence by a witness in a Senate inquiry to be used in a criminal proceeding.

26 *Parliamentary Privileges Act 1987* (Cth).

27 For example, the *Parliamentary Papers Act 1992* (Qld) – the provisions of which are now contained within the *Parliament of Queensland Act 2001.*

Such unusual judgements have reduced even further in the face of the decision in *Prebble v Television New Zealand Ltd* [28] where Lord Browne-Wilkinson said:

> … If article 9 is looked at alone, the question is whether it would infringe the article to suggest that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.
>
> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *British Railways Board v Pickin* [1974] AC 765; *Pepper v Hart* [1993] AC 593. As Blackstone said in his Commentaries, 17th ed (1830), vol 1, p 163: "… the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".[29]

Indeed, there have been instances where courts have interpreted privileges in a wide manner to extend the protection offered to the Parliament and it members so as to protect the business of the legislature. In *O'Chee v Rowley*[30] and *Rowley v Armstrong*[31] the informants of members and members' papers were protected from coercive process of the courts because of the negative effect such a release could have on the legislative process. McPherson JA, in O'Chee v Rowley stated:

> The decision in *Brown & Williamson Tobacco Corp v Williams* … and other American decisions on the subject, recognise the 'chilling' effect that court processes, like that being used by the plaintiff in this action, are capable of having on legislative activity; that is, by 'chilling' the ability of Congress "to attract future confidential disclosures necessary for legislative purposes (1995) 62 F 3d 408 at 417.9 [32]

ENHANCEMENT TO THE INDEPENDENCE OF THE COURTS—INTERPRETATIONS TO THE COMMONWEALTH PARLIAMENT

As regards the protection of the role of the courts, in Australia in relatively recent times, judicial interpretation of the Commonwealth Constitution has entrenched as law the

28 [1995] 1 AC 321, [1994] 3 NZLR 1.
29 [1995] 1 AC 321, 332; [1994] 3 NZLR 1, 6-7.
30 (1997) 150 ALR 1999.
31 [2000] QSC 88.
32 Note 28 at 212.

separation of judicial officers exercising Commonwealth judicial power (including State courts that exercise Commonwealth power). The implications are that:

- The judiciary should be separate from the other two branches of government—the legislature and executive.
- The judicial power of the Commonwealth may only be exercised by the High Court, other Federal courts and State courts vested with Federal jurisdiction.
- Judicial power cannot be combined with non-judicial powers.[33]

The High Court's determination in *Kable v Director of Public Prosecutions*[34] ruled that non-judicial powers should not be conferred on State courts discharging Commonwealth judicial powers. The decision in *Fardon v Attorney-General,*[35] however, ruled that the separation of judicial and non-judicial functions at the State level only applies where State legislation attempts to alter or interfere with the working of the Federal judicial system or where State legislation vests power on State courts that affects their capacity to exercise Federal jurisdiction impartially and competently.

PRACTICES AND PROCEDURES IN THE PARLIAMENTS

For their part, parliaments have long sought to avoid conflict by upholding either through Standing Orders or practice principles such the sub judice convention—whereby matters under adjudication by the courts cannot be discussed in Parliament.[36] Although in some jurisdictions this convention has been narrowed to criminal proceedings or civil proceedings where a jury is empanelled.[37]

Another practice enforced by parliaments is that the conduct of judicial officers (criticism) can only be debated on a substantive motion about that conduct. This means that the conduct of the judiciary cannot generally be criticised in debate. In Queensland the rule has been explained as follows:

> … unless debate is based upon a substantive motion, drawn in proper terms, reflections must not be cast in debate upon the conduct of the sovereign, the heir to the throne or other members of the royal family, the Governor-General of an independent territory, the Speaker, members of either house of Parliament or judges of superior courts. The rule includes reflections that convey reproach or are abusive.
>
> The rule has been inherited by this House and has long been applied as part of our procedure and practice. As the rule relates to the judiciary, it is relevant to the doctrine of separation of powers. I have reflected last night on comments made in

33 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51; [1996] HCA 24; Fardon v Attorney-General (2004) 223 CLR 575; *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; 240 CLR 319; 84 ALJR 31; 261 ALR 220.
34 Note 33.
35 Note 33.
36 In Queensland the convention is expressed in Standing Order 233.
37 Note 33.

> the House yesterday. I believe that some comments made in the House yesterday have transgressed the rule, in that comments went beyond examining decisions by a court but rather amounted to criticism of the character or conduct of a judicial officer in exercise of their judicial functions. I wish to remind all members of the important rule relating to office holders, such as judicial office holders, and call on all members to respect that rule.[38]

The conventions do not only relate to debate, but to questions that may elicit criticism,[39] notices of motion that contain criticism[40] and tabled documents such as explanatory notes.[41]

These conventions are oftentimes difficult to enforce. The most common flashpoint usually revolves around perceptions of lenient sentencing of offenders. It becomes difficult for presiding officers to contain members when judicial officers take actions that are widely criticised in the community—such as detaining in the watch house tradesmen, who disturbed the court by drilling on the floor below putting in smoke alarms as part of the refurbishment at a courthouse.[42]

There are also a number of conventions relating to the executive, including that the Governor and Governor-General not be criticised. Speakers have also ruled out of order inappropriate notices of motion that purport to be an order or infringe the prerogatives of the Crown. [43]

However, extreme matters have also led to this convention being put aside. In December 2001, allegations were raised that, during his time as Archbishop of Brisbane, then Governor General Peter Hollingworth had failed to deal appropriately with sex abuse allegations made against a church teacher at Toowoomba Preparatory School. A report by the Diocese of Brisbane into the handling of the cases was provided to Premier Peter Beattie in late April 2003. Dr Phillip Aspinall, Archbishop of Brisbane, wrote to the Premier requesting the tabling and publication of the report. On 1 May 2003 by leave of the House the report was tabled and a motion to publish the report agreed to.[44] Appendix 2 attempts to summarise the conventions of mutual respect.

FLASHPOINTS—PARLIAMENT AND EXECUTIVE V. COURTS

In terms of the Parliament and the executive infringing on the judiciary, issues such as mandatory sentencing, continuing detention orders and the appointment of judicial officers remain as flashpoints between Parliament, the executive and the courts.

38 Speaker Mickel 6 June 2010 Parliamentary Record p3582.
39 Speaker Simpson 16 October 2013 Parliamentary Record p3294.
40 Speaker Mickel 11 May 2011 Parliamentary Record p1348.
41 Speaker Reynolds 16 October 2007 Parliamentary Record p3517-8.
42 Parliamentary Record 14 September 2010 p3192.
43 Speaker Reynolds 27 February 2008 Parliamentary Record p422.
44 Parliamentary Record, 1 May 2003 p1555-56. (Governor-General Hollingworth stood aside on 28 May 2003, he announced his resignation and his commission as Governor-General was revoked as of 29 May 2003.)

Mandatory sentencing whereby the law made by Parliament as opposed to judges determine sentences. Opponents argue that it infringes on the separation of powers as it is designed to limit the power of the courts. That is, the courts are designed to protect the few from tyranny of the majority represented in Parliament. Opponents argue that mandatory sentencing compromises the rights of individuals to have their particular circumstances considered in order to address populist concerns.

The move to continuing detention orders in Australia since the 1990s has raised separation of powers arguments because they involve post-sentence preventive detention and ongoing supervision of high risk offenders, unlike regimes that existed in the past where orders were imposed by judges at the time of sentencing.[45] The regimes are politically popular as they are viewed as protecting the public and often occur in respect of persons previously convicted of horrendous crimes, but they do impact upon the individual rights of the offender as they effectively continue to punish the offender after their sentence is served.

The appointment of judicial officers has long been an area of potential controversy. The *Act of Settlement 1701* only protects judges from their unwarranted removal by the executive. The appointment of judges remains a purely executive function. The form, degree and quality of consultation is less than a convention and varies. The controversy that erupted with the appointment of Hon Tim Carmody as the Chief Justice of the Supreme Court in 2014 is perhaps the most public in collective memory in Queensland (if not Australia). However, various appointments made by former Queensland Attorney-General Matt Foley in an attempt to address gender imbalance in the court were, at the time, also controversial in legal circles in Queensland (although subject to less media and public commentary). Extending further back in history, the process for the appointments of the Chief Justice and the Chief Puisne Judge in 1982 by the Bjelke-Petersen Government has long been mired in controversy.

On 16 September 2009 I made the following submission to then Premier Bligh's Integrity Review:

> Queensland is blessed by an independent, vibrant and well respected judiciary.
>
> However, the judiciary could be further strengthened by improvements to the processes for judicial appointments. This would remove constant allegations regarding the selection of new appointments and further strengthen public confidence in this very important arm of government.
>
> It is vital that any discussion or review about the processes of judicial appointment include the judiciary and the legal community as well as the wider community.
>
> Recommendation:
>
> The judiciary be further strengthened by improvements to the processes for judicial appointments. This would remove constant allegations regarding the selection of

45 T Tulich "Post-sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales" *UNSW Law Journal*, Volume 38(2) 823.

new appointments and further strengthen public confidence in this very important arm of government.[46]

Unfortunately the process for judicial appointments was not a matter addressed by the government's response.[47]

FLASHPOINTS—COURTS V. PARLIAMENT AND EXECUTIVE

In terms of the judiciary infringing on the Parliament or the executive, the increasing practice of judges making statements *ex curia* or in semi-formal court proceedings (such as the swearing in of new judges, admissions or retirements) that are critical of government policy or Parliament's legislation is an increasing flashpoint.

As to be expected, judicial officers are aware of their ethical obligations regarding such commentary and most commentary adds to public debate in an appropriate and measured manner. However, on occasions such commentary can stray and create perceptions of partisanship, or at the very least potentially puts the judge "on the field" as a political player.

Of course such commentary can also occur during formal court proceedings, but at least in those instances the matter can be resolved on appeal.

RECENT EVENTS IN QUEENSLAND

No discussion of separation of powers or mutual respect can occur without some discussion of events in Queensland in the last two years. There are three matters that caused tension between the Parliament, the executive and the courts: the passing of the Vicious Lawless Association Disestablishment Bill (the VLAD Act) and associated Acts; the Criminal Law Amendment (Public Interest Declarations) Amendment Bill; and the appointment of Hon Tim Carmody as Chief Justice.

The story commences with a number of law and order issues on the Gold Coast, including a shoot-out at a Gold Coast shopping Mall, where an innocent bystander was wounded in April 2013. The defining event, however, was a public brawl between rival bikie gang members that erupted in the middle of a restaurant strip in Broadbeach on the Gold Coast on 27 September 2013. Police arrested some of the offenders. Later other bikie members congregated outside the Broadbeach Police Station and demanded the release of arrested gang members.

46 http://www.premiers.qld.gov.au/publications/categories/reviews/integrity-and-accountability-reform/submissions.aspx Accessed 7 September 2015.

47 http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2009/5309T1293.pdf Accessed 7 September 2015.

In response, on 15 October 2013, the Attorney-General introduced the Vicious Lawless Association Disestablishment Bill (the VLAD Act), the Tattoo Parlours Bill and the Criminal Law (Criminal Organisations Disruption) Amendment Bill. The bills were all declared urgent, and passed on 17 October 2013.

The laws and associated administrative arrangements included:

- Extra powers for the Crime and Misconduct Commission (CMC);
- Bikie-only prison at Woodford, north of Brisbane;
- Mandatory sentences of 15 years for serious crimes committed as part of gang activity, on top of the normal penalty;
- Club office bearers to be sentenced to another 10 years in jail, and parole will only be granted if the offender cooperates with police;
- Convicted bikies to be subjected to strict drug tests and searches in prison;
- No gym facilities or TV access in jail;
- Phone calls in jail to be monitored, except those relating to legal representatives;
- Inmates' mail to be opened and censored;
- Visitor contact to be restricted to one hour a week;
- Bikie criminals in other State prisons to be transferred to Woodford Prison;
- Introducing a licensing regime for tattoo parlours and artists, banning bikie gang members; and
- Motorcycles to be crushed as punishment for certain crimes

One of the more controversial aspects of the legislation were amendments to the *Bail Act*, which essentially sought to prevent persons charged under the VLAD laws from obtaining bail.

On 13 November 2014 the High Court, by majority, rejected a challenge to the VLAD laws on the grounds that they infringed the separation of powers principles in *Kable v Director of Public Prosecutions*. The majority of the Court held that the laws did not require the courts to proceed otherwise than in accordance with the processes which are understood to characterise the exercise of judicial power.[48]

Although otherwise unrelated, in the same sitting week, on 16 October 2013, the Attorney-General introduced the Criminal Law Amendment (Public Interest Declarations) Amendment Bill. This Bill was introduced in response to a Supreme Court decision in late September 2013 to grant conditional release under a supervision order to a sexual offender, Robert John Fardon.[49]

48 *Kuczborski v Queensland* [2014] HCA 46.

49 Fardon is a notorious sex offender in Queensland. In 2003 he was the first offender to be detained under the *Dangerous Prisoners (Sexual Offenders) Act 2003*. In September 2006 he was released subject to a supervision order containing 32 conditions. He subsequently broke the order three times in 2007: he attended a school on a pre-arranged visit, disobeyed a curfew restriction, and travelled without authority to Townsville. http://www.brisbanetimes.com.au/queensland/take-on-bleijie-ogorman-tells-queensland-judges-20131016-2vmhg.html#ixzz35QoruyVA Accessed 7 September 2015.

On 16 October 2013 Mr Terry O'Gorman, the President of the Council for Civil Liberties said that Queensland judges should "rebel against an extraordinary power grab by the State's attorney-general". Mr O'Gorman is reported as stating: "The legal profession has to wake from its slumber and take on the attorney-general because he is so extreme and he is doing so much damage to the legal framework".[50] Mr O'Gorman's reported comments were akin to a call to arms.

On 23 October 2013, Magistrate Bernadette Callaghan gave bail to a man accused of shooting up a Mooloolaba tattoo parlour and allegedly had the keys of a Rebels bikie clubhouse on him. Police attempted to apply the new legislation, which included a "presumption against bail for criminal motorcycle gang members'' to stop the man from receiving bail. The Magistrate found that evidence tendered by police that showed the man had been located at the Rebels chapter club on a number of occasions, found in possession of keys to the clubhouse and been in the company of members wearing their "colours'' was insufficient to prove the man was a member of the gang. He was released on bail. The Crown appealed the bail decision.[51]

On 24 October 2014 the Queensland Premier, Mr Campbell Newman was reported as saying:

> What we need to see is those involved in the court system, the insiders in the legal system, start to realise that that's what the community wants and they need to act accordingly to protect the community.[52]

On 30 October 2013 Fryberg J, hearing the Crown's appeal on another man's bail application, read the Premier's comments from 23 October above aloud in the court and asked the Director of Public Prosecutions' representative to clarify whether the comments had been withdrawn. Stating:

> I say that in great seriousness ... because it's essential in our system that justice be seen to be done.
>
> If I were to have the matter dealt with these remarks on the record and not withdrawn ... it would be very difficult for members of the public to avoid a conclusion... that the court was bending to the will of the government.[53]

Fryberg J eventually stayed proceedings regarding the bail application review because of the comments by the Premier that His Honour thought impacted on the independence of the courts.[54]

50 http://www.brisbanetimes.com.au/queensland/take-on-bleijie-ogorman-tells-queensland-judges-20131016-2vmhg.html#ixzz35QpCmPxN Accessed 7 September 2015.

51 http://www.warwickdailynews.com.au/news/what-do-police-need-do-prove-someone-bikie/2060802/ Accessed 7 September 2015.

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

53 http://www.brisbanetimes.com.au/queensland/courts-in-crisis-over-newmans-remarks-20131030-2wfm9.html Accessed 7 September 2015.

54 http://www.theaustralian.com.au/news/nation/judge-adjourns-bikie-hearing-over-concern-at-campbell-newman-remarks/story-e6frg6nf-1226749706000 Accessed 7 September 2015. *R v Brown* [2013] QSC 299.

There was, according to his Honour:

> … a very real risk that members of the public would perceive a result in favour of the Crown as having been influenced by the Premier's statements. Thereby the power of the executive arm of government would be enhanced and the independence of the judicial arm damaged. That damage would affect the institutional integrity of this Court.[55]

On the basis of these findings, His Honour concluded that a stay should be ordered.[56]

The order by Fryberg J was subsequently set aside by the Court of Appeal on 8 November 2013.[57] In coming to its decision, the Court of Appeal made some significant observations as to the law and convention regarding the separation of powers that need to be repeated here:

> It is neither possible nor prudent to attempt exhaustively to list the powers exercisable by a superior court of record under its inherent jurisdiction.
>
> ...
>
> The court's powers must, however, be exercised judicially and directed to the effective exercise of the court's jurisdiction in accordance with established legal principle. The real issue in the present case is as to the soundness of the premises on which the primary judge's determination was based, namely that there was "a very real risk that members of the public would perceive a result in favour of the Crown as having been influenced by the Premier's statements" and that, in consequence, the "independence of the judicial arm [would be] damaged" thereby affecting "the institutional integrity of [the] Court". For the reasons which follow, this Court does not accept these premises as correct.
>
> The members of the public to whom regard should be had for present purposes are persons who are reasonable and fair-minded and who are "neither complacent nor unduly sensitive or suspicious". We will refer to such persons merely as "members of the public". Such persons would apprehend that Queensland judicial officers would dispose of their busy workloads in accordance with their oaths or affirmations of office: to do equal justice to all persons and discharge the duties and responsibilities of the office according to law to the best of their knowledge and ability without fear, favour or affection.
>
> Gleeson CJ, in an address entitled "The Role of the Judge and Becoming a Judge" delivered at the National Judicial Orientation Programme on 16 August 1998, observed:
>
> > The duty of a judge is to administer justice according to the law, without fear or favour, and without regard to the wishes or policy of the executive government. Judges, of course, give effect to the will of parliament as expressed

55 R v Brown [2013] QSC 299 at [13].
56 R v Brown [2013] QSC 299 at [13].
57 http://archive.sclqld.org.au/qjudgment/2013/QCA13-337.pdf Accessed 7 September 2015.

> in legislation; but their duty is to behave impartially in conflicts between a citizen and the executive. There may, from time to time, be a big difference between the will of parliament as expressed in legislation and the policy of the executive government."

It will be the case, from time to time, that a law that a judge is bound to apply will be unpopular. It may also be the case that a judge, being true to his or her oath or affirmation of office, will declare unconstitutional and invalid a law that has general community approval. As McHugh J observed in an address, "Tensions between the Executive and the Judiciary":

> … if the rule of law is to remain the basis of our democracy, the courts cannot be moved by the political consequences of their decisions. They must maintain an a-political stance. In contrast to the exercise of executive power, judges cannot base their decisions on, or be affected by, potential political implications and media pressures. The judges must base their decisions on the law.

Judges of the Supreme Court sit as independent arbiters in civil and criminal cases. The State is a necessary party to the latter and is frequently involved in the former. The Australian Supreme Courts developed a reputation for independence and impartiality prior to federation. That reputation has been maintained without interruption. Such criticisms as have been made, from time to time, concerning the discharge by the courts of their functions have overwhelmingly concerned delays in determining proceedings and sentences imposed for criminal offences. In this State, criticisms on the grounds of delay have become infrequent.

The Attorney-General, a member of the executive government, if dissatisfied with rulings of law or sentences imposed, may exercise a right of appeal under s 669A of the Criminal Code (Qld). Such appeals are regularly instituted. Appeals from the District Court and the Trial Division of the Supreme Court lie to this Court. The Attorney-General's appeals succeed in some cases and fail in others. The State of Queensland and other manifestations of the Crown in right of the State of Queensland are also frequently litigators in civil matters in the Supreme Court. Despite the volume of litigation to which the Crown is a party, it is not suggested, except by those few who embrace far-fetched conspiracy theories that the decision-making processes of the courts are in any way influenced by the wishes of the Attorney-General or the executive government.

Judicial independence is not protected and fostered merely by practices and conventions. The security of tenure of Supreme Court judges is protected by statute. Judges may be removed from office before reaching the compulsory retirement age of 70 only by a formal act of the Governor in Council following a resolution of Parliament on grounds of proved misbehaviour or incapacity. Judges' salaries may not be decreased. Judges are thus not in a position of being rewarded or punished by the executive government in respect of any determination that they may make.

> The substance of most, if not all, of the matters discussed above is known, or can be expected to be known, by members of the public. That being the case, *it is improbable that members of the public would perceive the Supreme Court to have the institutional fragility implicit in the primary judge's findings or that judges of that Court would be pressured or influenced in their decision-making processes by statements of the nature of those under consideration.*
>
> ....
>
> The remarks attributed to the Premier were associated with the statements by the QPS and the DPP that they would be challenging court decisions. The necessary inference was that applications would be made to the Supreme Court in that regard. The program thus conveyed to listeners that emanations or representatives of the State were challenging decisions by means of the appropriate processes established by statute for that purpose.
>
> The words attributed to the Premier are implicitly critical of decisions made by magistrates who have granted bail to "alleged bikie members". The decisions of magistrates and judges are not exempt from criticism, even robust criticism. The most competent of judicial officers will err from time to time; that is why appeal processes exist. The Solicitor-General submitted that persistent statements criticising judicial decisions by a member of the executive or legislature could in no circumstances have any effect on the integrity of the court; rather, such statements could reflect only on the integrity of their maker. *While we are confident that judges and magistrates would continue to make independent decisions in the face of sustained criticism, we are not so sanguine that consistent disparagement cannot have any tendency to weaken public confidence in the courts. Recognising such considerations, members of the executive and other members of Parliament generally, and observing a convention in that regard, exercise restraint in voicing such criticisms*."[58]
>
> [Emphasis added, references omitted]

On 4 November 2013 the Chief Magistrate, later to become Chief Justice, Tim Carmody issued a practice direction, so that all contested bail applications under the *Vicious Lawless Association Disestablishment Act* were to be heard in a particular court room, essentially ensuring that all bail applications would be heard by the Chief Magistrates. The practice direction by the Chief Magistrate was reportedly criticised for transgressing on separation of powers and was criticised by the Bar Association, an Independent Member of the Legislative Assembly and minor party leader.[59]

On 6 December 2013, the Queensland Court of Appeal handed down two decisions that related to the *Criminal Law Amendment (Public Interest Declarations) Act*. The Court of Appeal 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

58 http://archive.sclqld.org.au/qjudgment/2013/QCA13-337.pdf Accessed 31 August 2015.
59 http://www.abc.net.au/news/2013-11-06/qld-chief-magistrates-bikie-bail-directive-an-abuse-of-power/5072272

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".[60] The decision was not appealed to the High Court.

On 17 December 2013 Supreme Court Judge (Hon Peter Applegarth) in sentencing three men for contempt of the Crime and Misconduct Commission (the failure to answer lawful questions at a hearing) noted that new jail measures for bikies were "extremely harsh" and reduced their sentences to compensate:

> …because of the harshness of the regime of solitary confinement to which the respondent will be subjected, I consider that a substantial allowance should be made for it.[61]

On 20 December 2013 then Attorney-General Jarrod Bleijie gave a Christmas address discussing tensions between the judiciary and the government:[62]

> It is stating the obvious that the executive government and some members of the legal community have had their differences over a variety of topics in the last twelve months.
>
> ... What is important to observe is that whilst the legislators and members of the legal community may, from time to time, disagree on important issues, that criticism should respect the institutional integrity of both the executive and the judiciary.
>
> Lest the view from one end of George Street to the other has become blurred, the government and people of Queensland continue to have full confidence in the members of this and every court of the State to dispense justice according to their oaths taken.[63]

On 29 January 2014 the Chief Magistrate, Mr Tim Carmody, at a swearing in of two new Magistrates, is reported as warning that the judiciary should not "meddle" with new laws or use their positions to criticism them. The Chief Magistrate said judges should not let personal opinions or ideological, political or religious beliefs infect their decision-making. He said separation of powers was a two-way street and scrupulous care should be taken not to abuse the institutional integrity of the courts:

> In return for the unfettered independence to make decisions – regardless of whether others think they are right or wrong – judges must not meddle in the administration of enacted laws by the executive and departments of state …

60 *Attorney-General (Qld) v Fardon* [2013] QCA 365 Holmes, Muir and Fraser JJA 06/12/2013. http://www.sclqld.org.au/caselaw/QCA/2013/365.

61 http://www.brisbanetimes.com.au/queensland/bikies-to-spend-christmas-in-solitary-confinement-20131216-2zh03.html Accessed 2 December 2015.

62 http://www.brisbanetimes.com.au/queensland/attorneygeneral-justice-margaret-mcmurdo-address-tension-between-judiciary-government-20131219-2znxn.html Accessed 7 September 2015.

63 http://www.brisbanetimes.com.au/queensland/the-attorneygenerals-exchange-of-christmas-greetings-20131219-2znz2.html Accessed 7 September 2015.

> It is clearly wrong, therefore, for judges to deliberately frustrate or defeat the policy goals of what they might personally regard as unfair but nonetheless regular laws under cover of office as a form of redress or amelioration.[64]

On 6 February 2014 the Queensland Bar Association (QBA) condemned Premier Campbell Newman for describing some defence lawyers as "part of the criminal gang machine".[65] On 11 February 2014 Supreme Court Justice Peter Applegarth told a jury hearing the case against an alleged murderer not to think less of the defence team just because politicians had made disparaging remarks about criminal lawyers.[66]

On 19 March 2014 the Solicitor-General, Walter Sofronoff QC, resigned. On 25 March 2014 the former Solicitor-General commented on the Attorney-General allegedly revealing details of private conversation with Queensland Court of Appeal president, Margaret McMurdo.[67]

On 12 June 2014 the sitting Chief Magistrate, Mr Tim Carmody, was announced as the new Chief Justice of the Supreme Court. Controversy plagued the appointment, with adverse commentary from a number of sources including the former Solicitor-General Walter Sofronoff QC; former Corruption Commissioner and Court of Appeal Judge, Tony Fitzgerald; retired Supreme Court Justice Jim Thomas; and sitting Court of Appeal Justice John Muir.[68] Mr Peter Davis, President of the Bar Association, resigned and made a statement that indicated inappropriate disclosures and commentary around the appointment process.[69]

Many of the statements made by detractors were highly personal, attacking Mr Carmody's perceived close ties to the government, intellectual vigour and alleged inexperience. Retired Family Court Judge Alastair Nicholson and Mr Tony Morris QC came out in support of Mr Carmody.[70]

Following the Governor's formal approval of Hon Carmody's appointment on 19 June, the Chief Justice Paul de Jersey (awaiting appointment as the next Governor)[71] was reported on 20 June to have issued a statement that said:

> The appointment of the next Chief Justice was then made by the Governor-in-Council. With that position established, it became incumbent on all of us who are involved in

64 http://www.couriermail.com.au/news/queensland/queensland-chief-magistrate-tim-carmody-warns-judiciary-against-using-position-to-criticise-new-laws/story-fnihsrf2-1226812904278 Accessed 7 September 2015.
65 http://www.couriermail.com.au/news/queensland/campbell-newman-says-lawyers-for-bikies-are-part-of-criminal-gang-machine/story-fnihsrf2-1226819588317 Accessed 7 September 2015.
66 http://www.couriermail.com.au/news/queensland/campbell-newman-blasted-by-supreme-court-justice-peter-applegarth-for-calling-bikie-lawyers-hired-guns/story-fnihsrf2-1226822875483 Accessed 7 September 2015.
67 http://www.theguardian.com/world/2014/mar/25/jarrod-bleijie-under-pressure-for-betraying-judges-confidence
68 http://archive.sclqld.org.au/judgepub/2014/muir180614.pdf Accessed 7 September 2015.
69 http://static1.1.sqspcdn.com/static/f/556710/25040883/1402639320151431 3/Davis_BAQ_resignation.pdf?token=OL%2FSK1lFYFh97ugnkN6CvTt0FNI%3D Accessed 7 September 2015.
70 http://www.theaustralian.com.au/business/legal-affairs/alastair-nicholson-has-tim-carmodys-back/story-e6frg97x-1226960449469 Accessed 7 September 2015.
71 Hon De Jersey became the 26th Governor of Queensland on 29 July 2014.

> the legal process to support its current expression. The stability of the legal system is integral to our democratic system and must be maintained.[72]

Despite the effective call by the Governor, on 23 June 2014 the Bar Association issued a call for Hon Carmody to not take up the position.[73] On 8 July 2014 Hon Tim Carmody was sworn in at a private ceremony in Brisbane's court district. On 1 August 2014 it was reported that no Supreme Court Judge attended the public welcome ceremony for Hon Carmody. The new head of the Queensland Bar Association, Shane Doyle QC, was however, reported as saying that Hon Carmody would have the respect of the Bar, and it was reported that many members the Bar attended the formal ceremony.[74] Hon Carmody eventually resigned as Chief Justice on 1 July 2015 but retained his commission as a Supreme Court Judge.

It is undesirable at this time to comment in too much detail on the period between Hon Carmody's appointment and resignation. It was a period that was marked by what can only be called in-fighting within the court and legal profession. It is opined that opponents of Hon Carmody's appointment would argue that what was said and done was to preserve and protect the independence of the court. There is little doubt that opponents perceived Hon Carmody as too close to government and would point in this regard to some of his comments and actions as Chief Magistrate.

It is also opined that others would say that it was the right of the executive to appoint Hon Carmody who was qualified for the position and once appointed, to protect and preserve the integrity of the court, no more should have been said or done. These persons may also say that criticism went beyond what was reasonable and was highly personal.

One important point to note about the saga is that despite all the public commentary, no member of the Assembly made inappropriate comments about the issue in the Assembly. A further important note is that reports of the saga suggested conduct by judicial officers that no other public officer could undertake without the risk of ethical sanction less than removal.

CONCLUSION

Ultimately any legislation of the Parliament or executive administrative decision, can be the subject of appropriate judicial review to determine whether there is a breach of the laws relating to separation of powers that apply at the Commonwealth and State level in Australia. The process of appeal can appropriately deal with judicial decisions that stray from accepted legal norms.

72 http://www.brisbanetimes.com.au/queensland/get-over-it-call-on-carmody-appointment-20140620-zsg9l.html, Accessed 7 September 2015.

73 http://www.austbar.asn.au/archives/1580 Accessed 7 September 2015.

74 http://www.theguardian.com/world/2014/aug/01/queensland-judges-snub-chief-justice-tim-carmodys-welcome-ceremony Accessed 7 September 2015.

There is, however, a strong argument that in order to protect separation of powers and the integrity of the court there needs to be a more transparent method of selecting and appointing members of the judiciary. The appointment of judicial officers has long been an area of potential controversy and the *Act of Settlement 1701* only protects separation of powers to the extent it protects a judge's removal. Of course, any such selection process must also seek to ensure that elevation to the judiciary is itself meritorious, representative (of the wider legal profession and community) and not limited to an elite..

In the 1990s parliaments from around Australia commenced to adopt codes of conduct and disclosure regimes for their members. In Queensland, Members have been found in breach of those regimes and punished accordingly by the Legislative Assembly. The time has perhaps come for the courts to look more closely at regimes that enable the review (within the court) of the words and actions of its members that are not part of a process subject to appeal but which fall short of misbehaviour sufficient for removal.[75]

75 It is noted that there are excellent texts relating to judicial ethics in Australia including the seminal work by Honourable James B Thomas titled *Judicial Ethics in Australia* first published in 1988, now in its third edition. It is also noted that *The Guide to Judicial Conduct* Published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration Incorporated, now in its second edition, is an excellent guide for judicial conduct but is not an enforceable code http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf.

APPENDIX 1 – LAWS OF SEPARATION IN QUEENSLAND

Purpose	Original Law	Modern expression in Queensland
To ensure the independence of Members of Parliament or ensure they are not conflicted by obligations to the executive (Conflicts and duties from Ministerial Offices and Assistant Ministerial Offices are excluded)	*Act of Settlement 1701* – No person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons (Repealed before enacted) *Succession to the Crown Act 1707* – s. 24 disqualified those who held a pension from the Crown or who held specified offices s. 25 disqualified Members of the Commons from holding 'new offices' but they could stand for re-election	s. 64 *Parliament of Queensland Act 2001* Qualifications to be a candidate and be elected a member the following persons are disqualified persons— (a) the Governor-General, Administrator or head of government of the Commonwealth or the Governor, Administrator or head of government of a State; (b) the holder of a judicial office of any jurisdiction of a State or the Commonwealth 65 Meaning of paid public appointment and related appointment (1) A person holds a paid public appointment if the person, for reward— (a) holds an office under, or is employed by, the State, another State or the Commonwealth; or (b) holds an appointment to or in or is employed by or in— (i) an entity of the State, another State or the Commonwealth; or (ii) the parliamentary service of the Assembly or an administrative office or service attached to the legislature of another State or the Commonwealth; or (iii) a court or tribunal or a registry or other administrative office of a court or tribunal, of the State, another State or the Commonwealth; However, a member does not hold a paid public appointment if— (a) the appointment is under the Constitution of Queensland 2001— (i) as a Minister or to act as a Minister; or (ii) as an Assistant Minister; or

Purpose	Original Law	Modern expression in Queensland
		69 Appointment to paid State appointment is of no effect (1) A member must not accept a paid State appointment. (2) Despite any law other than this Act, a purported appointment of a member to hold a paid State appointment is of no effect as an appointment. 70 Meaning of transacts business (1) A member transacts business with an entity of the State if the member— (a) has a direct or indirect interest in a contract with an entity of the State for the supply of goods to the entity to be used in the service of the public; or (b) performs a duty or service for reward for an entity of the State. 71 Restrictions on member transacting business with an entity of the State (1) A member must not transact business, directly or indirectly, with an entity of the State.
To ensure judicial independence from the Crown	*Act of Settlement 1701* – Judges' commissions are *valid quamdiu se bene gesserint* (during good behaviour) and could only be removed for misbehaviour by both Houses of Parliament.	s. 61 *Constitution of Queensland Act 2001* A judge may only be removed only on address of the Legislative Assembly for proven misbehaviour or proven incapacity to perform their role A judge's misbehaviour justifying removal from an office is proved only if the Legislative Assembly accepts a finding of a tribunal, stated in a report of the tribunal, that, on the balance of probabilities, the judge has misbehaved in a way that justifies removal from the office. The Tribunal must consist of three former judges.

APPENDIX 2 – CONVENTIONS OF MUTUAL RESPECT

Parliaments respect for the Executive	The Executives respect for the Parliament	Parliaments respect for the Courts	The Courts respect for the Parliament	The Courts respect for the Executive	The Executive's respect for the Courts
Precedence to Messages from the Governor	Executive bodies (such as Royal Commissions) recognise Parliamentary Privilege	The Sub Judice Convention	Courts recognise and uphold Parliamentary Privilege	Courts recognise and uphold Cabinet confidentiality	Processes of consultation for judicial appointments
The conduct of the Sovereign and representatives can only be criticised through a substantive motion	Executive bodies (such as Royal Commissions) recognise wider principle of non-intervention in parliamentary proceedings	The conduct of judicial officers can only be criticised through a substantive motion	The wider principle of non-intervention in parliamentary proceedings		Establishment of Independent Tribunal for Judicial Remuneration
Respect cabinet confidentiality	Separate Appropriations requested for Parliament		Public Interest Immunity Claims – on the grounds of parliamentary privilege		Attorney-General defends judiciary
The financial initiative of the Crown	The funding of the Official Opposition				

Pusillanimous Parliamentarians

James Allan

Dr James Allan, Garrick Professor of Law, University of Queensland

Let us assume that you believe, as I do, that the scope for democratic decision-making is under threat in five of the oldest democracies in the world—namely, the United Kingdom, the United States, Canada, New Zealand and Australia (which is not to rule out the same downwards trend in other democracies). Let us assume, too, that you put the blame for this decline on to unelected judges, bills of rights,[1] international law, supranational organisations and undemocratic elites. If that be the case, you may have been tempted to write a book setting out your arguments for why these assumptions are in fact true. You would then have argued in support of 'letting the numbers count' democracy, the kind under which all of us count equally and vote for representatives in a legislature. These representatives will have the final word on all the core social policy issues in society. For example: who can marry; whether prisoners can vote; if euthanasia will be permitted; what limits will be imposed on speech; what counts as a reasonable police search; who can have an abortion; and when and how those claiming to be refugees will be treated. For you, these are questions for an elected Parliament to answer, not for a small committee of ex-lawyers—a top court—to pronounce on in some definitive way, using (and note the irony of this) a majoritarian procedural decision-making rule of 4 votes beat 3, or 5 votes beat 4.[2] You prefer the size of the franchise entitled to decide such important matters to be many orders of magnitude greater than 7 or 9.

1 I have criticised bills of rights at length and in a host of contexts. For a sample see *e.g.,* James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 *Oxford Journal of Legal Studies* 337; James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (2002); James Allan, 'Rights, Paternalism, Constitutions and Judges' in *Litigating Rights: Perspectives from Domestic and International Law* 29 (Grant Huscroft and Paul Rishworth, eds., 2002); James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561; James Allan, 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197*;* James Allan, 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan and Grant Huscroft, 'Rights Internationalism Coming Home to Roost?' (2006) 43 *San Diego Law Review* 1; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; James Allan, 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533; James Allan, 'Jeremy Waldron and the Philosopher's Stone' (2008) 45 *San Diego Law Review* 133; James Allan, 'Meagher's Mischaracterisations of Majoritarianism' (2009) 20 *King's Law Journal* 115.

2 See Jeremy Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts' (2014) 123(6) *Yale Law Journal* 1626. All top courts must resort to a procedural rule to decide issues. No Spike Lee-like 'Do the Right Thing' substantive rule can resolve disputes because people (be they judges, legislators, or voters) disagree about what the substantively best or right course of action ought to be. So whichever body has the last word, disagreements can only be resolved on a procedural basis.

Let me confess that I was in fact tempted to write such a book. Indeed, the temptation proved sufficiently great that last year I gave in to it and wrote *Democracy in Decline: Steps in the Wrong Direction*.[3] One part of my book considered the causes of the decline, with virtually all of the focus being on judges, international law, bills of rights and supranational organisations. It is true that I did note that elected legislators were themselves not free of blame for the decline in the scope for democratic decision-making. Yet overwhelmingly my focus on the causes for the decline was elsewhere, not least on overweening judges.[4]

In this paper, rather than focus on judges and on the perils and ills of bills of rights, I will instead attempt to offer a fuller criticism of parliamentarians for their lack of backbone in standing up to these trends. In that sense this paper can be thought of as a small or partial counter-balance to the main thrusts of my recent book. Put differently, my topic here will be pusillanimous parliamentarians.

In attempting to make this case that too many parliamentarians grow weak at the knees when confronted with inroads into the scope for democratic decision-making—which is to say inroads into the *elected legislators'* own scope for resolving social policy disputes—I will have to pick and choose just a few of the various manifestations of the core problem. In doing so, I will look not just at Australia but also at several sister jurisdictions from the developed common law world. My goal is to sketch some of the ways in which parliamentarians are indeed pusillanimous.

A) FAILURE TO REPEAL

Let me start with the seeming inability of elected legislators to repeal a statutory bill of rights. This is a big picture concern. But consider New Zealand, the Australian State of Victoria and the United Kingdom.

In New Zealand the 1990 statutory New Zealand Bill of Rights Act was passed wholly on a party political basis. Not a single National Party MP voted in favour. And yet when the National Party was later returned to office[5] it did nothing. No repeal.

Or take the State of Victoria. Its *Charter of Human Rights and Responsibilities*[6] was enacted after a consultation committee was struck that contained not a single bill

3 James Allan, *Democracy in Decline: Steps in the Wrong Direction* (McGill-Queen's University Press, 2014—the rights bought and the book published in Australia by Connor Court Press, 2014).

4 See ibid, 42-83. I do, though, note that parliamentarians deserve some blame too.

5 The Fourth National Government of New Zealand (the Bolger–Shipley Government) came to power from 2 November 1990, and lasted until 27 November 1999.

6 *Charter of Human Rights and Responsibilities Act 2006* (Vic). Note that although the title refers to 'responsibilities' there is not a single one listed in the text of the instrument.

of rights sceptic or opponent, though it did contain a former basketball star.[7] It was passed wholly on a party political basis.[8] In this instance, the opposition to the *Charter* continued in the opposition ranks, for reasons related to democratic decision-making being preferable to judge-driven decision-making under the umbrella of such an instrument. Indeed, the Opposition Victorian Liberal Party went to the 2010 election with repeal of the *Charter* as party policy. The Liberals won that election, after which the Ted Baillieu Government began to backtrack. Rather than proceeding straight to repeal, it opted to make use of the mandated[9] review of the *Charter* after four years by the Victorian Scrutiny of Acts and Regulations Committee (SARC). When SARC reported back, all of the Liberal members of the committee, who comprised a majority of the committee, opted to recommend making the *Charter* non-justiciable, which would go a long way towards what supporters of repeal were seeking. The Labor members of the committee wanted to retain the *Charter*. Premier Baillieu over-ruled all the committee members from his own party and sided with the Labor side of politics to keep the instrument in place,[10] thereby breaking his party's clear pre-election promise.

None of the blame for that breaking of faith with the voters, and the failure of nerve of elected legislators, can be laid at the feet of the unelected judges. This was parliamentary pusillanimity at its worst. This is a diminishment of democracy caused by the elected politicians themselves, or at least by some subsection of them. At the next election the Liberal Party of Victoria was voted out of office.[11]

To move overseas again, this time to the United Kingdom, which has a statutory bill of rights titled the *Human Rights Act*.[12] The Blair Labour Government also enacted this statute on a party political basis in 1998. The Opposition Conservative Party did not support its enactment. They promised eventual repeal. By the time Labour was eventually defeated in 2010, the repeal pledge was far from clear, and anyway was not possible as Tory Prime Minister David Cameron's Government was a Coalition one as the Conservatives did not win a majority of seats. The Coalition partners, the Liberal Democrats, did not support repeal or change of any sort. In those circumstances the lack of action is wholly understandable and justified. During this period the focus had shifted from outright repeal to an alternative position of a 'British Bill of Rights'. This type of change would presumably still leave the top judges with a souped-up

7 See my 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticisms' (2006) 30 *Melbourne University Law Review* 906 at 907 and my 'You Don't Always Get What You Pay For: No Bill of Rights for Australia' (2010) 24 *New Zealand Universities Law Review* 179 with its comparison of this to the National Human Rights Consultation Committee, similarly one-sided, that was struck in the failed attempt to move to the enactment of a national statutory bill of rights for Australia.

8 For the Lower House, see: Victoria, *Parliamentary Debates*, Legislative Assembly – Fifty-Fifth Parliament, First Session, 15 June 2006, 2210-2211.

9 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44 that mandates a four-year review.

10 See Phil Lynch, Ben Schokman and Rachel Ball, 'Baillieu government retains Victorian Charter of Human Rights' (2012) 37(2) 133.

11 Victorian Electoral Commission, 'State Election 2014 results' (2014) < http://www.vec.vic.gov.au/Results/State2014/Summary.html>.

12 *Human Rights Act 1998*.

interpretive power,[13] and so have few benefits for supporters like me of 'last word decision-making by elected legislators rather than by unelected judges'—save, I suppose, that it would excise non-British judges in the European Court of Human Rights from having their say.[14] At any rate, Prime Minister David Cameron is currently pushing on with his pre-election promise to make this change, against the vociferous opposition of many lawyers and others, and so it will be interesting to see if repeal of the *Human Rights Act* (even with a substitute British bill of rights in its place) eventuates or not. If it does, then clearly there will be less parliamentary pusillanimity in Britain than in Victoria. Indeed, the saga over whether prisoners can vote or not, or in what circumstances they can vote, has shown that Prime Minister Cameron at least is no Baillieuesque invertebrate and has some sort of backbone when it comes to standing up for Parliament.[15]

These various examples give a taste of the difficulty parliaments seem to have in repealing a statutory bill of rights once one is in place. Let us turn now to a different sort of failure.

B) FAILURE TO USE THE TOOLS THEY WERE GIVEN

If we put to one side the big picture issue of repealing a bill of rights there is the issue of standing up to the top judges where and when a particular bill of rights allows for it. In other words, this is about the elected Parliament telling the unelected judges that it thinks that its understanding of how particular enumerated rights ought best to be understood, or when they are reasonably limited, or how two rights ought to play out when they conflict with one another is just as morally good as is the understanding of

13 For an account of the immense power the current *Human Rights Act* hands to unelected judges, a power not far off what top American and Canadian judges exercise, see my 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in (eds. T. Campbell, K. Ewing and A. Tomkins) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011), 108-126.

14 Whether this can be seen as a net gain at all is open to question. When judges from Albania or the Ukraine or Russia or Azerbaijan or more again, all countries with judges currently on the court, have a hand in gainsaying the elected British Parliament the illegitimacy of what is happening is more patent to many people I suspect than when it is home grown British judges doing the second-guessing and gainsaying.

15 This prisoner voting debate has played out across the common law and non-common law democratic world with various show-downs between the courts and parliaments. In Canada, see *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, overruling *Sauvé v Canada (Chief Electoral Officer)* [2000] 2 F.C. 117. In New Zealand see *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010* (NZ), which disqualified prisoners from voting. This was declared inconsistent with the Bill of Rights in *Taylor v AG* [2015] NZHC 1706. In Australia see the High Court of Australia's decision in *Roach v Electoral Commissioner* (2007) 233 CLR 162. This is a case which I critique in the strongest terms in 'The Three "R"s of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no) 'Riginalism' (2012) 36 *Melbourne University Law Review* 743. And in the United Kingdom see *Hirst v United Kingdom (No 2)* [2005] ECHR 681, and the more recent case of *McHugh and Others v The United Kingdom* [2015] ECHR 155. David Cameron has said that prisoners "damn well shouldn't" be given the right to vote, and has called for the powers of the European Court of Human Rights to be restricted. See, 'Prisoner's 'damn well shouldn't be given right to vote', says David Cameron' (14 December 2014) *The Guardian* < http://www.theguardian.com/politics/2013/dec/13/prisoners-right-to-vote-david-cameron>.

those top judges. Here, we are talking not about repealing a bill of rights but instead about using what a bill of rights offers to diminish kritarchy or juristocracy.

Alas, on this front things are no better; there is at least as much parliamentary pusillanimity when it comes to what I might describe as this sort of small stuff as there was when it came to the big stuff of opting to repeal such instruments.

Start with my native Canada and its potent, and constitutionally entrenched, 1982 *Charter of Rights*.[16] Section 33 reads:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [meaning as regards to some, but not all, of the enumerated rights] of this Charter.

Now it is of course true that this 'over-ride' or 'notwithstanding rejoinder' does not amount to any sort of full-blooded last word being accorded to Parliament to trump the judges. S. 33 does not apply to all of the enumerated *Charter of Rights* rights, but only to some; s. 33 only lasts for five years, although it can be renewed;[17] and the judges have decided that s. 33 can only apply prospectively not retrospectively.[18] This is in no way some sort of backdoor route to parliamentary sovereignty.

But neither is it nothing. And yet in the thirty-three years that the *Charter of Rights* has been in existence—with all of the many controversial decisions by the top Canadian judges in such areas as same-sex marriage,[19] euthanasia,[20] the scope of free speech,[21] the treatment of those claiming to be refugees,[22] whether prisoners can vote,[23] whether Parliament can prevent inroads into the scope of the one-size-fits-all nationalised health system,[24] and the list literally goes on and on and on—how many times do you think this s. 33 over-ride has been invoked by the Federal Parliament in Ottawa? If you thought 'zero' you are correct. And then wonder at the remarkable pusillanimity that that signals.[25]

Now it is true that some people such as Jeff Goldsworthy, Grant Huscroft and Jeremy Waldron have speculated that one reason for such timidity on the part of the elected

16 *Canadian Charter of Rights and Freedoms,* found in Schedule B to the *Canada Act 1982* (UK) c 11.
17 Ibid s 33 (1), (3).
18 See *Ford v Quebec (AG)* [1988] 2 S.C.R. 712.
19 See *Halpern v Canada (AG)* [2003] OJ No. 2268.
20 *Carter v Canada (AG)* [2015] SCC 5.
21 *RJR-MacDonald Inc v Canada (AG)* [1995] 3 S.C.R. 199, which held that restrictions on tobacco advertising were inconsistent with the freedom of expression. This was overruled in *Canada (Attorney General) v JTI0Macdonald Corp* [2007] 2 S.C.R. 610.
22 *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177.
23 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, overruling *Sauvé v Canada (Chief Electoral Officer)* [2000] 2 F.C. 117.
24 *Chaoulli v Quebec (AG)* [2005] SCC 35.
25 It is true that the Province of Quebec, which did not sign on to the 1982 repatriation of the Canadian Constitution and still has not, invoked s. 33 a handful of times early on over language rights. At the provincial level outside of Quebec s. 33 has been used not more than a handful of times, and *never* to overturn a court decision.

branches of government is the way in which s. 33 is worded.[26] Read it again. It is premised on the assumption that the top judges will tell us what our rights are (even by way of some 5–4 decision) and then the elected Parliament will be free (for five years only, looking forward, for some of the rights but not all of them) to respond by saying 'okay then, we opt to take away people's rights'. Put differently, s. 33 is premised on the assumption that the judges have some deeper moral insights and so can definitively tell all the rest of us how these rights do in fact play out against each other, and when they can reasonably and justifiably be limited, and which right will prevail when two conflict—all issues over which well-informed and certainly reasonable people regularly disagree, indeed over which the top judges themselves regularly disagree and hence have to resolve their judicial disputes by voting. And having heard the top judges pronounce conclusively about rights from on high as it were, the elected legislature is given a limited capacity to respond by taking those rights away. That is how s. 33 characterises what is going on.

Structured in that way, this over-ride is hardly handing over to the parliamentarians an easy-to-use tool. Nor does such a way of framing the debate come anywhere close to matching what is really happening. When the Supreme Court of Canada decides that tobacco companies can advertise near schools[27] or that all prisoners in all situations can vote,[28] the disagreeing legislature is not thinking 'let's take some rights away'. Rather it is disagreeing with the court's understanding of the proper scope and reach of rights and what limits are reasonable—in other words, it prefers its conception of rights to the one the top judges have offered, or rather that five of nine top judges have offered, the minority four basically agreeing with the legislature in various ways.

I think that is all true. Section 33-type over-rides are framed in a way that makes their use by the legislature tricky. Yet to my mind, conceding that fact does not wholly wipe away the raw cowardice and pusillanimity of the legislators: for thirty-three years all of them from across the political divide, have not invoked Canada's notwithstanding clause a single time in nearly three dozen years of what I would describe as rampant judicial activism.[29]

In an analogous vein, consider the United Kingdom with its statutory bill of rights, the *Human Rights Act*. This bill of rights does not allow judges to strike down or invalidate statutes, as I have made clear. The two main tools that judges have when operating it

26 See Jeff Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' in (eds. Campbell, Goldsworthy and Stone) *Protecting Human Rights: Instruments and Institutions* (2003) 263; Grant Huscroft, '"Thank God We're Here": Judicial Exclusivity and its Consequences' (2004) 25 *Supreme Court Law Review* 241; and Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' in (eds. Huscroft and Brodie) *Constitutionalism in the Charter Era* (2004) 7.

27 *RJR-MacDonald Inc v Canada (AG)* [1995] 3 S.C.R. 199.

28 *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519 and *Sauvé v Canada (Chief Electoral Officer)* [2000] 2 F.C. 117.

29 See footnote 1 above.

are a reading down provision[30] and a Declarations power.[31] The former just asks the judges to do all that they can, or that they think is possible, to read other statutes in a way that is rights-respecting—what is deemed 'possible' being left to the judges. In the United Kingdom what has been deemed possible is pretty much anything, with the leading case of *Ghaidan*[32] laying down that the judges can read words in and so read words out: that they do not need to perceive any hint of statutory ambiguity before doing this; that the clear and unmistakable intention of Parliament need not stop them; and that this 'interpretive' task can proceed right up the point of 'judicial vandalism', with that issue too being decided by the judges themselves. This *Ghaidan* interpretive approach to a statutory bill of rights' reading down provision has been explicitly rejected in both New Zealand[33] and in Australia.[34] Antipodean top judges have opted for sanity, if I can put it in those terms, and leave to one side all the further issues related to rule of law concerns when judges can treat a statute in this Alice in Wonderland way.[35]

But if we put aside the use of the reading down provision in a statutory bill of rights, the other tool given to judges is the Declaration power. Stay in the United Kingdom. Since the enactment of the *Human Rights Act* under the Blair Government there have been well over two dozen such declarations by the top judges. And remember, there is no power to strike down or invalidate statutes. Yet every single time the British judges issue such a declaration the parliamentarians defer to the judges and change the legislation to accord with what the judges prefer—well, every single time except one.[36]

It is not unfair to describe that sort of track record in terms of a pusillanimous Parliament. Indeed that probably amounts to an overly kind way of putting the matter. Of course, it is also true that by British standards, Antipodean legislators look to have evolved into vertebrates compared to their invertebrate northern hemisphere cousins. Indeed we have seen a Labour Party Deputy Prime Minister in New Zealand publicly take that country's Chief Justice to task for her comments suggesting that judges might well be able to re-write the doctrine of parliamentary sovereignty.[37] In fact as a rough

30 This is section 3 in the UK's *Human Rights Act* and section 6 in the *New Zealand Bill of Rights Act* and section 32 in the *Victorian Charter of Human Rights*.

31 This is section 4 in the UK, section 36 in Victoria and while the New Zealand statutory bill of rights (being the first of the three of them) did not give such a declarations power to the judges, the judges 'rectified' that omission by later giving it to themselves. See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

32 *Ghaidan v Godin-Mendoza* [2004] UKHL 30. And note that *Ghaidan* has been affirmed and affirmed and affirmed repeatedly. See, for instance, *Shekdrake v DPP* [2005] 1 AC 264, 303 (per Bingham LJ).

33 See *R v Hansen* [2007] 3 NZLR 1.

34 See *Momcilovic v The Queen* (2011) 245 CLR 1, 38 [20], 54-5 [61]-[62] (French CJ); 87-90 [148]-[160] (Gummow J); 123 [280] (Hayne J); 211 [546], 219 [574] (Crennan and Keifel JJ); and 250 [684] (Bell J).

35 See footnote 13 above.

36 As of March 2015, there have been 29 declarations of incompatibility by UK courts. According to the Human Rights Joint Committee, 'There is … only one outstanding declaration of incompatibility where the Government has yet to remedy the incompatibility: that concerning the statutory disqualification of serving prisoners from voting in parliamentary elections.' See, UK Parliament – Human Rights Joint Committee, 'Declarations of Incompatibility by UK courts' (2015) <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm>.

37 See Audrey Young, 'Cullen to judges: Speak up, don't make changes' (26 May 2005) *NZ Herald* <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10127569>.

generalisation it seems to me to be fair to say that elected legislators in New Zealand and Australia show far more spine in standing up to over-powerful judges than is anywhere in evidence in the common law world north of the equator.

C) FAILURE TO RETAIN THE APPOINTING POWER

Here is another example, solely from Britain. It has to do with judicial appointments. I have discussed it at length elsewhere[38] and so here will simply give the reader a brief précis. The idea here is the response one often hears from supporters of a powerful judiciary that the unelected judges in fact have a modicum of democratic legitimacy given that they are appointed by the Executive (or in the United States at the federal level by the Executive after confirmation by the Senate). This is supposed to go some way (nowhere near far enough, in my view, but some way) towards buttressing the type of argument that claims that top judges will never veer too far from the political mainstream. Whatever your position on that, notice that it requires that judicial appointments be made by the elected government of the day. Win an election and your party picks the top judges, (subject, no doubt, to minimum standards as far as length of time at the Bar, say, or after the need to consult with various parties before choosing). Yet in the United Kingdom that appointments power has been given over to a judicial appointments commission. That commission has 15 members, of which five are judges and two are lawyers. It is laughable, in my view, to think that the other eight members will ever stand up to and over-rule these seven. A judicial appointments commission amounts to the legal fraternity itself choosing who will be the judges; indeed it comes close to being a system in which existing judges choose the future judges. And yet when the Cameron Government came into office it left that system in place, a system that is incestuous, that is designed to block democratic input, and that goes some way to creating a self-selecting, insular, lawyerly caste—an especially bad idea in an age of great judicial power.

And of course one hears calls for a similar judicial appointments commission here in Australia.[39] Almost always this is under the aegis of seeking to depoliticise the judiciary, as though that is self-evidently a good thing and as though a lawyerly caste does not itself share broad political views sometimes quite distinct from those of the wider population.

So going down this route is yet another indicia of parliamentary pusillanimity.

38 See, for example, my 'Appointing Judges in New Zealand: If It Were Done When 'tis Done then 'twere Well It Were Done Openly and Directly' in (ed. P. Russell and K. Malleson) *Appointing Judges in an Age of Judicial Power* (U. of Toronto Press, 2006), 103-121; and my 'Doin' the Sankey Hanky Panky' *op. cit.* fn. 13 above, from page 122.

39 For example, Gabrielle Appleby, 'Appointing Australia's highest judges deserves proper scrutiny' (9 December 2014) *The Conversation* <https://theconversation.com/appointing-australias-highest-judges-deserves-proper-scrutiny-35039>.

D) FAILURE TO CALL OUT CANT AND PATENT IMPLAUSIBILITY

I will be brief in this last section. There are signs of hope that parliamentarians are recovering some small modicum of their nerve and at least on occasion standing up to judges. Indeed, one area for optimism is parliamentary privilege and the recent New Zealand Parliament's response to an awful set of cases, a response set out in detail in another article in this issue.[40] But on the whole it is hard not to think that the current emphasis on 'rights talk' in society at large has helped to shift social decision-making power from the elected branches to the unelected branch. Too few parliamentarians stand up and call out weak and implausible judicial decisions for what they are, possibly on the erroneous view that the rule of law somehow excludes such criticism—as though the rule of law were somehow equivalent to rule by judges, which it patently is not.[41] What we need is the opposite: more parliamentarians standing up and calling out cant and implausible judicial reasoning, as well as the over-reach of international law,[42] and then being prepared to gainsay these things. When few of our elected legislators seem prepared to do that, the words of Cassius can seem apt: 'The fault, dear Brutus, is not in our stars, But in ourselves'.[43]

This short paper has been at attempt to show that blame for the recent inroads into democratic decision-making in five of the oldest democracies in the world does not lie solely at the feet of unelected judges, bills of rights and international law. Some blame attaches as well to parliamentarians themselves. That, and that alone, is the claim being made in this paper.

40 Back when I lived and worked in New Zealand I wrote about these awful judicial decisions and why they were wholly implausible. See my 'Parliamentary Privilege: Will the Empire Strike Back?' (2002) 20 *New Zealand Universities Law Review* 205.

41 For a full argument to that extent see my 'Reasonable Disagreement and the Diminution of Democracy: Joseph's Morally Laden Understanding of "The Rule of Law"' in (ed. R. Ekins) *Modern Challenges to the Rule of Law* (LexisNexis, 2011), 79-92.

42 I set out that case in my *Democracy in Decline*, fn. 3 above.

43 Shakespeare, *Julius Caesar* (Act I, Scene 2, lines 139-140.

Chronicles

From the Tables — January–June 2015

Robyn Smith

Dr Robyn Smith, Executive Officer, Office of the Clerk, Northern Territory Legislative Assembly

AUSTRALIAN PARLIAMENT

The Minister for Foreign Affairs, Julie Bishop, moved a motion in respect of a stay of execution for Andrew Chan and Myuran Sukumaran, sentenced to execution in Indonesia, on 12 February. The motion was unanimously supported by all Members of the House of Representatives.

A condolence motion for the late John Malcolm Fraser, former Prime Minister of Australia, was moved on 20 March after which the House adjourned until 12.42pm the following day as a mark of respect.

Electronic devices continue to require guidelines for Members to ensure the use of devices does not interfere with the work of the Parliament. In March, the House adopted a resolution which, inter alia, provided that: devices must be operated in silent mode and not interfere or distract other Members either visually or audibly; devices must not record proceedings; communication on social media about private or in camera committee meetings is a breach of privilege; and use of devices must be unobtrusive. The resolution noted that communication via electronic devices is unlikely to be covered by parliamentary privilege and that reflections on the Chair made via social media may be treated as a matter of order.

Prime Minister Abbott moved a motion in relation to the 100th anniversary of the Gallipoli landings on 12 May.

In response to the Norfolk Island Legislation Amendment Bill 2015, the House of Representatives received a remonstration passed by the Legislative Assembly of Norfolk Island on 20 May. The bill provided for the transition of Norfolk Island from a self-governing territory to become subject to the laws of New South Wales and the establishment of a Norfolk Island Regional Council for the delivery of local services. The Norfolk Island Legislative Assembly was abolished from 1 July 2015. The island became self-governing in 1979.

The Senate, after a year of operation, adopted new Standing Orders which had been on trial. Changes include: updating of Scrutiny of Bills Committee powers and procedures as a consequence of that committee's review of its future operations and directions; the operation of estimates committees and consolidated guidance for officers on

accountability; consideration of private senators' bills on Thursdays; other changes to the routine of business involving 10 minute statements and a Matter of Public Importance; consolidation of arrangements for the presentation of documents and committee reports with consequential increases in opportunities to debate them; and incorporation of amendments to the Senate contracts order after its review by the Finance and Public Administration References Committee.

AUSTRALIAN CAPITAL TERRITORY

Former Chief Minister Katy Gallagher was appointed by the ACT Legislative Assembly to fill the casual Senate vacancy created by the resignation of the Hon Kate Lundy. Senator Gallagher resigned as Chief Minister in December 2014 in anticipation of her appointment to the Senate.

Standing Orders were changed to provide for the delivery of ministerial statements without leave in both the morning and afternoon of a sitting day. There was no change to the requirement that such statements must be circulated to members at least two hours prior to the time of delivery.

NEW SOUTH WALES

A general election on 28 March resulted in the return of the Baird Coalition Government with a slightly reduced majority (from 61 to 54 seats). The 56th Parliament was opened by His Excellency the Governor, General the Hon David Hurley on 5 May. Shelly Hancock was re-elected Speaker unopposed and Don Harwin was re-elected President unopposed.

The Legislative Assembly adopted Sessional Orders in the same terms as those operating in the 55th Parliament. The Legislative Council, however, adopted Sessional Orders which updated existing orders and introduced seven new orders to better deal with common procedural practices.

Joint sittings were held on 6 May to deal with casual vacancies in the Legislative Council and the Senate. Two Members of the Council resigned prior to the election to contest lower house seats. One was re-appointed to the Council together with a new Member. In a second joint sitting on the same day, Jennifer McAllister was elected to fill the casual vacancy created by the resignation of Senator John Faulkner.

The Legislative Assembly established 16 statutory and standing committees, three fewer than in the previous parliament. Among those were two new committees: the Committee on Investment, Industry and Regional Development; and the Committee on Environment and Planning.

A Joint Select Committee was established on 13 May to inquire into and report on companion animal breeding practices in New South Wales, and on 25 June, the Assembly established a Select Committee on the Regulation of Brothels.

In line with a Coalition election promise, the Legislative Council established a Select Committee on the Leasing of Electricity Infrastructure on 6 May, the committee having one month to report. The Committee duly reported on 2 June by which time the Government had already introduced and passed bills in the Assembly. The bills were subject to 61 proposed amendments. Ultimately, the bills, with some amendments, were passed.

NEW ZEALAND

Pacific leaders — specifically the Cook Islands Prime Minister and Minister of Internal Affairs and the Premier of Niue, together with the High Commissioners of both countries to New Zealand — appeared at their own request before the Social Services Committee to present a submission on the Social Assistance (Portability to Cook Islands, Niue, and Tokelau) Bill which allows New Zealanders retiring in the Cook Islands, Niue or Tokelau greater access to their superannuation and veterans' pensions.

A bill to revoke the Remuneration Authority's 2015 determination in respect of Members' salaries was passed on urgency and the 2013 determination reinstated. The Government expressed its dissatisfaction with the 2015 determination as representing an inappropriate increase for members' remuneration, disproportionate with other relevant salary movements and inflation. The Remuneration Authority (Members of Parliament Remuneration) Amendment Bill imposed the Quarterly Employment Survey, published by Statistics New Zealand, as the benchmark for future salary variations.

Mary Harris retired as Clerk of the House of Representatives on 3 July. David Wilson was appointed in her stead. Debra Angus, formerly Deputy Clerk, resigned in May.

QUEENSLAND

A general election on 31 January resulted in defeat of the Newman LNP Government and a knife-edge result with neither the LNP (42 seats) or the ALP (44 seats) able to govern in their own right, 45 seats being a majority. Former Opposition Leader Annastacia Palaszczuk secured the support of Independent Peter Wellington and was sworn in as the 39th Queensland Premier on 14 February. Premier Campbell Newman was the first sitting Queensland Premier to lose his seat since 1915. The 55th Parliament opened in March and, following the swearing in of Members, Independent Peter Wellington was elected Speaker.

On 30 March, the Palaszczuk government suffered its first blow with the resignation from the ALP of the Member for Cook who went to the cross-benches. The new

government was now a minority government although both cross-benchers guaranteed support for the government on matters of supply and confidence.

Sessional Orders adopted by the House provide for increased opportunities and time available for private Members' bills and private Members' motions.

The Queensland Parliament passed a resolution on 20 May in very similar terms to the House of Representatives resolution in respect of the use of electronic devices by Members adopted in March.

Speaker Wellington implemented new media access rules on 21 May which allowed film crews back on to the floor of the Chamber following incidents in 2006 and 2012 which resulted in media crews being banned from the floor.

Standing Orders were amended to increase the number of portfolio committees from seven to eight and to change the names of committees to reflect new ministerial portfolios. The new Committees are: Agriculture and Environment; Communities, Disability Services and Domestic and Family Violence Prevention; Education, Tourism and Small Business; Finance and Administration; Health and Ambulance Services; Infrastructure, Planning and Natural Resources; Legal Affairs and Community Safety; and Utilities, Science and Innovation. The Committee of the Legislative Assembly and the Parliamentary Crime and Corruption Committee remain in place.

Parliament elected Joanna Lindgren on 21 May to fill the casual vacancy created by the resignation of Senator Brett Mason.

VICTORIA

Committees for the 58th Parliament were appointed on 16 April after which the Legislative Assembly referred matters to the Standing Order Committee for consideration. They were: (a) scope and overlap of joint committees and Legislative Council Committees, including options for resolving any issues; (b) options for Public Accounts and Estimates Committee reform; (c) appropriate size and chairing arrangements of committees; (d) opportunities to enhance participation in the running of committees. An identical referral went to the Legislative Council's Procedure Committee. The committees will collaborate and report jointly to their respective houses.

A new Sessional Order (number 5) eliminates 'Dorothy Dix' questions by providing that only non-government Members may ask Questions Without Notice. Subsequent sessional orders provide that a Member may ask a supplementary question, introduces two-minute statements from Ministers at the end of a question and, if applicable, a supplementary question, and the Speaker determines whether an answer is 'responsive'. If not, Sessional Order 11 provides that the Minister must lodge a written answer to the Speaker by 2pm the following day.

Another new Sessional Order (number 9) provides for five government and five non-government Members to ask 'constituency questions' of Ministers immediately after Question Time. Ministers are required to answer in writing to the Clerk in much the same way as Written Questions are dealt with.

Sessional Order 15 provides for the incorporation of second reading speeches into the Parliamentary Record in certain circumstances, excluding bills which propose to alter the Constitution or override the Charter of Human Rights and Responsibilities.

An interesting question arose in the Legislative Council about the status of a Minister who had been stood down from ministerial responsibilities but who continued to receive a ministerial salary and was absent from the Chamber on a number of sitting days. The Minister's salary was subsequently suspended pending the outcome of an inquiry, but his commission from the Governor had not been withdrawn, which potentially left him responsible for answering questions in the Chamber and interacting with government agencies. Following the outcome of the inquiry, Minister Somyurek tendered his resignation as a Minister after which his status was no longer in question.

Barely three months after the general election of November 2014, Danny O'Brien resigned as a Member of the Legislative Council to successfully contest the lower house seat of Gippsland South on 15 March. Melinda Bath was appointed to fill the casual vacancy on 15 April.

The Legislative Council adopted Sessional Orders in similar terms to the Assembly in respect of Question Time, including the abolition of 'Dorothy Dix' questions and the capacity for the President to rule on whether an answer has been sufficiently responsive.

The number of joint committees was reduced from 12 to nine following passage of the Parliamentary Committees and Inquiries Acts Amendment Bill. Eight of the nine joint committees have a non-government majority and three of the nine have non-government Chairs.

WESTERN AUSTRALIA

In May, Peter McHugh, Clerk of the Legislative Assembly, gave notice of his transition to retirement commencing in October 2015. McHugh is the longest service Clerk of either House of Parliament in Western Australia and, at the time of his retirement, will have served the Parliament for 29 years, 26 as Clerk. Kirstin Robinson will take on the role of Acting Clerk from October and become Clerk in July 2016.

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