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Special Edition

Mount Erebus to Ann Street

What should Oppositions do?

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The 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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From the Editor

It is with great pleasure that I introduce this Special Edition of the *Australasian Parliamentary Review* on **Freedom of Speech, Debate and Information**. This was also the theme for the 2023 Australasian Study of Parliament Group (ASPG) Conference hosted by the Western Australian Chapter of the ASPG in Perth in September 2023.

Like the Conference itself, this Special Edition canvasses not just bedrock topics such as parliamentary privilege, the doctrine of effective repetition, and citizen 'right of reply' provisions, but philosophical questions such as who has a voice in the legislature, and who gets to 'heard' in parliamentary forums and inquiries. Some of the speeches and papers presented here challenge us to consider the fragility of freedom of speech in our parliamentary systems, and whether parliaments should have to defend their 'social licence' to exercise free speech in an environment which increasingly considers legal but possibly 'offensive' speech to be impermissible.

This Edition captures the inspiring thoughts of the Keynote Speakers at the Conference, including Dr Arif Ahmed MBE, Director for Freedom of Speech and Academic Freedom, Office for Students ('Arguing for free speech in the 21st Century), the Hon Robert French AC ('Your Freedom Ends Where my Nose Begins – But what if the Nose Moves?') and Catherine Spencer, Auditor General for Western Australia ('Unheralded but indispensable: The Auditor General's role in promoting government transparency').

Speeches are also included from the erudite Professor James Allan, University of Queensland (Who Will Guard the Free Speech Guardians?) and David Gibson, Chair, GLBTI Rights in Aging Inc, and former Liberal National Party member for Gympie in the Queensland Parliament (Queering Up the Debate: Freedom of Speech seen through a LGBTI lens).

The Special Edition also includes papers presented by Charlie Feldman, President, Canadian Study of Parliament Group, as well as experienced parliamentary staff from a wide range of jurisdictions, including: Neil Laure, Clerk of the Queensland Parliament; Cecilia Edwards, Hansard Editor, Office of the Clerk of the House of Representatives, New Zealand; Vanessa O'Loan, Legislative Council, Parliament of New South Wales; and Dr Joel Bateman & Ophelia Tynan from the House of Representatives, Parliament of Australia.

Powerful academic offerings are also included from Thomas Spencer ('Article 9 of the Bill of Rights') Scott Prasser ('What should Oppositions do?') and Rachel Tan ('Combating Misinformation and Disinformation').

The views expressed in this Edition are varied and diverse, provocative and reflective, leaving readers in no doubt that freedom of speech remains a cornerstone of our collective practice as scholars and professionals with a shared interest in flourishing parliamentary democracies in this region. I express deep gratitude to all contributors, authors and reviewers involved in this publication and commend the contents to you.

Sarah Moulds, Senior Lecturer in Law, University of South Australia, November 2023

Speeches

Arguing for Free Speech in the 21st Century

Dr Arif Ahmed MBE[1]

Director for Freedom of Speech and Academic Freedom, Office for Students

It is a great honour to address the Australasian Study of Parliament Group. And you could not have chosen a more timely and important subject. That is your theme for this year: freedom of speech, debate and information.[2]

I want to begin by thanking you and especially Isla Macphail. Isla got in touch with me in late 2022 to invite me to speak. As you all know she is most persuasive, so of course I accepted, and since then I have had a chance to observe just a little of her work on this conference. Even from my perspective from the other side of the world, the enormous care and hard work that she has put into this event have been obvious. So I want to begin by paying tribute to her dedication and thanking her. My only regret is that I can not be there in person to say thank you.

My past experience as an academic has of course informed my thinking on this subject, of freedom of speech, debate and information. But this event is also among my earlier public appearances in the newly created role of Director for Freedom of Speech and Academic Freedom at the Office for Students, the independent regulator of higher education in England. It might therefore be worth my saying a little about myself, and more about that role.

[1] This is an edited transcript of a speech Professor Arif Ahmed delivered in Perth, Western Australia on 29 September 2023 to the Australasian Study of Parliament Group's Annual Conference. The Conference theme was 'Freedom of Speech, Debate and Information'.

[2] Although some of the material is changed for this occasion, and the material on Burke is new, the text of this article overlaps in large part with that of a speech given at King's College London on 9 October 2023. See A Ahmed, 'Transcript of Arif Ahmed's speech at King's College London' Speech to Office for Students, Kings College London, published 10 October 2023. Accessed at:< https://www.officeforstudents.org.uk/news-blog-and-events/press-and-media/transcript-of-arif-ahmeds-speech-at-kings-college-london/>.

I have worked in higher education for the last 20 years or more, mostly at Cambridge University, as a university teacher. A lot of the teaching involved lecturing on philosophy, logic and probability, to large groups. But one distinctive feature of Cambridge is that you also have one-on-one hour-long sessions with a student, to discuss an essay. I must have done about two thousand of those!

Additionally, for about 15 years until 2020 I acted as a Trade Union representative and caseworker for the University and College Union. This work was interesting and fulfilling. I was always happy to advise employees who either didn't know their workplace rights or were afraid to exercise them.

Both experiences gave me a vivid sense of why free speech matters, especially for those most likely to be victimised. And so for many years I've campaigned for freedom of expression in higher education. This has been through internal committee work and public engagement.

Turning to my role. The post, Director for Freedom of Speech and Academic Freedom at the Office for Students, the independent regulator of higher education in England, is perhaps the longest job title anyone has ever had outside the Mikado. It is also a creature of statute. It exists by virtue of section 10 of the *Higher Education (Freedom of Speech) Act 2023* (UK). This legislation on free speech passed through Parliament to become law in May.

The Act is not yet fully implemented. In fact we are expecting the implementation to be phased over the next two years. But the part establishing the Directorship *is* in force. It states that the Director shall have responsibility for overseeing the free speech functions of the Office for Students. Those functions relate to new duties, around securing and promotion of free speech, that will fall upon English universities and colleges.

Turning to the Office for Students itself The Office for Students is an independent public body. It is not part of central Government, but we report to Parliament through the Department for Education. It is a creature of the Higher Education and Research Act 2017, which also sets out its powers and general duties.[3]

[3] Office for Students, 'Home - Office for Students', Website. Accessed at: <https://www.officeforstudents.org.uk/>.

The mission of the Office for Students is to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers. In pursuit of this mission it has four objectives:

- All students, from all backgrounds, with the ability and desire to undertake higher education, are supported to access, succeed in, and progress from higher education.
- All students, from all backgrounds, receive a high quality academic experience, and their interests are protected while they study or in the event of provider, campus or course closure.
- All students, from all backgrounds, can progress into employment, further study, and lead fulfilling lives, in which their qualifications hold their value over time.
- All students, from all backgrounds, receive value for money.[4]

At the Office for Students, we think that all students should have a high quality academic experience that broadens their knowledge and skills and equips them for the future – work or study. We think all students, regardless of their background, should be able to benefit from a high quality education and have the confidence to express their views – this is equality of opportunity. [5]

All staff and students are entitled to teach, learn and research in a culture that values vigorous debate including in relation to difficult, contentious or discomforting topics. A student will not have a high quality education if it's not grounded in freedom of expression for themselves, for fellow students and for those who teach or supervise them. Freedom of speech and academic freedom are embedded in our work as a regulator. [6]

Let me now say a little about what I think a role like mine must mean in practice.

The first thing to say about it is in my view the most important. This is that it is not political. It must be completely impartial. There can be no question of my taking sides, or of the Office for Students taking sides, in any culture war.

[4] Office for Students, 'Home - Office for Students', Website.

[5] Office for Students, 'Home - Office for Students', Website.

[6] Office for Students, 'Home - Office for Students', Website.

In slightly more concrete terms, this amounts to something like *viewpoint neutrality*. Within the law, we will protect the speech rights of speakers at universities – students, staff, visiting speakers – independently of the viewpoint that they are expressing. It makes no difference whether you are in favour of Brexit or against it. It makes no difference what side you take on statues or pronouns or colonialism, or abortion or immigration or animal rights. You can castigate the monarchy or defend it. You can argue that Britain, or Australia, or any other nation, is fundamentally racist – or that it never was. You can write as a post-colonial theorist or as a gender-critical feminist, or as an opponent of either of these approaches, or as both, or as neither. As long as you do so within the law. You can even be rude about me – up to a point.

There are now persistent and widespread concerns that many in higher education are being silenced, either by the activity of the university or by its inactivity. And that silencing may fall disproportionately on those who are most vulnerable. On the student who might join university eager to debate contentious issues about gender identity, or gay rights in Islamic law, or the Black Lives Matter movement. To discover that those issues are avoided, that seminars steer away from such topics. Or on the lecturer who may face a disciplinary process following complaints from students about their inclusion of certain texts in the course reading list. Or on the trainee who is told that they are 'unfit to practise' in a particular profession because of lawful, but contentious, views that they have expressed in a class.

The debate over free speech, as it plays out in the media, in politics and in universities and colleges themselves, often connects to broader societal issues and concerns. This includes issues relating to identity and equality, harassment and discrimination, the regulation of social media, and even geopolitics. The implications of these concerns for free speech in universities are varied and often complex. For some, the key concern is the erosion of free speech. Universities must be places where students and staff can openly and rigorously question current orthodoxies and beliefs, and explore new areas of intellectual enquiry, regardless of whether this involves or leads to the expression of views and opinions that may be uncomfortable, offensive or upsetting. Students, it is suggested, are being shielded from exposure to difficult and controversial subject matter, for instance in the denial of a platform to controversial speakers. There are

fears that a climate of self-censorship among academics and students has taken hold, in which the discussion of certain topics has become taboo.[7]

Some commentators have suggested that an emphasis on free speech is at odds with work to reduce inequalities and tackle discrimination in higher education.[1] Some have drawn attention to the impact on groups who may feel silenced or threatened by the expression of certain views and perspectives. They believe that campuses should be inclusive environments or 'safe spaces', and they worry that an emphasis on free speech, which may encompass lawful but offensive or hurtful speech, might undermine work being done in this area.[8]

Others have challenged claims of a free speech 'crisis'. They say that the debate is a distraction from other pressing issues in higher education. Let me address these two points in turn.[9]

First, on the relation between freedom of speech and the rights of minorities. Freedom of speech is in fact essential to two ideals: democracy and minority rights. It ought to be clear enough how free speech is an underpinning value in a democracy. In fact it is so, in two ways. First: because without it there cannot be an engaged and informed citizenry. A world in which some agency – whether the state or a special interest group – controls the flow of ideas is a world where voters only learn what that agency wants you to learn.

Free speech matters to democracy in another way. A large democracy could not function by direct plebiscite. Instead, voters elect one or more chambers of representatives that deliberate and decide on the matters before them. In the UK for instance, about 55 million voters are divided into about 650 constituencies. At each election the main parties each field a candidate in every, or nearly every, constituency. (Some parties compete only in Northern Ireland, Scotland or Wales). Every voter in a constituency casts one vote for a candidate to represent that constituency. The winner is decided by a simple plurality. That candidate is then returned to Parliament until the

[7] Office for Students, 'Insight Brief: Freedom to question, challenge and debate' Insight Brief 16, December 2022. Accessed at: <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf>.

[8] Office for Students, 'Insight Brief: Freedom to question, challenge and debate'.

[9] Office for Students, 'Insight Brief: Freedom to question, challenge and debate'.

next election, as the MP for that constituency. The MP is the representative of the voters – all of them. The voters – all of them – are her constituents.

What matters in this context is the idea that MPs are not expected simply to reflect the views of their constituents. They 'represent' constituents in the sense of having been selected by them. But this does not mean that on any issue that comes before parliament itself, they are bound to vote as the constituents would wish. At least, that is one view of the matter. In a famous speech on this subject, Edmund Burke said:

> *it ought to be the happiness and glory of a representative, to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and, above all, ever, and in all cases, to prefer their interest to his own. But, his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.*[10]

This principle, that MPs make their own *judgment* serve the public *interest*, plainly requires freedom of both conscience and speech for MPs in the conduct of parliamentary business.

So much for democracy. What matters more in this context is that the ideals of democracy and minority rights are not entirely harmonious. Democracy is a *majoritarian* principle. It rests power, directly or indirectly, with whatever majority or large minority can most effectively mobilize. But this creates a danger. As Madison has written:

[10] Edmund Burke, 'Speech to the electors of Bristol - On Being declared by the Sheriffs duly elected one of the Representatives in Parliament for that City', 3 November 1774, Bristol, UK as quoted in. Edmund Burke, The political tracts and speeches: of Edmund Burke, Esq. Member of Parliament for the city of Bristol. Dublin: Wilson, 1777, pp. 347-356.

> *It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.*[11]

Minority rights is an *anti-majoritarian* principle. It insists that there are some lines that neither a despotic prince nor a despotic *majority* can cross. The will of the majority can never by itself justify depriving a minority of dignity, liberty, life or property. Even a minority of one. And history has taught us that free speech matters even more to the protection of minority rights, than it does to democracy.

For it is minorities, in particular *disempowered* minorities, that benefit most clearly from freedom to express your views. A recent illustration is the Civil Rights movement in the United States. Speech and expression were essential to Civil Rights protestors, just as censorship was their opponents' most convenient weapon. The American Civil Liberties Union reminds us that thousands of black Americans were arrested or imprisoned in the 1960s for speech – for protesting racial segregation. This includes the leaders of the Albany Movement, Dr Martin Luther King and Ralph Abernathy, who in 1962 were imprisoned for leading a prayer vigil outside Albany City Hall.[12]

More famous, and perhaps in the end more consequential, was a full-page advertisement placed in 1960 the *New York Times*. In it, supporters of Dr King criticized police in Montgomery, Alabama for their treatment of civil rights protestors. The advertisement contained some inaccuracies. For instance, it asserted that the police had arrested Dr King seven times. In fact, it was only four times. And it asserted that the police had 'ringed' the Alabama State College Campus. In fact, they had not actually surrounded it.

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[11] James Madison, 'The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments', *The Federalist Nos 51-60*, 8 February 1788, via Library of Congress Research Guides. Accessed at: <https://guides.loc.gov/federalist-papers/text-51-60#:~:text=It%20is%20of%20great%20importance,in%20different%20classes%20of%20citizens>.

[12] American Civil Rights Movement, 'Civil Rights Movement Is a Reminder That Free Speech Is There to Protect the Weak' News and Commentary Website, 26 May 2017. Accessed at: <https://www.aclu.org/news/free-speech/civil-rights-movement-reminder-free-speech-there-protect-weak>.

As it happened, these inaccuracies prompted the Montgomery Public Safety Commissioner to sue for libel. He won at the state trial court and the state supreme court agreed in 1962. Then in 1964, in a unanimous decision that counts among the most important judicial decisions of modern times, the US Supreme court vacated the decision. The effect was to secure exceptionally strong protection for speech that is critical of public officials. Quoting Brandeis, the Court wrote:

> *Believing in the power of reason as applied through public discussion, [the Founding Fathers] eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*[13]

As has been commonly asserted: Freedom of speech matters the most precisely to the powerless: to those whom present political, religious and social arrangements most closely oppress. Freedom of speech matters most if speech is all you have.

Indeed there is evidence that this effect applies more generally. It is not just that freedom of speech benefits oppressed minorities. It also benefits those with the fewest material resources. A recent study from New Zealand measured this by combining four extensive datasets.[14] These were the WVS, 'a repeated cross-sectional survey involving samples of people from over 90 countries covering 7 waves over 36 years', the Latino barometer, a repeated cross-sectional survey involving samples of people from 17 countries covering 18 waves over 23 years, the CIRIGHTS database, which includes data on free speech and other human rights across the world between 1981 and 2017, and the VDEM database, which provides annual data on free speech and human rights for more than 150 countries, going back in some cases as far as 1789.[15]

The authors of the study regressed verbally expressed concerns for free speech over other priorities (e.g., fighting rising prices) against levels of material resources and education, controlling for other factors. And they regressed benefits to well-being from free speech against levels of material resources and education, controlling again for

[13] *New York Times Co V Sullivan*, 376 U.S. 254 (1964).

[14] D A Voerman-Tam, N Grimes and N Watson 'The economics of free speech: Subjective wellbeing and empowerment of marginalized citizens', *Journal of Economic Behaviour and organization* 212 (2023), pp. 260-74.

[15] Voerman-Tam et al, 'The economics of free speech', p.261.

other factors such as other human rights. What they found was, first, that people with higher incomes were more concerned about free speech than they were about many of the other priorities that they were asked to rank, in contrast with those on lower incomes. And second, that higher free speech is associated with better positive outcomes for the worse off than for the better off. So that free speech has, in their words, an 'empowerment effect for more marginalized groups.' In other words – those who are better off tend to worry more about freedom speech, but those who are worse off really benefit more from it.[16]

As the authors remark, these results are not necessarily incompatible. Indeed on reflection the apparent conflict is hardly surprising. One plausible mechanism by which it might arise is that other material concerns – such as unemployment and inflation – may 'crowd out' free speech for the less well-off. Still, it is ultimately through free speech that those other concerns get transmitted into public policy.

So free speech clearly matters – for democracy, for minorities and for those who are worse off, in general terms. Turning to the context of universities and colleges, it is not always the case that promoting free speech and supporting inclusivity are mutually exclusive. It might be argued, for example, that creating an inclusive environment in a university or college in which all are able to put forward their views and arguments, and each contributor to a discussion is heard, facilitates and encourages free speech rather than stifling it. The question arises of how best to achieve this in practical terms.[17]

Instead of addressing that question, let me turn to the second objection, about whether there is a problem. There is evidence to support concerns about free speech. For instance, a recent study published by Finlay Malcolm, Bobby Duffy and Constance Woollen at King's College London showed that 48% of students agree with the statement 'Students avoid inviting controversial speakers to my university because of the difficulties in getting those events agreed', compared to 38% in 2019.[18]This, and

[16] Voerman-Tam et al, 'The economics of free speech', p.261. Having said that, and as the authors note later in the paper, we should be cautious about drawing causal conclusions from an associational study (see p. 272).

[17] This paragraph is taken from Office for Students, 'Insight Brief: Freedom to question, challenge and debate'.

[18] Finlay Malcolm, Bobby Duffy, Constance Woollen, 'Freedom of speech in UK higher education: Recommendations for policy and practice' Policy Paper, The Policy Institute, Kings College London, September 2023. Accessed at: <https://www.kcl.ac.uk/policy-institute/assets/freedom-of-speech-in-uk-higher-education.pdf>.

other statistics in Professor Duffy's study, certainly do raise concerns. As Professor Duffy writes:

> *Our current research on this topic presents a mixed picture. But, in the end, there are enough signs of an increased sense of threat to free speech among significant minorities to warrant action to bolster it.*[19]

Things are no better when we turn from freedom of speech to academic freedom. This concept, which is related to free speech but distinct from it, concerns the freedom of academics to teach, research and discuss theories and ideas without external pressure from their employer, from the state or from the public. The Academic Freedom Index 2023, conducted by the Institute of Political Science at FAU Erlangen-Nurnberg in Bavaria, finds that academic freedom in the United Kingdom has fallen significantly in the last ten years. The UK now ranks around sixtieth in the world for academic freedom, well below nearly all EU countries. By the way, Australia comes in at about thirtieth.[20]

So much for the two arguments with which I began. A third argument is as follows. There is such a thing as progress. We know more about most things than we did fifty years ago; and we know more about almost everything than we did a hundred years ago. This includes scientific progress; but it also includes moral progress. Britain at least is a more open, tolerant and welcoming place for all people than it was 50 years ago; and probably much more, along all these dimensions, than it was 100 years ago.

But if there *is* such a thing as progress (the argument continues), then what is the point in hearing people repeat – what is the point in *letting* them repeat – views that are outdated and wrong? If universities exist for the sake of knowledge, then why do universities have an interest in allowing the defence and dissemination of claims that could not advance anyone's knowledge because they are not even true?

There are two answers. The first is that progress, if it happens at all, does not happen evenly. Although in some circles a scientific advance might be universally accepted once verified, much scientific progress, and perhaps most social and political progress, meets resistance before it gains acceptance. For instance, there is, and for a long time is likely to remain, considerable disagreement about the nature and prospects of AI.

[19] Malcom et al, ''Freedom of speech in UK higher education'.

[20] Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), and the V-Dem Institute, 'Academic Freedom Index', Website, December 2022. Accessed at: <https://academic-freedom-index.net/>.

Those who reject the truth on any subject will for a long time co-exist with those who have grasped it. If those people cannot express their views, they will never change them. And this is true about those whose views on social matters are different from yours.

It is possible, and may be reasonable, to be cynical about this. In a very thought-provoking recent book, Matteo Bonotti and Jonathan Seglow have said that this argument only works if we assume that everyone involved in the debate is taking part in good faith. We have to assume that they want to arrive at the truth and that they are open to challenge. But when we look at some of the bubbles and echo chambers that the internet has created, we find that this is not so (they say).[21]

But even if it is true that these 'hate speakers', as Bonotti and Seglow call them, are not interested in challenge and debate whilst in their own echo chambers, it does not follow that they cannot be drawn into constructive conversations outside those contexts. Nor does it follow that their minds cannot be changed. The process by which this happens, however, may be gradual. I know this from my own experience as a teacher of philosophy and from numerous debates about all kinds of question. It is rare, in any particular debate, for either side to change its mind. But over a period of time you *can* plant a seed in someone's mind; and over numerous conversations with you and with others, their attitudes do change.

I know of people who through such a process have profoundly changed their religious and political views. And the view that they reached through this process, whether sympathetic to religion or hostile to it, whether socially conservative or socially liberal – whatever it was, it was authentically theirs. For many students, university might be the only time in their lives when they have both the time and the relative freedom to embark on this exploration. A generation deprived of that freedom may never truly appreciate what it has lost. And once it is both lost and forgotten, it may never come back.

The second answer, as Mill saw, is that even if you have grasped the truth, you can hardly be said to know it if you cannot defend it against objections. In short – you cannot know that something is true unless you know why it is true; and you cannot know why it is true unless you know why at least some alternatives are false.

[21] J Seglow and M Bonotti, *Free Speech* (Polity Press, 2021). p. 39.

In the teaching of my own subject, it is vital that you are willing to challenge the student's most basic assumptions, even (perhaps especially) if you share them. Both the student and the tutor might be convinced, for instance, that economic immigration is a net positive for developed countries, that capital punishment is a net negative, and that abortion raises no serious moral concerns. And yet in teaching these subjects the tutor may have a pedagogical duty to play devil's advocate – to question the arguments for these positions and to put the best possible case for the opposite. Probably there is no more effective way to get the student to think for themselves. An atmosphere in which no visiting speaker can, and no tutor has the confidence, even in teaching to, voice these objections, is one where it is hard to see how education – at least that kind of education – can happen.

I will close with perhaps the most eloquent statement anyone ever made of the general spirit behind all of these points. I earlier quoted a passage by Supreme Court Justice Louis Brandeis. Let me now set it in context. Brandeis was writing in 1927 in effect defending a communist who had been arrested after she gave a speech attacking racist lynch mobs.

> *Those who won our independence [he wrote] believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.*[22]

I would only add that it ought to be a fundamental principle of every government, and every public body, everywhere.

[22] *Whitney v. California* 274 US 357 (1927), 375 as per Brandeis J concurrence.

Your Freedom Ends Where my Nose Begins – But what if the Nose Moves?

The Hon Robert French AC[1]

INTRODUCTION

There is an old saying attributed to an anonymous author in the United States:

> *Your freedom ends where my nose begins*

Freedom of movement does not mean freedom to swing our fists at somebody else's nose. But what if the nose moves into my personal space? Is my freedom to be further constrained? The saying makes a bigger point than the proposition that we are not free to punch other people. The bigger point is about freedom in general and alerts us to shifting legal and social constraints.

There is no such thing as an absolute freedom. The Founding Fathers of our *Constitution* perhaps incautiously used the term 'absolutely free' in the notoriously litigated s 92 of the *Constitution* which provides:

> *On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

The intercourse limb of the guarantee covers freedom of movement but as Mr Clive Palmer found in November 2020 his freedom of movement was not absolute. He had sought and was refused permission to enter Western Australia which had closed its borders in April 2020 by a Border Direction made under the *Emergency Management Act 2005* (WA). He commenced proceedings in the High Court of Australia alleging that

[1] This the transcript of a speech the Hon Robert French AC delivered in Perth, Western Australia on 29 September 2023 to the Australasian Study of Parliament Group's Annual Conference. The Conference theme was 'Freedom of Speech, Debate and Information'.

the border closure was invalid for infringing s 92. On 6 November 2020, the High Court pronounced orders to the effect that the *Emergency Act* was valid and that the validity of the Border Direction did not raise a constitutional issue. Reasons for decision were published on 24 February 2021.

International Conventions declaring civil and political rights and freedoms have also recognised that there must be limits. Article 19 of *the International Covenant on Civil and Political Rights*, provides in para 2:

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.*

That is followed immediately by para 3 which provides:

> *The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

Those are general limitations. They use words of broad meaning. Such words can be elastic in their application. And their application may differ from one society to another and according to changing political and social perspectives within our own society.

The purpose of my presentation is to emphasise the centrality of freedom of speech to our society and its institutions. It is also to draw attention to the tendency of laws, administrative practices, social conventions and cause advocates to try to limit that freedom by declaring expanded no-go areas. In so doing I acknowledge the threats to civil discourse posed by the dissemination of disinformation through social media and in other ways.

A mechanism by which the no-go areas are expanded is to broaden the application of words which describe speech which is to be disapproved or prohibited. The word 'hate' in the context of hate speech may be one such example. The American Bar Association has defined 'hate speech' as 'speech that offends, threatens or insults groups based on race, color, religion, national origin, sexual orientation, disability or other traits.' That

definition attaches the strong, negative connotation of 'hate' to conduct which, while it should be deprecated or condemned, may be underpinned by something less than hatred according to the ordinary meaning of the word. The apparently expanding scope of the word 'bullying' may be another example. The appropriation of narrowly focussed negative terms in order to advocate broadly defined behavioural norms can risk undercutting the norms that it seeks to promote. It can detract from the moral clarity of law, practice or conventions which seek to moderate expressive behaviour. My own interest in this phenomenon was enhanced by a consideration of institutional codes of conduct in the higher education sector.

In 2019, I was asked by the Commonwealth Government to conduct a review of freedom of speech and academic freedom in Australia's universities. That Review led to the formulation of a Model Code for Freedom of Speech and Academic Freedom in universities. It reflected a concern that there were in Australia's universities many codes of conduct governing staff and students which defined misconduct in broad terms which could impose unreasonable restrictions on freedom of speech — verbal noses moving into what should be personal spaces.

In the Report arising from that Review, I included a chapter with general observations about freedom of speech from which I draw in part in this presentation.

FREEDOM OF SPEECH – SOME GENERAL OBSERVATIONS

Australia has no equivalent to the First Amendment guarantee of freedom of speech under the Constitution of the United States. Its people enjoy common law freedoms. By that I mean freedoms recognised and developed by the Courts in Australia which, in doing so have drawn upon the legal heritage of the common law of England. A list of those freedoms was set out in a Report published by the Australian Law Reform Commission (ALRC) in 2015 in connection with its Inquiry into Encroachments by Commonwealth Laws on Traditional Rights and Freedoms. They include freedom of speech, religion, association and movement.[2] They can be defined tritely by the absence of legal constraints. A distinguished English Judge put it well:

[2] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report 129, December 2015.

> *For private persons, the rule is [that] you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions.*[3]

In similar vein, in relation to freedom of speech, the High Court said in *Lange v Australian Broadcasting Corporation*:

> *Under a legal system based on the common law, 'everybody is free to do anything subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.*[4]

Freedom of speech has been described, however, as more than a mere freedom, being characterised, even in the common law courts, as a 'right'. Lord Coleridge spoke in 1891 of the 'right of free speech' as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment so long as no wrongful act is done'.[5] That nomenclature, combining right and freedom, has found its way into international law. Article 19 of the *International Covenant on Civil and Political Rights* provides that 'everyone shall have the right to freedom of expression'.[6]

As Professor Trevor Allan put it, in relation to civil and political liberties generally:

> *The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.*[7]

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[3] *R v Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513, 524 (Sir John Laws).

[4] (1997) 189 CLR 520, 564.

[5] *Bonnard v Perryman* [1891] 2 Ch 269, 284. See also *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150, 155; *Wheeler v Lester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2) [*1990] 1 AC 109, 220.

[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

[7] T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia*, Federation Press, 1996, p. 148.

The weighty value accorded to freedom of speech at common law has been reflected in observations from the High Court over the years, including reference to 'the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest'[8]and the statement that '[f]reedom of communication, which of course includes freedom of speech, is properly regarded in our society as a fundamental right.'[9]

Two leading Australian legal academics, Professors Enid Campbell and Harry Whitmore, once described freedom of speech as 'the freedom par excellence; for without it, no other freedom could survive'.[10] In the words of Eric Barendt it is 'closely linked to other fundamental freedoms which reflect … what it is to be human; freedoms of religion, thought and conscience'.[11] The ALRC in the Report it published in 2015 accepted that freedom of speech and freedom of expression are integral aspects of a person's right of self-development and fulfilment.

A similar approach is taken in international human rights law. In 1946 at the first meeting of the General Assembly of the United Nations it was called 'the touchstone of all human rights'. That approach was reflected in the courts of the United Kingdom. Lord Steyn, in 2000, wrote:

> *Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stewart Mill), 'the best test of truth is the power of thought to get itself accepted in the competition of the market …' Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials.*

[8] *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 328.

[9] *Cunliffe v Commonwealth* (1994) 182 CLR 272, 363.

[10] E Campbell and H Whitmore, *Freedom in Australia*, Sydney: Sydney University Press, 1966, p. 113 quoted in ALRC, *Traditional Rights and Freedoms*, [4.1].

[11] Eric Barendt, Freedom of Speech (Oxford University Press, 2nd ed, 2013) quoted in ALRC, *Traditional Rights and Freedoms*, [4.1].

> *It facilitates the exposure of errors in the governance and administration of justice of the country …*[12]

Freedom of speech at common law and international law serves two important purposes — respect for the dignity and autonomy of individuals and facilitating the flow of information and ideas essential to the functioning of democratic societies.

FREEDOM OF SPEECH NOT ABSOLUTE

Like all freedoms, freedom of speech is not and never has been absolute. Historically, its legal limits were found in common law offences such as sedition, blasphemy and scandalising the courts. The common law wrongs of defamation, passing off and deceit are other long-standing examples.

Ours is an age of statutes made by parliaments. There are many statutes which in one way or another constrain expressive conduct, a prime example of which, but is not limited to, speech. Thus a law may prohibit conduct which is 'offensive, insulting or humiliating' in certain circumstances. The question whether expressive conduct answers that description is not necessarily answered by asking its alleged victim. He or she may take offence or feel insulted or humiliated too easily. So the law tends to engage the services of the leading figure in the judge's small band of imaginary friends — the reasonable person. That is to say it makes the test objective rather than subjective. And the courts tend to interpret statutes so as to minimise their intrusion on the freedom.

THE REASONABLE PERSON COMES TO THE RESCUE

The reasonable person played a part in a leading Australian decision on offensive behaviour with some interesting historical resonances. It involved the former Governor-General of Australia, Sir John Kerr. Long before his appointment as Governor-General, when he was a judge of the Supreme Court of the Australian Capital Territory in 1966, Justice Kerr wrote a judgment on the subject of offensive behaviour.[13] A

[12] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 126 (citations omitted).

[13] *Ball v McIntyre* (1966) 9 FLR 237.

student at the Australian National University, Desmond Ball, protesting against Australia's involvement in the Vietnam war, climbed on to a statue of King George V outside Parliament House in Canberra. He wore on his head a placard which read 'I will not fight in Vietnam'. He refused to remove the placard or climb down from the statue. He was charged with the misdemeanour of behaving in an offensive manner in a public place contrary to s 17 of the *Police Offences Ordinance 1930–1961* (ACT).

There was no evidence that anybody had actually been offended by this behaviour. Justice Kerr called in aid 'the reasonable person' in its gendered manifestation as the 'reasonable man'. To be offensive, he concluded, the behaviour must be 'calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man.'[14] He defined the reasonable man as one 'reasonably tolerant and understanding, and reasonably contemporary in his [or her] reactions.'[15] Justice Kerr's decision in *Ball v McIntyre*, which allowed an appeal against Ball's summary conviction, set the threshold of the imputed emotional response required for conviction of offensive behaviour at a fairly high level. It defined a legal standard which acted as a warning to judges to proceed with caution before making a finding that a legal prohibition on offensive behaviour had been breached. That kind of interpretive approach has been reflected in many later decisions which have cited Justice Kerr's judgment.

The allegedly offensive student, Desmond Ball, became a renowned scholar in strategic studies both nationally and internationally, a Professor at the Australian National University and the recipient of many honours, including the award of Officer of the Order of Australia.

When Ball protested, he was speaking to the world at large about Australia's involvement in the Vietnam war. A passing Monarchist might have been offended by the fact that he was sitting on a statute of King George V, but there is nothing to suggest he was directing his remarks to passing Monarchists. Negative speech directed to particular classes of persons defined by their attributes, ancestry, or religious beliefs raises a different question. And in such case a tension can arise between freedom of speech and the rights and dignity of others. Such speech may contravene laws giving effect to human rights anti-discrimination rules. In judging where the balance should

[14] *Ball v McIntyre* (1966) 9 FLR 237, 243.

[15] *Ball v McIntyre* (1966) 9 FLR 237, 245.

be struck, it is perhaps important to remember that rights belong to people and dignity resides in people. Opinions and beliefs do not have rights. Indeed it can even be argued that neither opinions nor beliefs are entitled to respect. Of course when speaking to or about a person who holds opinions or beliefs with which one vehemently disagrees, it is better to express that disagreement civilly and with respect than with vehemence. It is also important to remember that there may be a very close connection between a person's beliefs and their sense of identity and personal dignity. Religious beliefs are a particular example. I may say that religious belief is delusional generally. In so saying I am less likely to offend people than if I say that a particular set of religious beliefs or a particular religion is a wishful fantasy or has been the vehicle of historical evils.

RESTRICTIVE APPROACHES TO STATUTORY INTERFERENCE

There has long been debate about the proper limits of societal interference with speech in general and offensive speech in particular. John Stuart Mill said that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'[16]

A wider approach was proposed by Professor Joel Feinberg, who suggested that the prevention of offensive conduct is properly the state's business.[17] His approach has been criticised on the basis that it may extend the heavy-handed reach of the criminal law and increase a potentially oppressive discretion allowed to law enforcement officers and sanction an illiberal lack of acceptance or toleration of other ways of life.[18]

The general approach of Australian courts to the interpretation of statutes affecting common law rights and freedoms was described in the ALRC Report, on Traditional Rights and Freedoms, published in 2015:

> *Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia 'common law constitutionalism' has not been*

[16] John Stuart Mill, *On Liberty*, John W Parker, 1859, pp. 14–15.

[17] Joel Feinberg, *Offense to Others: The Moral Basis of the Criminal Law*, Oxford: Oxford University Press, 1985, p. 1.

[18] R A Duff and S E Marshall, 'How Offensive Can You Get' in Andrew von Hirsch and A P Simester, *Incivilities: Regulating Offensive Behaviour*, Hart Publishing, 2006, p. 57.

> *applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the 'principle of legality', courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.*[19]

A restrictive approach to limits on freedom of speech in the context of an international convention was reflected in the leading judgment of the European Court of Human Rights in 1976 in *Handyside v United Kingdom*.[20] The case concerned the freedom of expression guaranteed by Art 10 of the *European Convention on Human Rights*. The Court held that protection of freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive but also 'those that offend, shock or disturb the State or any sector of the population'.[21] Such it said are the demands of 'that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[22] That broad statement was of course subject to the provisions of Art 10(2) allowing for restrictions to be imposed on the freedom for various societal purposes including the protection of the reputation or rights of others.[23] The Court also said in a later case:

> *The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.*[24]

THE ELUSIVE CONCEPT OF 'HARM'

John Stuart Mill said that 'the only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to

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[19] ALRC, *Traditional Rights and Freedoms*, [1.7].

[20] (1976) 1 EHRR 737.

[21] (1976) 1 EHRR 737 [49].

[22] (1976) 1 EHRR 737 [49].

[23] See generally Luzius Wildhaber, 'The Right to Offend Shock or Disturb? – Aspects of Freedom of Expressions under the European Convention on Human Rights', 36 *Irish Juris,* 2001, pp. 17–31.

[24] *Sunday Times v United Kingdom* (1979) 2 EHRR 245; Ect HR [65].

others.'[25] Mill's statement begs the large question — what is harm? It is a question which lies at the heart of some controversies about freedom of speech on university campuses and increasingly in other institutions and workplaces. Plainly enough, physical injury or death inflicted on another person is a harm. Incitement to violence involves the risk of such harm. Incitement to adverse discrimination based upon hatred or contempt or ridicule directed against a person or group of persons involves a risk of harm. Economic loss is a harm. Personal reputational damage is a harm. Beyond those core examples there is room for debate. Reputational damage to an institution may depend upon whose good opinion defines its reputation. There may be different constituencies with different views of relevant facts and circumstances. In such cases contestable value judgments come into play. There is real difficulty where harm is defined by reference to the subjective reactions or feelings of members of a class of persons said to be affected by some expressive conduct.

An example of a 'harm' which should not be subjectively defined arises in relation to offensive speech, a class of speech which sometimes appears in university codes. It is useful to recall the words of Justice Hayne in his judgment in *Monis v The Queen*:

> *The common law has never recognised any general right or interest not to be offended. The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. … The common law did not provide a cause of action for the person who was offended by the words or conduct of another that did not cause injury to person, property or reputation.*[26]

As his Honour went on to observe, however, legislatures in common law jurisdictions including Australia have created offences which hinge on words or conduct being 'offensive'.[27]

A leading example is s 18C of the *Racial Discrimination Act 1975* (Cth). The section renders unlawful acts done otherwise than in private, which are reasonably likely 'in all

[25] John Stuart Mill, *On Liberty,* John W Parker, 1859, pp. 14-15.

[26] (2013) 249 CLR 92, 175 [223].

[27] (2013) 249 CLR 92, 175 [224].

the circumstances to offend, insult, humiliate or intimidate another person or a group of people' where the acts are done because of the race, colour, national or ethnic origin of the other person or persons. Each of the States and the ACT have vilification provisions in their racial discrimination legislation.

As reported by the ALRC in 2015, there are numerous Commonwealth laws which interfere with freedom of speech and expression. Intellectual property, media, broadcasting and telecommunication laws limit the content of publications, broadcasts, advertising and other media products. Anti-discrimination laws apply in workplace relations to prohibit certain forms of speech and expression.[28] There are also a number of provisions of counter-terrorism laws and secrecy offences which impact on the freedom.[29]

INSTITUTIONAL LIMITATIONS

Freedom of speech is bounded by law but the law is generally interpreted in favour of the freedom to the extent that its words allow. The imposition of tighter limits on the freedom by institutions such as higher education providers, than the limits imposed by the general law, requires powerful justification having regard to the societal value attached to the freedom. As a general proposition, no higher education rule or policy should make it more difficult to exercise the freedom on campus than off it. To the extent that higher education rules seek to deal with offensive or insulting or humiliating or intimidating speech, the question whether speech answers those categories in any case should be defined objectively rather than by reference to the subjective reactions of individuals which may be highly variable. Formulae such as 'speech which a reasonable person in the circumstances would regard as insulting or humiliating or intimidating' are to be preferred as limiting the scope of any restrictions. A further safeguard would require that the speaker intend the speech to have one or other of those effects. The word 'offensive' may be too broad to be used even when subject to an objective test.

[28] *Fair Work Act 2009* (Cth) s 676.

[29] ALRC, *Traditional Rights and Freedoms*, [4.5]–[4.6].

VULNERABILITY AND SENSITIVITY

Returning to the nose principle, freedom of speech is limited in the sense that it cannot be exercised in a way that is inconsistent with the rights and freedoms of others. An extension of that concept, which is an area of current debate, would treat the freedom as qualified by diversity and inclusion policies. The qualification would allow for the protection of the sensitivities or vulnerabilities of particular groups of students whom it is thought may be unfairly disadvantaged by exposure to certain kinds of lawful speech.

Sigal Ben-Porath in her book *Free Speech on Campus* observed in this connection:

> *The focus should not be on civility as a main norm but rather on the conditions for dignitary safety, whose absence limits the substantive access of some members of the community. Even within a civil classroom, without dignitary safety, students fear humiliation, ridicule, and rejection and are therefore partially or wholly barred from taking full advantage of their learning opportunities.*[30]

As she points out, deciding if harm or risk of harm is significant enough to justify putting a limitation on the free exchange of ideas, can be difficult. This is especially so when the harmed party is a person whose identity and skills are evolving and whose wellbeing is entrusted to the university along with the role of intellectual growth. She writes:

> *Protecting a student's intellectual comfort by avoiding serious challenge to her views may create a sense of well-being and safety, but the price paid in development and in the opportunity to participate in the university's mission would be too high to pay. On the other hand, when the challenges presented to a student are based not on shaking her beliefs or views but rather on undermining her dignity and questioning whether she belongs in the institution altogether — especially as a member of an identity group — this can damage not only her sense of well-being but also the ability of others to hear her and evaluate her views. The guiding principles for*

[30] Sigal Ben-Porath, *Free Speech on Campus,* University of Pennsylvania Press, 2017, p. 42.

> *drawing this line should be based on a democratic commitment to inclusive freedom rather than on principles of civility.*[31]

That kind of consideration may be relevant to the implementation, in speech codes, of a higher education provider's duty, under the Higher Education Standards, to foster the wellbeing of students.

THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

In addition to the common law freedom of speech which has been discussed, there is in Australia an implied constitutional freedom of political communication. The implied freedom operates as a limit on Commonwealth, State and Territory law-making powers. It is subject to reasonably appropriate restrictions imposed for a legitimate purpose consistent with the constitutional scheme for a representative and responsible government.

There is no comprehensive guarantee under the *Australian Constitution* for individual rights and freedoms. In his judgment in *Australian Capital Television Pty Ltd v Commonwealth*[32] Sir Anthony Mason said:

> *The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.*[33]

Nevertheless in that case the High Court implied a freedom of political communication under the *Constitution* which operates as a limit on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law particularly in relation to defamation concerning public figures. The Court held invalid a new Pt IIID of the *Broadcasting Act 1942* (Cth) which sought to prohibit political advertising by means of radio and prohibition during an

[31] Ben-Porath, *Free Speech on Campus*, p. 42.

[32] (1992) 177 CLR 106.

[33] (1992) 177 CLR 106, 136.

election period in relation to a federal election or referendum, a Territory election or a State or local government election.

The implied freedom of political communication began its life with a law giving statutory protection against insults to the dignity of the Industrial Relations Commission of Australia. In or about 1992 the *Australian Newspaper* published an article highly critical of the Commission. It said, among other things:

> *The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.*[34]

The newspaper was prosecuted for a breach of s 299 of the *Industrial Relations Act 1988* (Cth), which provided that:

> *(1) A person shall not:*
>
> *...*
>
> *(d) by writing or speech use words calculated:*
>
> *...*
>
> *(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.*

Counsel for the *Australian Newspaper* submitted that there was to be implied into the *Constitution* a guarantee in favour of the people of Australia that the Parliament has no power to make a law which impairs their capacity to perform the functions and responsibilities entrusted to them by the *Constitution*. The High Court held the section invalid. Three members held that it infringed an implied freedom of political communication derived from the text and structure of the *Constitution* relating to representative democracy and election of parliamentary representatives by the people.[35]

[34] *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 96.

[35] *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 52–53 (Brennan J), 95 (Gaudron J), 105 (McHugh J).

Unlike the First Amendment guarantee in the United States Constitution, the implied freedom is not an individual right. It is a limitation on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law of defamation in relation to public figures. It was elaborated in a number of defamation cases involving politicians[36] culminating in the decision of the High Court in *Lange v Australian Broadcasting Corporation*,[37] which concerned a defamation action brought by a former Prime Minister of New Zealand against the Australian Broadcasting Corporation. The test for validity adopted by the Court in *Lange* modified in a later case, *Coleman v Power*,[38] involved two questions:

> *1. Does the challenged law in its terms, operation or effect, effectively burden freedom of communication about government or political matters?*
>
> *2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*

As can be seen the application of those tests to laws affecting offensive speech and expressive conduct necessarily requires evaluative judgments.

Justice Brennan said in *Cunliffe v Commonwealth*[39] the implied freedom is negative: It invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control. That is to say it creates an area of freedom of action which cannot be unreasonably encroached upon by statute. There is a question whether it is applicable to the common law more widely than in the area of defamation.

The implied freedom also applies indirectly to delegated legislation. A statute, validly enacted, will not authorise the making of delegated legislation or indeed the creation of administrative powers or discretions which could be exercised in such a way as to

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[36] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

[37] (1997) 189 CLR 520.

[38] (2004) 220 CLR 1 That test has been recently elaborated by the Court in rejecting a challenge to the validity of laws of the State of New South Wales prohibiting the political donations from property developers: see *McCloy v New South Wales* (2015) 321 ALR 15.

[39] (1994) 182 CLR 272.

impermissibly burden the freedom.[40] It affects the scope of the powers which can be conferred on public authorities, including higher education authorities in relation to the making of delegated legislation, including by-laws, rules and regulations.

SOME REFLECTIONS ON THE UNIVERSITY SECTOR

In my Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers, I found that many higher education rules and policies which were mentioned in the Report, used broad language capable of impinging on freedom of expression. One example was a Discipline Rule which defined 'misconduct' to include conduct that 'demonstrates a lack of integrity or a lack of respect for the safety or wellbeing of other members of the university community.' It extended that definition to conduct that is otherwise:

> *(i) a contravention of the values set by the council for the university; or*
>
> *(ii) prejudicial to the good order and government of the university; or*
>
> *(iii) reprehensible conduct for a member of the university community to engage in.*

Particular examples of misconduct were set out in that Rule. They included behaving in a way to another member of the university community which created a hostile study, research or work environment. As I observed, the terms 'lack of respect', 'prejudicial' and 'reprehensible' are wide. It does not require much imagination to apply them to a considerable range of expressive conduct. When you use terminology of that kind in statutes or at common law, they fit into what Professor Julius Stone described as 'legal categories of indeterminate reference'. They allow, as he said 'a wide range for variable judgment in interpretation and application approaching compulsion only at the limits of the range.' I found that the kind of terminology and rules and policies which might affect expressive conduct was rife on university campuses in Australia. It made the sector an easy target for those who would argue that the potential exists for restrictive approaches to the expression of contentious or unwelcome opinions which some might find offensive or insulting. I considered that although the risk could never be

[40] *Wotton v State of Queensland* (2012) 246 CLR 1.

eliminated, it could be reduced by appropriately limiting language in higher education rules and policies. Of course, rules and policies can only go so far. A determining factor will be the culture of the institution. A culture powerfully predisposed to the exercise of freedom of speech and academic freedom is ultimately a more effective protection than the most tightly drawn rule. A culture which is not so predisposed will undermine the most emphatic statement of principles. Reciting a generally expressed commitment to freedom of speech and academic freedom does not of itself provide strong evidence of the existence of such a culture.

I recommended that higher education providers should adopt umbrella principles, operationalised in a code applicable to cases in which freedom of speech and academic freedom might be in issue. It could be applied to guide the exercise of powers and discretions, formal and informal, when their breadth would allow for its application. Its purpose was to restrain the exercise of over-broad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.

THE DRAFT MISINFORMATION BILL

An expansive concept of harm appears in the Commonwealth Government's draft Bill, known as the 'Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023'. It seeks to provide the Australian Communications and Media Authority with powers to combat online misinformation and disinformation. The proposed Bill would be an amendment to the *Broadcasting Services Act 1992* (Cth). 'Misinformation' captures content which is false, misleading or deceptive and where provision of that content on a digital service is reasonably likely to cause or contribute to serious harm. 'Disinformation' is intended to capture misinformation that has been disseminated with the intention of deceiving another person. For misinformation to be covered by the powers it must be reasonably likely that it would cause or contribute to serious harm. The term 'harm' is defined as follows:

> *(a) hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability;*
>
> *(b) disruption of public order or society in Australia;*
>
> *(c) harm to the integrity of Australian democratic processes or of Commonwealth, State, Territory or local government institutions;*

(d) harm to the health of Australians;

(e) harm to the Australian environment;

(f) economic or financial harm to Australians, the Australian economy or a sector of the Australian economy.

It is not necessary to delve further into the terms of the draft Bill which, on the strength of a range of submissions, appears to be the subject of considerable concern. It is sufficient to look at the open-textured content of the definition of harm which would enliven the regulator's powers. What constitutes disruption of '… society in Australia'? What is the threshold for an outcome of misinformation is able to be designated as 'hatred'? What does 'harm to the integrity of Australian democratic processes' mean? The scope of this terminology feeds directly into the scope of the regulator's power. The wider the potential application of the concept of serious harm, the wider the powers of the regulator to intervene in relation to such conduct.

CONCLUSION

The boundaries of freedom of speech are, from time to time, contested and moved by laws, institutional administrative policies and practices. Every new intrusion on freedom of speech — a movement of the nose — confers authority on some official or court to take adverse action against a person whose attempted exercise of the freedom infringes the new constraint. This is a matter in which, to some extent, we have become complacent. The codes of conduct and the broad concepts of misconduct which have infected the higher education sector are not confined to it. Freedom may be constrained by self-censorship where people fear contravening ill-defined concepts of misconduct or inappropriate behaviour. Ultimately, it is a matter of societal and institutional culture. Parliament has a leading role to play in supporting a culture of freedom of speech.

Unheralded but indispensable. The Auditor General's role in promoting government transparency

Caroline Spencer[1]

Auditor General for Western Australia

INTRODUCTION

I concede, that as a professional class, auditors tend to be tolerated rather than venerated. Especially at this time of the year in Western Australia (WA) as my dedicated staff conclude their financial audits of over 150 State sector entities before moving straight into their audits of 148 local governments next week.

I need to stress that as auditors we do not seek lofty levels of recognition. All we really want is to do our duty and hand over an unqualified audit opinion as quietly and efficiently as possible. I note that contrary to popular opinion, finding problems actually causes much angst for us as a breed, and a lot more work. We follow the evidence, and while we like to *trust*, it is our job to *verify* - with due professional scepticism – and if that leads us to a material problem, then report it we must.

However, I do think it is important to reflect on the unheralded (albeit sometimes unwelcome) but indispensable role auditors play in providing transparency, assurance and accountability around the performance of the governments we, as citizens, elect to govern us.

[1] Caroline Spencer has served as the 19th Auditor General for Western Australia since May 2018. This is the transcript of a speech Ms Spencer delivered in Perth, Western Australia on 29 September 2023 to the Australasian Study of Parliament Group's Annual Conference. The Conference theme was 'Freedom of Speech, Debate and Information'. Ms Spencer would like to acknowledge the work of Mr Tim Hughes in assisting with the preparation of this speech. Mr Hughes recently retired from the Office of the Auditor General, where he worked for four years as the Principal Adviser to the Auditor General. Prior to that, Mr Hughes worked in the Legislative Assembly Committee Office of the Parliament of Western Australia from 2008 to 2019.

You might pause to ponder what the public accountability landscape would look like without independent auditors, and indeed other independent integrity officers.

To assist with such reflection, I will today provide:

- An overview of the evolution of the Auditor General's role in WA and the various ways in which my Office, the Office of the Auditor General (OAG), promotes government transparency. Humans have long known, that as a counter to the impulses and excesses of our natures, sunlight is generally the best disinfectant. And we know what happens when it is resisted for too long in any institution.
- An outline of the Auditor General's relevant powers and responsibilities, and how I approach custodianship of the role.
- My thoughts on the current operating environment and its challenges.

EVOLUTION OF THE AUDITOR GENERAL'S ROLE IN WA

Earliest surviving references to a public audit function date back as far as 1314 with England's then Auditor of the Exchequer. The legislation under which the current UK Comptroller and Auditor General operates has its origins in the *Exchequer and Audit Departments Act 1866* (UK).[2]

WA's public audit function pre-dates the Swan River Colony's establishment in 1829 with Captain Stirling establishing a Board of Counsel and Audit while en route at sea. He wanted to ensure structures were in place to promote transparency and probity over public property and finances before landing in the new settlement.

Captain Mark Currie was appointed WA's first Auditor General in 1831. He also served as the Clerk of the Colony's first Executive Council. As you may be aware from the painting hanging on one of the walls at the WA Parliament - An Early Meeting of the Legislative Council by Owen Garde OAM, 1979, Captain Currie had the makings of a good auditor and appeared to understand his place as impartial observer of government operations and decision-making. Front row seats, but never at the main table. Nonetheless, an integral apparatus of the Crown.

[2] National Audit Office (UK), 'Our history', no date. Accessed at: <https://www.nao.org.uk/about-us/our-history/>.

In 1881, WA's first Audit Act was passed. Eight years later, WA's constitution was enacted. Both Acts stipulated the requirement for the Auditor to inspect and report to the legislature on expenditure from the Government's consolidated account.[3]

In line with global trends for public auditors to move beyond financial auditing and into providing assurance on non-financial matters of interest, by 1985 the Auditor General was vested with powers to conduct performance audits around the effectiveness and efficiency of departments and statutory authorities.[4]

In 2006, the Auditor General assumed the unique function of providing opinions[5] on notifications lodged by Ministers under section 82 of the *Financial Management Act 2006* (WA) advising why they have refused to answer questions in Parliament.

In 2018, WA's local governments were added to the Auditor General's auditing responsibilities,[6] bringing the number of public entities we audit to around 320.

And we now have an Australian-first Forensic Audit function. This function was established in 2020 following a request from the Government in response to Australia's largest public sector fraud[7] and allows us to go deeper than traditional financial auditing methods. Again, the increasing functions are representative of the interests of the Parliament and the people in what they would like our Office to provide transparency and assurance on. Assurance on the growing range of sustainability reporting will also be undertaken by public auditors wherever confidence in that information is sought by stakeholders.

[3] *The Audit Act 1881* (WA) ss 7-12; *Constitution Act 1889* (WA) s 65.

[4] *Financial Administration and Audit Act 1985* (WA) s 80.

[5] Under the *Auditor General Act 2006* (WA), s 24(2)(c), the Auditor General is required 'to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate'.

[6] Following passage of the *Local Government Amendment (Auditing) Act 2017* (WA).

[7] Office of the Auditor General (WA), *Annual Report 2019-20*, 24 September 2020, p 8. Accessed at: <https://audit.wa.gov.au/wp-content/uploads/2020/09/OAG-Annual-Report-2020.pdf>.

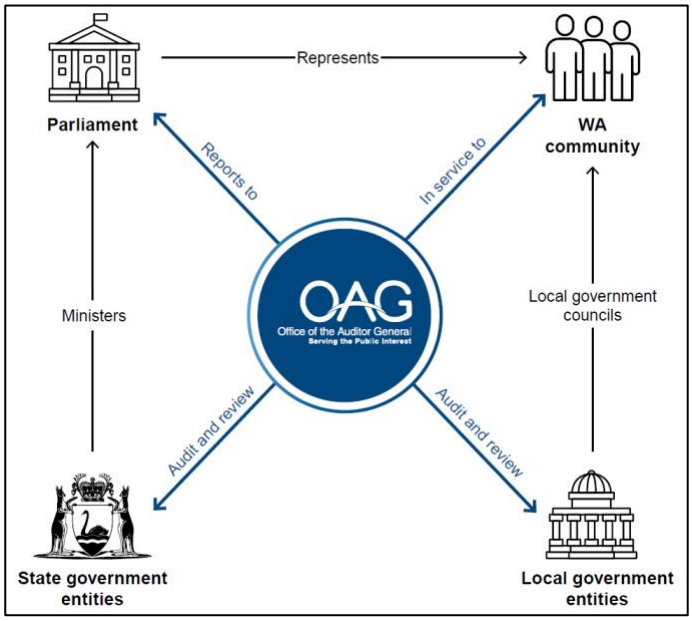

Figure 1. Role of the Auditor General and the OAG.

Apparent through this evolution is the legislature's will to ensure accountability for executive decision-making, expenditure, and program delivery through the lens of an independent auditor serving the community by reporting directly to Parliament on matters the auditor judges to be in the public interest.

Also evident is the principle that accountability and transparency underpin the political legitimacy of those we elect periodically to govern us (either at State or local government level) under the long-standing theory of the social contract.

There is an inherent tension between governments and the Auditor General of the day due to the Auditor General's independence provisions. At our Office's 190th anniversary celebrations in 2019, then-Premier, Hon Mark McGowan and then-Opposition leader, Hon Liza Harvey, both joked with our staff about how much more they preferred our audits and reports when they were on the Opposition benches.

Notwithstanding this, both current and former Government members have acknowledged the Auditor General and OAG's role in promoting transparency and accountability.[8]

The transparency the Office promotes is multi-layered and serves several audiences.

Our opinions on financial statements, financial management and information systems controls are included in all departmental, statutory authority and local government annual reports, all of which are available to the public when tabled.

Parliament uses these opinions, as well as our audit results reports and performance audit reports to inform both its scrutiny of government performance and its debates around legislative proposals.

The Legislative Assembly's Public Accounts Committee periodically follows up entity responses to the recommendations in our performance audit reports, which Directors General tell me is very effective in focussing the mind on implementation!

The Legislative Council's Standing Committee on Estimates and Financial Operations retains a keen eye on our financial audit results reports as part of the planning for its Annual Report and Budget Estimates hearings.

I am also called to appear before other committees to provide expert witness testimony on audit matters within their portfolio responsibilities. As OAG auditors spend time engaging with 20 per cent of public sector entities in any given week, we offer a key source of intelligence for Parliament, and indeed for government ministers as to what is happening in their own portfolio entities.

Only this week, I have signed my Opinion on the annual financial statements for the whole-of-government accounts – another critical piece of transparency and assurance for the public, as well as WA's institutional investors, the buyers of our government bonds.

Finally, our work provides a layer of transparency for the Executive branch of government, notwithstanding the tension this can bring at times through our public

[8] See, for example, B.S Wyatt, Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 October 2006, pp 7769-7774; Hon Ben Wyatt, MLA, Treasurer, 'Treasurer congratulates new Auditor General', WA Government Media Release, 14 March 2018. Accessed at: <https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/Treasurer-congratulates-new-WA-Auditor-General-20180314>; J.R Quigley, Attorney General, Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 October 2006, pp 4700-4702.

reporting. As part of our financial and information systems audits, we provide accountable authorities and Ministers with 'management letters' containing a range of audit findings and recommendations aimed at process improvements. These letters, which are generally not made public, may draw attention to operational matters of which Ministers, councillors and CEOs may otherwise be unaware. In recent years, we have been issuing an average of 2,000 management letter findings annually.

As an aside, if governments or any organisation really want to improve effectiveness, efficiency and compliance, may I suggest starting with the auditor's management letters. Addressing the recommendations in these letters may negate much of the need to spend any further money engaging consultants to identify business and governance improvement opportunities.

There is indeed much we do behind the scenes to help build capability and support the maintenance of quality public administration and good governance in this State. And my counterparts in your jurisdictions do similarly.

AUDITOR GENERAL'S RELEVANT POWERS AND RESPONSIBILITIES AND HOW I APPROACH MY CUSTODIANSHIP OF THIS ROLE

The legislation primarily governing my activities, and those of the OAG, is the *Auditor General Act 2006* (WA) (AG Act).

The AG Act establishes the Auditor General as an 'independent officer of Parliament', who is 'authorised and required to act independently in relation to the performance' of their functions.[9] Section 7 provides the Auditor General with complete discretion on what to audit, when and how to report, and what to include in reports.[10]

So how do I approach the role as Auditor General given its significant powers and responsibilities?

I have referred in previous forums to the analogy of the Auditor General and the OAG as the well-trained and disciplined watchdog of public finances carefully scanning our

[9] *Auditor General Act 2006* (WA) ss 7(1) and 7(5).

[10] *Auditor General Act 2006* (WA) s 7(6).

environment for risks to good public administration. Neither bulldog barking incessantly and soon ignored, nor timid lap dog afraid to speak out.

We know that we must use our significant powers of access, including our coercive powers in certain cases, judiciously, lest the sector, the Parliament and our community lose confidence in us. But likewise, we cannot be cowed and avoid the difficult calls. Our duty is to serve the public interest above all else.

In recent years, our performance audits have provided transparency on the efficiency or effectiveness of a range of key government services impacting large and diverse numbers of Western Australians. For example, we have identified:

- an ongoing risk of unsafe drinking water in scores of remote Aboriginal communities[11]
- long-standing inefficiencies in the management of adult mental health services and long-stay hospital patients[12]
- significant disparities in the allocation of psychologists across public schools[13]
- an urgent need, which Government has since actioned, for a review of the Public Trustee's funding and governance model[14]
- an increased risk of illegal fishing and undesirable mining impacts due to numerous regulatory weaknesses.[15]

[11] Office of the Auditor General (WA), *Delivering Essential Services to Remote Aboriginal Communities*, 2 June 2021. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/delivering-essential-services-to-remote-aboriginal-communities-follow-up/>.

[12] Office of the Auditor General (WA), *Access to State-managed Adult Mental Health Services*, 14 August 2019. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/access-to-state-managed-adult-mental-health-services/>; Office of the Auditor General (WA), *Management of Long Stay Patients in Public Hospitals*, 16 November 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/management-of-long-stay-patients-in-public-hospitals/>.

[13] Office of the Auditor General (WA), *Delivering School Psychology Services*, 23 June 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/delivering-school-psychology-services/>.

[14] Office of the Auditor General (WA), *Public Trustee's Administration of Trusts and Deceased Estates*, 10 August 2022. Accessed at:< https://audit.wa.gov.au/reports-and-publications/reports/public-trustees-administration-of-trust-and-deceased-estates/>.

[15] Office of the Auditor General (WA), *Regulation of Commercial Fishing*, 7 December 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/regulation-of-commercial-fishing/>. Accessed on 23 September 2023; Office of the Auditor General (WA), *Compliance with Mining Environmental Conditions*, 20

Our financial and information systems auditors have identified and reported on a range of significant cyber-security risks and weaknesses in local governments,[16] as well as a growing number of unresolved controls issues within State sector entities.[17]

Finally, over the last three years, we have filled a long-standing void in the status reporting of major infrastructure projects against projected timeframes and budgeted costs.[18]

On occasions, I have deemed it in the public interest to report to Parliament confidentially through my oversight committees, the Legislative Assembly's Public Accounts Committee and the Legislative Council's Standing Committee on Estimates and Financial Operations. This was the case with some initial findings we made in 2019 with the system that maintains WA's Registry of Births, Deaths, and Marriages. It was not until late-2020[19] that I reported publicly and at a high level on this matter, once the system weaknesses had been rectified and the threats of access to foundational identity records of Western Australians – including those that give the gift of Australian citizenship – had been mitigated. This was one instance where limiting transparency was the more prudent course of action.

Since September 2020, the OAG has tabled 12 reports on various aspects of the Government's response to the COVID-19 pandemic, including:

- our audit of the SafeWA check-in app found Police were accessing data for purposes other than contact tracing[20]

December 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/compliance-with-mining-environmental-conditions/>.

[16] Office of the Auditor General (WA), *Cyber Security in Local Government*, 24 November 2021. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/cyber-security-in-local-government/>.

[17] Office of the Auditor General (WA), *Financial Audit Results - State Government 2021-22 - Part 3: Final Results*, 30 June 2023. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/financial-audit-results-state-government-2021-22-part-3-final-results>/.

[18] Office of the Auditor General (WA), *2022 Transparency Report - Major Projects*, 17 June 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/2022-transparency-report-major-projects/>.

[19] Office of the Auditor General (WA), *Western Australian Registry System – Application Controls Audit*, 26 November 2020. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/wars/>.

[20] Office of the Auditor General (WA), *SafeWA - Application Audit*, 2 August 2021. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/safewa/>.

- our contact tracing system audit found significant weaknesses in the systems used to protect sensitive personal data[21]
- our examination of the vaccine roll-out found inequitable access impacting vulnerable groups[22]
- we found the procurement of Rapid Antigen Tests went from $3 million to over half a billion dollars, without any recorded evidence of clear, considered and coordinated planning[23]
- most recently, we provided transparency on how WA's Hotel Quarantine Program worked.[24]

This was an unprecedented time for public administration across the country. In WA alone, beyond Federal stimulus measures, more than $5.5 billion was committed by July 2020 towards 'helping restore business and consumer confidence and rebuilding the economy'.[25]

In addition, individual liberties were curtailed under WA's State of Emergency legislation that was enacted to manage the health response and limit the pandemic's spread.

The Government and its agencies were confronted with an extremely challenging environment and operated with a heightened and prolonged sense of urgency to deliver support measures. Such environments present increased risk for inefficiency, waste, fraud, declining quality of services and unintended impacts on citizens' lives.

[21] Office of the Auditor General (WA), *COVID-19 Contact Tracing System - Application Audit*, 18 May 2022. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/covid-19-contact-tracing-system-application-audit/>.

[22] Office of the Auditor General (WA), *WA's COVID-19 Vaccine Roll-out*, 18 November 2021. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/was-covid-19-vaccine-roll-out/>.

[23] Office of the Auditor General (WA), *Financial Audit Results - State Government 2021-22 - Part 2: COVID-19 Impacts*, 3 May 2023, pp 14-20. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/financial-audit-results-state-government-2021-22-part-2-covid-19-impacts/>.

[24] Office of the Auditor General (WA), *Requisitioning of COVID-19 Hotels*, 9 August 2023. Accessed at: <https://audit.wa.gov.au/reports-and-publications/reports/requisitioning-of-covid-19-hotels/>.

[25] Government of Western Australia, 'WA Recovery Plan', 23 June 2023. Accessed at: <https://www.wa.gov.au/government/publications/wa-recovery-plan>.

Notwithstanding the difficulties it created for the Government, audited entities, and indeed the OAG, I thought it necessary to undertake independent scrutiny of the COVID-19 response. This was important to:

- provide Parliament with timely assurance and transparency over major activities and spending;
- evaluate the quality and timeliness of advice to the Government, and to confirm whether key risks were identified and addressed as part of this process;
- check whether response initiatives were delivered in accordance with relevant legislative and policy requirements; and
- ensure governance structures, procurement and contract management practices were sound in the circumstances.

To assist entities with navigating this period, the OAG also published Better Practice Guidance on COVID-19 financial and governance matters within weeks of the outbreak in WA. This is one of dozens of Better Practice Guides we have published on our website to help State and local government entities build capability and inform Parliament and the public of 'what good looks like' in public administration.[26]

I believe the assurance and transparency the OAG provided during this time will provide enduring benefit to the current and future governments of this State. Not only by helping retain public confidence in the openness of our system of government, but also, via the series of reports and findings that I trust will help inform any future emergency responses.

CURRENT CHALLENGES

Our democratic systems of government - which distribute power through various checks and balances and are underpinned by the rule of law to limit the power of the majority and the mighty, and to protect the minority - are imperfect and fragile. But for many people across the world, they have delivered an extended period of peace

[26] Office of the Auditor General (WA), 'Better practice guidance', no date. Accessed at: https://audit.wa.gov.au/resources/better-practice-guidance/.

and prosperity following the violence and dislocation witnessed throughout much of the last century.

Arguably, we are now in an era where memories of this period are fading, apathy is rising, and trust in our public institutions is diminishing. No doubt feeding this is the fact that misinformation, particularly via social media platforms, has never been more accessible. This has coincided with a decline in the incidence of respectful debate and deliberation, which is so necessary to addressing policy challenges in a credible and lasting way – the ability to 'disagree well', and more importantly learn from each other and come to the best answer in the public interest. That is, seeking truth and doing right, not needing to be right.

Also of concern, as the Royal Commission into the Robodebt Scheme has identified,[27] is a timidity in some senior parts of the public sector that is impacting the provision of frank and fearless advice to decision-makers in government.

In this fraught environment, the need for an informed independent opinion, duty-bound to report matters of significance in public interest to Parliament, is more critical than ever. This will likely place greater importance on the work of the OAG and other audit and integrity offices as focal points for accountability and transparency as trust is what our system relies on.

Here in WA, we are looking at the impacts on our operations following recent amendments to the AG Act.

The Government advised that the reforms in the *Auditor General Amendment Act 2022* (WA) (Amendment Act), which received Royal Assent on 29 November 2022, 'would empower the Auditor General to further assist Parliament in holding Governments to account, strengthening the trust, transparency, and accountability of Government within the community'.[28]

The amendments explicitly provide the basis for the Auditor General to access materials that are subject to claims of public interest immunity and legal professional

[27] C Holmes AC SC, *Royal Commission into the Robodebt Scheme: Report (Volume 1)*, 7 July 2023, p. 643. Accessed at: https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.PDF.

[28] Hon Mark McGowan MLA, Premier; Treasurer, and Hon John Quigley MLA, Attorney General, 'New laws to improve Government accountability and transparency'', WA Government Media Release, 19 October 2022. Accessed at: https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/New-laws-to-improve-Government-accountability-and-transparency-20221019.

privilege without waiving the attached privileges and immunities. This explicit recognition should be helpful in not allowing confusion to continue in some parts of the public sector around full and free access to such documents and could ideally lead to greater audit efficiencies in this regard.

However, a number of the other provisions in the Amendment Act are novel, and untested in any Australian jurisdiction. Some of these provisions will diminish the Auditor General's discretionary powers to report directly to Parliament on matters the Auditor General considers to be in the public interest.[29] This is of concern to me and my colleagues, along with some other matters we have now identified in the rather extensive amendments, including an expanded scope of cabinet confidentiality which goes beyond established definitions including that within the *Freedom of Information Act 1992* (WA).[30]

While I acknowledge any legislation passed reflects the will of the Parliament, the reality is that the impact of the amendments will be a diminishment of the Auditor General's current ability to promote public transparency in determining what to report to Parliament and introduces uncertainty into aspects of the relationship between the Auditor General and the Parliament. As such, it has become increasingly apparent that the amendments will not achieve the Government's stated aims.

I am keeping Parliament informed, most recently through my Office's Annual Report,[31] which was tabled this week.

[29] Under the *Auditor General Amendment Act 2022* (WA), s8 (36D and 36E), where it relates to 'confidential material', or the 'the substance of' confidential material, the Auditor General may prepare a report containing such information and give a copy of it to the Premier, Treasurer, responsible Minister, and the Director General of the Department of the Premier and Cabinet. Under the current provisions of the *Auditor General Act 2006* (WA), matters that the Auditor General considers not in the public interest to be tabled in both Houses of Parliament (and therefore publicly reported), can be provided to Parliament's Public Accounts Committee and Estimates and Financial Operations Committee.

[30] Under the *Auditor General Amendment Act 2022* (WA), s 8 (32A.(2) and 36D), confidential material is defined to cover 'proceedings, deliberations or decisions of Cabinet or of any committee of Cabinet (including *proposed or contemplated* proceedings, deliberations or decisions)'.

[31] Office of the Auditor General (WA), *Annual Report 2022-2023*, 27 September 2023, pp 11, 110-111. Accessed at: https://audit.wa.gov.au/reports-and-publications/reports/annual-report-2022-2023/.

My Office will also seek to continue to work with the relevant ministers and parliamentary committees to see these matters are addressed, or at least raise awareness around them so the implications are fully understood.

As we navigate sensitive and incredibly important matters such as these, contrary to perceptions that may exist, there is *never a dull moment* in the life of a public sector auditor!

CLOSING COMMENTS

I close by asking our public entities and officers to continue to embrace the process of independent review, despite the additional workload and short-term inconvenience it brings. Entities may take comfort knowing it is my turn soon, with the OAG's legislative and performance review now due.[32]

I expect parts of these will prove onerous – and perhaps even some of the findings uncomfortable – as is the case with all proper reviews. But I welcome them as a means of identifying ways to improve our processes and to demonstrate our commitment to the transparency and accountability I see as so critical to maintaining capability and deserved public confidence in the institutions that support our democratic system of government.

[32] As required under the *Auditor General Act 2006* (WA), s 48.

Queering Up the Debate: Freedom of Speech seen through a LGBTI lens

David Gibson

Chair, GLBTI Rights in Aging Inc, and former Liberal National Party member for Gympie in the Queensland Parliament

INTRODUCTION

> *Her Majesty granteth you liberal but not licentious speech — liberty therefore but with due limitation.*[1]

Gays have had a long-standing love affair with musical theatre – some would argue since the time of the Greeks. So, let's kick off this paper by paraphrasing a line from the great Julie Andrews in the musical classic *The Sound of Music*.

> *'Let's start at the very beginning, when you read, you begin with A-B-C,*
>
> *When you engage with the Rainbow community you use L-G-B' …*

and well, there are a few more letters that have been added over the years.

GLBTI Rights in Ageing Inc (herein referred to as GRAI) opts for the acronym LGBTI to refer to older people of diverse genders, sexualities and sex characteristics. This reflects their lived experience and recognises that some terms like 'queer' were used as a slur when they were younger.

GRAI also recognises that the initialism does not capture the full diversity of sexualities, bodies, identities, and experiences that exist within our community.

[1] Lord Keeper, Sir Edward Coke, to the Speaker of the House of Commons (1593) in Elton, *The Tudor Constitution*, Cambridge: Cambridge University Press, 1982, p 274.

Which will bring us back to the topic at hand – 'Queering Up the Debate: Freedom of Speech seen through a LGBTI lens'.

This topic is personal for me. As a former member of the Queensland Parliament for three terms and as a bisexual man, I have been a part of that group of LGBTI individuals who have hidden their sexuality or gender identity out of fear. I have also witnessed firsthand how challenging debates about the LGBTI community can be. I have heard comments uttered; that thankfully were not recorded by Hansard, hissed by Members of Parliament or the heckles across the chamber from a member who doesn't have the call, all in an attempt to elicit a response or provide a headline for the media.

I have seen LGBTI community members sitting in the visitors' gallery, becoming outraged at the debate, and watched both sides stoke the fire for their own political purposes.

One might assume that in 2023, on the upcoming sixth anniversary of the passing of the Marriage Amendment Bill, that equality has been achieved and all is well for the LGBTI community in Australia. Sadly, that is not the case. LGBTI individuals still face higher levels of discrimination, stigma, and exclusion, leading to poorer health, economic, social, and mental health outcomes than their heterosexual peers.

But let us rewind to a time before marriage equality. The Bligh Labor Government's parting gift to Queensland was the *Civil Partnerships Act 2011* (Qld). One of the Newman Liberal National Party (LNP) Government's election promises was to repeal the Act, so just four months after it came into effect, on the long night of winter solstice in June 2012, the debate on the Civil Partnerships and Other Legislation Amendment Bill was well underway.

I had no intention of speaking on the bill, but after witnessing the weaponization of freedom of speech, I rose and, with just 263 words, delivered the shortest speech I ever gave in the parliament. In part I said:

> *I rise because tonight has not been one of the finest nights of the Queensland parliament. It is not appropriate for us as legislators, for us as people who represent all Queenslanders regardless of their sexual*

> *orientation or regardless of their faith, to adopt a language that is so politically charged that it results in what we saw in our parliament tonight.*[2]

I have observed firsthand that whilst the privilege of freedom of speech should carry with it a corresponding obligation, in reality it was not always applied responsibly.

The parliamentary privilege of freedom of speech is often hailed as the most important of all privileges, described as 'one of the cornerstones of democracy'.[3]

While freedom of speech is indeed a fundamental right, it is crucial to remember that the right to speak freely within the parliamentary chamber was never intended to be used as a shield to engage in hate speech or intimidation of marginalised communities like the LGBTI population.

The abuse and scapegoating of vulnerable people by political figures contribute to rising hate against LGBTI communities and attacks on their civil rights.[4] We have recently witnessed a surge in hate groups from all points on the political spectrum, from far-right neo-Nazis on the steps of the Victorian Parliament holding banners reading 'destroy paedo freaks' to the movement known as TERFs (trans-exclusionary radical feminism), feminists – which includes some lesbians, who reject the notion that trans women are women.

LGBTI discrimination and harassment are human rights issues that violate the fundamental rights of individuals based on their sexual orientation, gender identity, or sex.[5] The experiences of stigma, bullying, and marginalisation against LGBTI communities are serious problems that can lead to other human rights breaches. The impact of verbal abuse, bullying, and harassment can be just as severe as physical violence.

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[2] D Gibson, Queensland, *Parliamentary Debates*, Legislative Assembly, 21 June 2012, p. 991.

[3] Enid Campbell, *Parliamentary Privilege in Australia*, Melbourne: Melbourne University Press, 1966.

[4] Council of Europe, Committee on Equality and Non-Discrimination, *Report: Combating rising hate against LGBTI people in Europe*, Strasbourg, 27 September 2021. Accessed at: <https://assembly.coe.int/LifeRay/EGA/Pdf/TextesProvisoires/2021/20210921-RisingHateLGBTI-EN.pdf>.

[5] Australian Human Rights Commission Website, 'Violence, Harassment and Bullying and the LGBTI Communities', 2 October 2010. Accessed at: <https://humanrights.gov.au/sites/default/files/content/pdf/bullying/VHB_LGBTI.pdf>.

Which brings us to either the Parliamentary paradox or rank hypocrisy. Governments across Australia recognise the importance of promoting inclusivity, respecting diversity, and protecting the rights of all individuals regardless of their sexual orientation or gender identity. To achieve this outcome, legislation has been enacted to ensure a safe and inclusive society, address discrimination, and promote understanding and acceptance.

Yet within those same parliaments, we still see examples of derogatory and insulting remarks about LGBTI communities which reinforce intolerance and appear to sanction discriminatory behaviour.

Members of Parliament have claimed gay people infected children with AIDS, blame them for murders, and suggest that gay people have only existed 'for maybe 60 years.' – I'm not sure the Greeks would agree!

The remarks I refer to were given by Bob Katter MP during the same sex marriage debate, he also said that 'homosexual behaviour' is responsible for suicides. If Katter had bothered to check, Australian studies on LGBTI mental health note that it is societal attitudes, stigma, and discrimination which increase the risk of suicidal ideations, *not* a person's sexuality.

> *Whilst members of Parliament must be free to speak their minds in Parliament,… To provide such an immunity or privilege to such persons is, indeed, likely to encourage, or at least facilitate, a disregard for the truth by those to whom the protection is given.*[6]

During that outrageous and homophobic rant, not a single member of the House rose to object. Not one warning was given by the Speaker. Why? Because under the standing orders, that kind of toxic language is permitted. How is it acceptable that such language is allowed to be used in parliamentary debate, especially when it can have an adverse impact on the mental health of members of the LGBTI community.

The use by Members of Parliament of toxic language, hate speech, and vilification has eroded confidence in our parliamentary systems. Trust is at an all-time low.

[6] Royal Commission into Commercial Activities of Government (Final Report, November 1992) vol 2, 151 [5.8.6]

Research from the Museum of Australian Democracy, titled *Trust and Democracy in Australia*,[7] showed that in 2018 satisfaction in democracy had more than halved in a decade and trust in key institutions was eroding. If current trends continued, by 2025, it was projected that fewer than 10 percent of Australians will trust their politicians and political institutions, resulting in ineffective and illegitimate government.

The hate speech displayed by some Members of Parliament reveals a 'moral blindness' to what is ethical and in the community's interest, focused solely on the political point-scoring contest or the pursuit of media attention.

> *…the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.*[8]

Words matter, especially when those words can cause harm to the vulnerable and marginalised in our society as identified in the 'harm principle'. The latest data from the *ABS National Study of Mental Health and Wellbeing (2020-2022)*[9] provides a crucial insight into the mental health challenges faced by different segments of our society, including for the first time those who identify as LGBTI.

The statistics reveal a troubling discrepancy: 50.3% of the LGBTI population report suffering from anxiety disorders, a stark contrast to the 17.2% among heterosexual respondents. Furthermore, when it comes to affective disorders, encompassing depressive episodes and other mood conditions, LGBTQI individuals are four times more likely to be affected than the general population.

This data is reinforced by the findings of La Trobe University's *Privates Lives 3*[10] Australia's largest national survey of LGBTI people which identified some alarming statistics:

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[7] Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia: Democratic decline and renewal,* Democracy 25 Report 1, Canberra, December 2016. Accessed at: <www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>.

[8] John Stuart Mill, *On Liberty*, Hackett Publishing, 1978, p. 13.

[9] Australian Bureau of Statistics. (2020-2022). National Study of Mental Health and Wellbeing. Accessed at <https://www.abs.gov.au/statistics/health/mental-health/national-study-mental-health-and-wellbeing/latest-release>.

[10] A O Hill, A Bourne, R McNair, M Carman, & A Lyons, 'Private Lives 3: The health and wellbeing of LGBTIQ people in Australia'. ARCSHS Monograph Series No. 122. Melbourne, Australia: Australian Research Centre in Sex, Health

- 39.5% of LGBTI people experience social exclusion,
- 34.6% had encountered verbal abuse,
- 23.6% suffered harassment such as being spat at or offensive gestures,
- 11.8% experienced sexual assault, and
- 3.9% of LGBTI people were physically attacked or assaulted with a weapon due to their sexual orientation or gender identity. [11]

Sadly, the *UN CRC25: Australian Child Rights Progress Report*[12] is not much better. It identified that 80% of LGBTI children report abuse at school, leading to reduced concentration, missed days at school, a drop in school grades and dropping out of school altogether.

With so many LGBTI people in Australia still feeling ostracized and unsafe, we must reflect on what can be done to reduce stigma, prejudice, discrimination, and abuse experienced by these diverse communities.

In today's world it is not sufficient to expect that Members of Parliament will self-govern and moderate their language accordingly. However, I am not naïve. Any reform project aimed at preventing the misuse of parliamentary privilege as a means to stop hate speech must be framed by the recognition not only of the scale of the problem but also its complexity.

To enhance public trust in parliamentary processes, parliaments have, in the past, taken various measures to recalibrate members' privileges in recognition that parliamentary privilege belongs to Parliament as an institution and not to individual members.

One example was the establishment of the Register of Members' Pecuniary Interests. The intent in making information publicly available was to promote transparency and

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and Society, La Trobe University, 2020. Accessed at: <https://www.latrobe.edu.au/__data/assets/pdf_file/0009/1185885/Private-Lives-3.pdf>.

[11] Hill et al, 'Private Lives 3', p. 14.

[12] Australian Childs Rights Taskforce, *UN CRC25: Australian Child Rights Progress Report,* May 2016. Accessed at: <https://www.unicef.org.au/stories/1-in-6-children-australia-is-not-the-lucky-country>.

accountability, ensuring that members act in the best interests of the public they represent.

Perhaps it is time Parliaments to take a lesson from our sporting codes[13] to ensure that Members of Parliament speak in the best interests of the public they represent.

The National Rugby League and the Australian Football League have strict codes of conduct that prohibit players from engaging in hate speech, vilification, or discrimination based on race, gender, sexual orientation, or other personal characteristics. Players who breach these codes of conduct can face disciplinary action, including fines, suspension, or termination of their contracts.

Would the imposition of fines by Privileges Committees for breaching a parliamentary code of conduct by engaging in hate speech, or other forms of vilification be an effective tool? It appears to work for our sporting players, so why not for Members of Parliament? By way of example, the Speaker during a debate could note the words spoken as potentially being in breach of the code of conduct and refer the matter to a privileges committee for review and return to the debate with minimal disruption. The committee then reviews Hansard to determine if it was in breach of the code, and if so, issues a fine and the matter is concluded.

I raise this partially tongue in cheek, but also with a desire for examining innovative approaches that demonstrate a commitment to promoting accountability and ethical conduct, rebuilding the public trust while maintaining the integrity of parliamentary processes.

It is time to recalibrate what Free Speech means, because in 2023 the deliberate vilification of LGBTI people masquerading as 'Freedom Speech in Parliament' is no longer acceptable.

[13] Melissa Woods, 'Four NRL players cop fines and suspensions for bringing the game into disrepute'. *The Roar,* 5 October 2021. Accessed at: <https://www.theroar.com.au/2021/10/05/four-nrl-players-cop-fines-and-suspensions-for-bringing-the-game-into-disrepute/>.

Who Will Guard the Free Speech Guardians?

James Allan[1]

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INTRODUCTION

As regards the state of free speech in today's advanced liberal democracies you can find Pollyannas and Cassandras. However, my own sense is that these days there are a good many more commentators and writers who fit into the latter's camp than the former's. Perhaps readers agree; perhaps they disagree. I lean more towards thinking the Cassandras[2] have a point, while also recognising that for all free speech-related matters things are still far better in the world's liberal democracies of today than anywhere else. One can, of course, concede that point and still subscribe to the sentiment often – but erroneously – attributed to Thomas Jefferson that 'eternal vigilance is the price of liberty'.[3]

This short paper will be an exercise in rousing the troops here in Australia to start showing a bit more vigilance in defence of the liberty of speech that many consider to be the most important liberty of them all. I will restrict my observations and arguments on the state of free speech to two realms. One I know very well indeed, having worked in university law schools around the world for over three decades (eighteen of them now in Australia) after a handful of years as a corporate litigator in Toronto and as a barrister for a year in London on scholarship. I refer to the present state of free speech in universities in Australia. My view is that viewpoint diversity on campus is collapsing

[1] This the edited transcript of a speech Professor James Allan delivered in Perth, Western Australia on 29 September 2023 to the Australasian Study of Parliament Group's Annual Conference. The Conference theme was 'Freedom of Speech, Debate and Information'.

[2] Quibblers will rightfully point out that Cassandra's negativity was grounded in accurate predictions where Pollyanna was unrealistically sunny. My reply is that a bit of poetic license is sometimes needed to help make these sort of papers less dry.

[3] Wendell Phillips, '*Speeches Before the Massachusetts Anti-Slavery Society,* Boston, Massachusetts, 28 January 1852, p. 13.

(perhaps the past participle would be more apt here) and that the resulting inroads into academic freedom are insidious and indirect, not often Peter Riddesque in being open and blatant.[4]

The other realm is one many of you know better than I, namely Parliament. I want to consider the inroads many of our elected representatives in this country seem to desire to make on the scope we citizens have to speak our minds and express our views. If it did nothing else the two and a half years of the pandemic showed us that possibility. And we are seeing right now, as well, a desire by parliamentarians on both sides of the aisle to co-opt Big Tech into the banning, censoring, downplaying, and bowdlerising of speech that offends, annoys and discombobulates those in powerful positions. Here I will consider the extent to which claims that another's speech is 'misinformation' or 'disinformation' is clear-cut and factually uncontentious and how often, by contrast, it is contentious, politicised, uncertain and hence just a form of propaganda to throw around these 'misinformation' and 'disinformation' labels with a rather unrestrained abandon. I will make a short digression here, too, to wonder if a remedy might be to make the decisions of our elected legislators subject to oversight by our unelected judges. My take is that irrespective of how pessimistic one might be as regards our politicians' commitment to free speech – and having listened to former Prime Minister Scott Morrison's desiccated understanding of the benefits of free speech during and before his tenure it is hard not to be a tad pessimistic– handing some sort of gainsaying function over to the judges would only make things worse.

So that is the purview of this paper: an account of what our universities and our legislatures are doing in the way of circumscribing free speech. I will, of necessity, generalise here and there and I will be blunt. That is because these days the defence of free speech requires – no, it demands – a certain level of bluntness that at times might verge on the rude and the crass.

REALM ONE: THE UNIVERSITIES

Let me start by posing this little thought experiment. Imagine a principality in which, say, 60 percent of the inhabitants are strong proponents of all of today's transgender

[4] See e.g. *Ridd v James Cook University* [2021] HCA 32. Case Summary available at: https://eresources.hcourt.gov.au/showCase/2021/HCA/32

rights advocates' shibboleths and 40 percent align more with the J K Rowling and Martina Navratilova and Riley Gaines worldviews. All the top positions in this principality are held by those in the 60 percent camp. Now these two camps might tick along in relative tolerance or, more likely, they might not. If not, think about the sorts of speech-related codes of conduct and regulations limiting speech that those in the majority might be inclined to impose on the minority as regards these fundamentally different worldviews. These would be legal processes that sometimes would be threatened, sometimes invoked, and would then require a formal dispute-resolution process to resolve (whatever the principality's background constitutional and legal protections of free speech be).

Now imagine that over a decade or two the numbers and percentage of J K Rowling adherents in this society drops and drops, perhaps through emigration or through highly selective immigration. The principality reaches a point where the ratio in favour of orthodoxy has become, say, 9:1 rather than the earlier 6:4. Viewpoint diversity, in other words, has collapsed and now a massive majority of people share the same outlook. They overwhelmingly agree on their foundational moral and political premises. As a result, those in charge rarely need to invoke speech-limiting codes of conduct, regulations, statutory frameworks and the like. Why would they do any of that against people who share their own core outlooks? Hence this collapse in the numbers of those with unorthodox, heretical, non-conformist, iconoclastic, heterodox, 'apostatical' views – paradoxically – makes it more likely one could stand up and with some plausibility say 'there is no free speech problem in this principality'. At least that would be the case if all one does is look at how often the speech-inhibiting regulations, codes and statutes were invoked and applied.

And so it is in our Australian universities today, at least in my view. The collapse of viewpoint diversity is well-documented around the Anglosphere.[5] If any readers doubt

[5] See Jonathan Haidt, 'Intimidation is the New Normal on Campus', *The Chronicle of Higher Education*, 26 April 2017; Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, Penguin, 2013; Keith Whittington, *Speak Freely: Why Universities Must Defend Free Speech*, Princeton University Press, 2nd ed., 2019; and James Phillips 'Why Are There so Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses' *Harvard Journal of Law & Public Policy*, 39, 2016, pp. 153–206. Phillips weighs various explanations by looking at citation and publication rates of law professors at the top 16 United States law schools. After subjecting the data to regression analysis, propensity score matching and reweighting, nearest neighbour matching and coarsened exact matching Phillips concludes that the clear explanation for the lack of

that progressive-left orthodoxy reigns supreme on our campuses then they need only make a quick visit to one nearby. I can assure you that our universities are bastions of monolithic orthodoxy, of left-wing, progressive conformism and genuflecting at the foot of received identity politics wisdom, in an ideological, not party-political, sense. At least that is so outwardly and openly.

There are myriad acknowledgements of country, delivered in an ever increasing range of contexts), various sectarian flags on buildings that always fly, implicit demands to celebrate this supposedly oppressed group or that, you get the idea. More to my overall point, this collapse of outlook diversity works indirectly and insidiously affecting promotions, grant-getting, the willingness to work in a university and more. Many dissenters and apostates from the university orthodoxy (students included) learn to self-censor, to keep quiet, to ride out the one-sided indoctrination sessions without comment. Put bluntly, free speech declines and its absence becomes a big problem. And yet you simply cannot see it solely by looking at university Codes of Conduct, policies, statutory frameworks and the like. These tertiary institutions supposedly dedicated to the free flow and competition of ideas have become very uncongenial places for those with the broadly conservative core views shared by at least half the wider population – sufficiently unpleasant that many just opt to leave their jobs in the university sector.

Let me give you just one example of what happens on campus when a progressive-left bromide becomes held by the preponderance of academics and near-on all the senior managers. I refer to how our universities have handled the s128 constitutional Voice referendum. More than half of Australia's 42 universities have come out and publicly backed the 'Yes' campaign, including five of the purportedly elite Group of Eight universities. University of NSW has even lit up one of its main buildings with a big 'Yes'. As for the remainder of Australia's universities, not a single one of them has come out for the 'No' side; they have opted officially to stay neutral. Even there, though, plenty of windows in the main university registry offices are filled with 'Yes' posters; you will not find one housing a 'No' poster. That is as close to balance and impartiality as we get. This is rather remarkable when all the polls since about July have shown the 'No' side to have a considerable lead with the public.

conservatives was discrimination – not conservatives' greater greed, lesser brainpower or lack of interest in such jobs.

I realise that these universities who live off taxpayers' monies and who are using those monies to support the 'Yes' side are also insisting that they nevertheless support free speech. But that position seems at odds with how things work on the ground. For instance, if we move down to a more granular level of what is happening on campuses (and I mean on both the universities that have officially come out for 'Yes' *and* those that have officially stayed neutral) let me point out that many universities are putting on 'information sessions' that overwhelmingly support the 'Yes' side. At some it is wall-to-wall supporters of the Voice speaking and supposedly giving students some sort of balanced information about the Voice. It would be laughable, if it weren't. And if you query this – as I have at a high level – you get this sort of basic answer: 'We've briefed one of the 'Yes' speakers to give the 'No' side.' Got that? Because the great free speech philosopher John Stuart Mill is rolling in his grave. No one can seriously believe that a person strongly committed to one side of a highly contentious and moralised issue can do even a half-decent job of giving the other side's case. Consider that at the University of Sydney the self-styled 'important information on the Voice' includes videos of high-profile Voice supporters such as Noel Pearson and Marcia Langton on the official website.[6] And there is a 'Voice to Parliament Handbook'[7] written by Kerry O'Brien and Thomas Mayo freely available to staff and students. To call this a one-sided briefing is to undersell the degree of partisanship, slant and skew of what is being offered to faculty and students.

Now I will lay my cards on the table. I am a long-time political conservative. I have a weekly *Spectator Australia* column. I write occasionally for *The Australian* and for a good few overseas outlets. I have a very high appetite for work-related risk. I may have been the first person in the country to come out in print predicting this Voice referendum would lose. I made this prediction back when it was first officially confirmed that the referendum would be held, and polls had support for it up around 70 percent approval. I do not hide my right-of-centre views nor why I believe the Voice proposal is a very bad idea.[8] But there are very, very few academics in this country who

[6] See e.g. University of Sydney, 'Opinion: The Voice to Parliament', Website, 2023. Accessed at: <https://www.sydney.edu.au/ncccc/the-voice-to-parliament.html.>.

[7] Which is wrong on its face as the Voice, were it successful, would be to Parliament *and the Executive*.

[8] In fact, I was invited by the editor of the *Australian Law Journal* to make the 'No' case in response to former Chief Justice French's article in favour of the 'Yes' case. See James Allan, 'Very High Risk, Very Low Reward: This Voice Referendum Deserves to be Defeated' *Australian Law Journal*, 97, 2023, pp. 411-420.

mimic my willingness to articulate and fight for (openly and publicly) right-of-centre positions.

In the law school context my opposition to the Voice led in part to one of Australia's oldest peer-reviewed law journals publishing gratuitous and severe criticism against me and a number of former senior Liberal Party politicians.[9] I responded in a different peer-reviewed law journal, having been refused a right of reply in the originating publication.[10] I regularly get phone calls from academics – working at other universities and sometimes at my own – who say they are right-of-centre and dare not speak their minds. They worry about promotion applications. Students, too, come to see me. They worry about grades on assignments. Yes, this is all anecdotal, I know. But the evidence of the left-wing, progressive bias of our universities and of those across the anglosphere cannot plausibly be denied. And nor can the effect this rather massive one-sidedness of outlook has on the willingness of academics and students to speak their minds.

Bluntly put, it stifles free speech. Just go back to our taxpayer-funded universities. They are using the tax dollars of a citizenry that polls show lean noticeably one way on a big constitutional issue to support the other side; to virtue-signal with other people's monies. These same universities purport to hold impartial and moderately balanced information sessions to faculty and students when often the views expressed cover only one side of the debate (in this case, the arguments in favour of 'Yes'). Of course, students and faculty notice this one-sidedness and what the approved, recommended, 'respectable' position is according to university elites. Remarkably, it is always in the same political direction too. Many, if not most, dissenters and non-conformists therefore say nothing; they self-censor; they think about what is most prudential given the upcoming promotion application or essay to hand in. And they keep shtum.

[9] See Harry Hobbs, 'The New Right and Aboriginal Rights in the High Court of Australia', *Federal Law Review* 51(1), 2023, pp. 129-154.

[10] See James Allan, 'Attacking the "New Right", Australian Law Reviews and the Peer Review Process' *University of Queensland Law Journal*, 42, 2023, p. 145. I there set out the incredible vitriol Hobbs directs at 'No' supporters including me; I set out what I argue are his wrong-headed assumptions of what motivates 'No' supporters like me; why a piece such as Hobbs's was more suitable as an op-ed in a weekly than in a peer-reviewed law journal; and how we all know that an exactly similar sort of submitted article coming from the other the side of politics and attacking those with left-leaning views would never make it through the peer-review process and be published, let alone in a highly ranked law review. As it happened, this reply by me was in the US's SSRN top ten list of downloads for law for a couple of months. So at least a good few Americans enjoyed my reply.

Readers, what is that if not a free speech problem broadly understood? It is happening in our tertiary institutions which are supposedly dedicated to the free flow and competition of ideas. Alas, the way this Voice referendum is being handled on campus is just one example of how groupthink and a sort of monolithic, pervading orthodoxy in our universities are enervating and emasculating free speech on the ground and doing so in a very important sense. I use it simply as an illustration of the larger problem remembering that off-campus and amongst the public at large these on-campus 'accepted' views are highly contested and often quite minority ones. It is a side of the university free speech problem that I suspect is less well-known.[11]

REALM TWO: PARLIAMENT

I turn now to Parliament and the desire many of our elected representatives have to make inroads into the scope we citizens have to speak our minds and express our views. We saw that here in Australia, in spades, throughout the two and a half plus years of the Covid pandemic. I fully agree with retired UK Supreme Court Justice Lord Sumption's view that our elected politicians imposed 'the biggest inroads on our civil liberties in the last two hundred years'.[12] In fact, during the lockdown years I made quite a bit of use of my first degree, which was in mathematics, and read more statistical studies to do with epidemiology and the like than I would ever have imagined.

[11] And although I believe that this *de facto* imposition of a monolithic orthodoxy and the related collapse of viewpoint diversity is the far greater problem as regards the scope to speak one's mind on campus, that is not to say that on the narrowly legalistic plane I think the courts in Australia have done a good job supporting academic freedom and the scope to speak one's mind. I do not. For instance, I have strongly criticised the High Court's decision in the Peter Ridd case (*Ridd v James Cook University* [2021] HCA 32). See, for example, James Allan, 'Universities and Turbulent Academics' in . Morgan Begg (ed *Peter Ridd and the Case for Academic Freedom*, IPA, 2023, pp. 69-86, in particular pp. 80-86. *Inter alia*: 'In a sentence, the High Court said an academic could not be punished for speaking, but could be punished for complaining about being punished for what we now are told he could rightfully say in the first place.' *Ibid*., p. 85. 'My view is that the High Court of Australia got it badly wrong, and that Ridd was dealt a bad result. His academic freedom was infringed. In the result the High Court only managed to virtue-signal – that is to tell us all how important academic freedom was in the abstract and how much they, these top judges, valued it when it did not matter to the result. But when it did matter the top judges preferred the JCU code of conduct and the acceptability of the university's reprisals against Ridd for his having done his job the way it is supposed to be done.' *Ibid*., p. 80.

[12] See, for example, Jonathan Sumption, *Law in a Time of Crisis*, Profile Books, 2021.

In March 2020, I was published in the *Spectator Australia* where I argued that these civil liberties' emasculating regulations were:

- wrong in principle based on any sort of core commitment to individual freedom first principles
- wrong on any sort of cost-benefit analyses, even enfeebled ones that only included the medium term effects of long school closures and the inevitable budget blow-out which would inevitably lead to massive debt, enormous printing of money, then asset inflation and hence the huge transfer of wealth from the young to the old and from the poor to the rich.[13] and
- wrong when the costs were borne wholly by the private sector and not at all by the public sector, including the fact that the politicians imposing these draconian regulations did not themselves take even a tiny pay cut while mouthing platitudes that 'we are all in this together'.

Early on in the pandemic I wrote two peer-reviewed law review articles attacking these lockdowns that continue to be apposite.[14]

Whatever one's view on all those issues, I believe the most compelling argument against all these draconian lockdown rules can be found in the fact that even if your focus is solely and exclusively on total deaths what you find if you look at cumulative excess deaths from the start of the pandemic in March 2020 to now (this criterion being the hardest one by far to game), is that the country that did not lockdown, that did not close schools[15] and that just gave its citizens the information they needed and trusted them – Sweden – has the lowest cumulative excess deaths in the OECD.[16]

[13] See, as one of many such claims and this one explicitly from the political left, Toby Green and Thomas Fazi, *The Covid Consensus: The Global Assault on Democracy and the Poor – A Critique from the Left*, Hurst & Co., 2021 – reviewed by me in *Law & Liberty*). In fact, the Covid years were the two best years ever for billionaires. See also Lucas Chancel et al, 'World Inequality Report 2022' (World Inequality Lab Report, 2022) 3 and 46.

[14] See James Allan, 'The Corona Virus: Old vs Young' *Griffith Journal of Law & Human Dignity*, 8, 2021, p. 197 and James Allan, 'Politicians, the Press and "Skin in the Game"' *The Western Australian Jurist*, 11, 2020, p.41.

[15] None closed at all for primary age students though for a short period of time in 2020 they did close for 15-19 year olds.

[16] See, inter alia, Michael Simmons, 'Sweden, Covid and "Excess Deaths": A Look at the Data' *The Spectator*, 10 March 2023; Johan Norberg, 'Sweden During the Pandemic', Policy Analysis No. 959, 29 August 2023and Green and Fazi, 'The Covid Consensus' above.

I bring that up not to relitigate the past, though truth be told the reckless overreach of the government's actions still makes me angry to this day. Instead, I raise it for two related reasons. The first is a bit of a digression but one I very much wish to make. During the entirety of the lockdown years during which democratic countries around the world imposed what Lord Sumption describes as 'the biggest inroads on our civil liberties in the last 200 years' not a single jurisdiction with an entrenched or statutory bill of rights saw the judges interpret that list of moral entitlements in a way that did much of anything to lessen the harshness of these myriad Covid restrictions.[17] This is despite the fact that the regulations sometimes verged on the irrational. For example, it was plain on the data from early on that being outside was better than inside and that sitting in a restaurant was no different than standing, yet masks were demanded standing but not sitting. No judges anywhere in the democratic world – including all the jurisdictions with potent bills of rights – did a single thing for freedom or made use of any of the rights enumerated in a bill of rights to try. I have long argued that when you buy a bill of rights you buy nothing more and nothing less than the first-order normative views of the unelected judiciary.[18]

During Covid, and as a generalisation about the caste as a whole, the judges were in favour of these lockdowns.[19] So too, as it happened, appeared to be the entirety of the

[17] The only thing you can find at all are in a few US jurisdictions and Scotland – a few cases on freedom of religion where, if big stores could stay open, then churches could too. These came later in the day.

[18] See e.g. James Allan, *The Age of Foolishness: A Doubter's Guide to Constitutionalism in a Modern Democracy*, Academica Press, 2022; James Allan, *Democracy in Decline: Steps in the Wrong Direction*, McGill-Queen's University Press, 2014; James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary' *Oxford Journal of Legal Studies,*16(2) 1996, p. 337; James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts' *San Diego Law Review,* 43(1), 2006 p. 1; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' *King's College Law Journal* 17(1), 2006, p. 1; James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby' *Melbourne University Law Review* 33(3), 2009, p. 1032; James Allan, 'Why Politics Matters: A Review of Why Law Matters' *Jurisprudence* 9(1), 2018, p. 132; James Allan, '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 Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, p.108.

[19] Or perhaps in part, in a time of moral panic, the judges were politically afraid to rock the boat. Alan Myers KC has written a paper in part attacking the High Court of Australia's decision in *Palmer v Western Australia* [2021] HCA 5 (the s.92 borders case), mocking the reasoning that led our top judges to conclude that 'absolutely free' meant 'not free unless we judges think it is reasonable'. The point here is not just an interpretive critique but to wonder if the result might have been different had the Morrison Commonwealth government joined the Clive Palmer challenge. There are reasons to think it might indeed have been in which case a motivating factor in the

Australian Human Rights Commission. No criticism was heard from any of these incredibly highly paid people throughout the entire pandemic years; not a peep about any of the features of what at times looked to me to be brutal government rules, responses and actions. There was no rebuke of the concomitant restrictions on speech on social media, or from the self-styled 'human rights brigade' around the anglosphere. A bill of rights did nothing, and neither did they, to safeguard us against free speech incursions. In fact, the only sorts of legal actions against these Covid regulations that worked (and then only in a few jurisdictions and occasionally) were old-fashioned administrative law actions arguing that the Executive was acting *ultra vires* the governing statute. That at least caused the elected legislature to pass an amendment.

And, of course, the universities were every bit as bad, as monolithicly orthodox and as conformist on this front too. Just consider how world leading epidemiologist Professor Jay Bhattacharya was treated by Stanford University.[20]

The second, and main, reason I bring up the Covid years and the draconian response is because it was during the pandemic that the then Coalition Minister for Communications, Urban Infrastructure, Cities and the Arts, Paul Fletcher, opted to push for a 'New Disinformation Law' and even to urge the Morrison government to take the plan to the 2022 election. Why? It was the public dissent during the Covid years and the picking of holes in the government's response by some individuals online in the various social media outlets. The government – a supposedly Liberal government, to be abundantly clear – apparently decided it needed further and better tools to silence such online dissidents and sceptics.

outcome was (depending on how charitable you are) the judges' desire to defer to the political branches in a time of widespread moral panic or cowardice. See Allan Myers, 'The Thirteenth Sir Harry Gibbs Memorial Oration' delivered 26 August 2023, Melbourne at the 33rd Conference of The Samuel Griffith Society. Accessed at: <https://mcusercontent.com/a5aba540fd03e717a60317a42/files/26b8a9a5-18f1-6ba9-0b08-44b5c1beee5f/Allan_Myers_Sir_Harry_Gibbs_Oration.pdf>.

[20] See Paul D Thaker, 'Dr. Jay Bhattacharya Reveals Stanford University's Attempts To Derail COVID Studies' *The Disinformation Chronicle,* Online, 12 September 2023. Accessed at: <https://disinformationchronicle.substack.com/p/dr-jay-bhattacharya-reveals-stanford>.

> *The legislation will provide the Australian Communications and Media Authority (ACMA) with new regulatory powers to hold big tech companies to account for harmful content on their platforms.*[21]

Leave aside that one of the world's top epidemiologists, Professor Jay Bhattacharya of Stanford University said that 'governments have been the most important and most damaging source of covid misinformation during the pandemic'.[22] These online sceptics doubted and critiqued such widespread governmental and public health officials' claims as: that masks work ; that the new Covid mRNA vaccines stop transmission and/or infection; that lockdowns will not cause huge collateral damage; that the lab leak theory was completely false and perhaps motivated by racism; and that these Covid vaccines do not cause heart injuries and deaths. Although rejected at the time by many as baseless, some of these critiques have since been supported by much evidence. [23]

It was the desire to suppress a good deal of what the then Liberal government Cabinet considered to be 'misinformation' that motivated the Morrison government to push for these significant speech-limiting and speech-infringing new laws. The bitter irony is that much of what the online dissidents claimed has proven to be true and that it was the government itself that was trading in misinformation. For a right-of-centre conservative like me – to say nothing of anyone who has the slightest passing knowledge of John Stuart Mill's famous arguments in favour of free speech[24] – this is a staggering indictment of a political party that sells itself as caring about free speech.

Now let me give you the even more disagreeable news on the free speech front. The Labor Albanese government has proposed a far worse and more speech-inhibiting

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[21] Paul Fletcher, 'New Disinformation Laws', Australian Government, Media Release, 21 March 2022, Canberra.

[22] Jay Bhattacharya (Twitter, 22 December 2022, 6:19 pm). Accessed at: <http://twitter.com/DrJBhattacharya/status/1605840394482130944>. NB Jay Bhattacharaya co-authored *The Great Barrington Declaration* with Professor Sunetra Gupta of Oxford and Professor Martin Kulldorff then of Harvard. These authors argued for a targeted, Swedish-type response, and all three of whom thereafter faced attempts to censor their views, limit the reach of their professional opinions and much personal abuse.

[23] For example, the Cochrane Review finds no evidence for the claim that masks make any difference. See, for instance, Tom Jefferson et al, 'Physical Interventions to Interrupt or Reduce the Spread of Respiratory Viruses', *Cochrane Database of Systematic Reviews*, 30 January 2023. See also Michael R Gordon and Warren P Strobel, 'DOE Says Lab Leak is Likely Origin of Covid-19',*Wall Street Journal*, 27 February 2023; Matt Ridley and Alina Chan, 'The Covid Lab-Leak Deception',*Wall Street Journal*, 27 July 2023.

[24] Mill's best-known work in this area is *On Liberty*.

iteration of this earlier Paul Fletcher flirtation with inroads into the scope for free speech, also by nodding in the general direction of the justificatory labels 'disinformation' and 'misinformation'. This new draft *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023* ('the ACMA Bill) currently before Parliament in Canberra is very bad indeed for any of us who value free speech. I will provide an overview of the main features of the Bill, then say a few things about 'misinformation' claims generally, and then conclude.

Firstly, this ACMA Bill explicitly excludes content produced by government from falling within the ambit of misinformation and disinformation.[25] It also excludes content produced by accredited educational institutions and the legacy press.[26] In other words, the great and the good are to be wholly exempted from the charge of producing misinformation and disinformation. This follows from the ACMA Bill's definition of misinformation and disinformation which implicitly presupposes that these sins can attach only to views that contradict the official position. Yet the exemption of such sources from the reach and ambit of charges of being misinformation or disinformation is nowhere justified within the ACMA Bill. And recall, traditional notions of misinformation and disinformation encompass all information deemed to be false or misleading, either unknowingly so (misinformation) or knowingly (disinformation). Traditionally, there is no source-based exception or dispensation as regards 'establishment' sources of information – the ones that got so much factually wrong during Covid.

Then there is the problem of premising the ACMA Bill on the identification of truth, as though social media companies or the courts or any third-party fact-checkers will be able to identify what the true position is in any highly debated or highly moralised case. The ACMA Bill also pretends not to be directed at individuals but this is artifice. ACMA will be able to force social media companies to develop a code of practice, or failing one being deemed effective then enforce an industry standard. While the ACMA Bill itself does not allow ACMA to decide what information is true, misleading or deceptive, it does allow ACMA the power to create these enforceable codes/standards that will do just that. The result will be that an individual who posts content online, accessible

[25] Exposure Draft: Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth), sch 1, definition of 'excluded content for misinformation purposes' ('ACMA Bill').

[26] ACMA Bill, sch 1.

to more than one person, would need to comply with the industry standard/code of practice that ACMA implements under the Bill. This makes the individual open to being silenced and the digital media site subject to potentially severe civil and criminal penalties if the codes/standards are breached. Freedom of speech should be made of sterner stuff! This is regulation of speech by the Executive. And pawning off the calls to some supposedly neutral 'fact-checker' body does not alleviate the awfulness. Fact-checking bodies are not able to give disembodied determinations of what is 'false, misleading or deceptive'[27] (none of which is defined in the ACMA Bill) any more than anyone else. As J.S. Mill argued long ago, it is the open competition of competing views that best gets at the truth.

The problems of deeming some body to be authoritative deciders of these matters are myriad. Look at the RMIT fact-checkers as regards the Voice.[28] Look at the Facebook concession in the context of litigation where its officials conceded that fact-checking was ultimately just a question of opinions.[29] And why should any of us accept the presumption undergirding this ACMA Bill that online censorship (indirect, yes, but that is what it is) of certain information will reduce real world harm? It is more likely to drive dissenting views underground and encourage the use of loopholes, evasions and work-arounds.

I could go on and point to the looseness and amorphousness of the definition of 'serious harm' in the ACMA Bill, itself a big problem.[30] But by now we can see that this ACMA Bill is a huge over-reach; a mighty inroad into free speech; in brief a disgrace.[31] At the heart of the problem is the fact that the very concepts of 'misinformation' or 'disinformation' as applied even to claims that are purely factual become exercises involving contentious, politicised, and uncertain judgement calls. We saw this again

[27] ACMA Bill, s 7(1)(a).

[28] See Cassandra Morgan, 'Meta Suspends Fact-Checker Ahead of Voice Referendum', *National Indigenous Times*, 30 August 2023.

[29] Post Editorial Board, 'Facebook admits the truth: Fact checks are really just (lefty) opinion', *New York Post,* Online, 14 December 2021. Accessed at: <https://nypost.com/2021/12/14/facebook-admits-the-truth-fact-checks-are-really-just-lefty-opinion/>.

[30] ACMA Bill, s 7(3) of Schedule 1.

[31] And it is being introduced at the same time as a top US federal court, the Fifth Circuit, has just upheld much of a lower court's findings that the Biden administration violated the free speech rights of Americans with its Covid censorship demands (largely in the name of 'misinformation' and 'disinformation') on Big Tech. See *State of Missouri v Biden* No.23-304445 (5th Cir. 2023).

and again during the pandemic. When we move away from claims that are overwhelmingly on the plane of facts, of the copula 'is', and into claims involving value judgements and the copula 'ought' the problems multiply. At this point anyone claiming to be the voice of some disembodied, balanced, disinterested God who can pick between information and misinformation is deluding him or herself. Just look at the many competing assertions surrounding the Voice. For all the claims and assertions from a Robert French or a Brett Walker on one side there is an inconsistent set of claims from an Ian Callinan and a David Jackson on the other.[32] That is one retired High Court Justice and one top silk on each side. Fact-checking is just opinion-giving travelling under the guise of political expediency. Mill was correct. The remedy for speech seen to be misleading is not suppression of speech but more speech on the other side, telling us why you think the first speech was wrong-headed and likely to deceive.

This ACMA Bill, in my view, is a very serious threat to free speech in this country. It is being offered up to Australians just as a top US Court, the 5th Circuit, has held the Biden administration's collusion with Big Tech to suppress Covid related dissenting views was a breach of the First Amendment.[33] This ACMA Bill needs to be defeated in the court of public opinion and then in Parliament. And to end on a more Pollyanna note, I think it will be. Perhaps not immediately. But it is a sufficiently egregious Bill that the Liberal party might re-discover some core principles and run next election explicitly to repeal it should the Albanese government force it through. You cannot end on a more optimistic note than that.

[32] See e.g. Robert French and Geoffrey Lindell, 'The Voice – A Step Forward for Australian Nationhood'. *Australian Law Journal* , 97(6), 2023, p. 1; Bret Walker SC as quoted in Nicole Hegerty, 'Legal experts offer Voice to Parliament backing as referendum looms' *ABC Online*, 14 April 2023; The Hon Ian Callinan AC, Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum Submission 71, Joint Select Committee on the Aboriginal Torres Strait Islander Voice Referendum, 20 April 2023; David Jackson AM KC, Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum Submission 31, Joint Select Committee on the Aboriginal Torres Strait Islander Voice Referendum, 20 April 2023.

[33] *State of Missouri v Biden* No.23-304445 (5th Cir. 2023).

Articles

Mount Erebus to Ann Street: Forty years of judicial supervision of ad hoc and permanent commissions of inquiry and the intersection with parliamentary privilege and doctrines of mutual respect

Neil J Laurie

The Clerk of the Queensland Parliament

Abstract: This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v. Carne*,[1] and considers the doctrines of mutual respect and parliamentary privilege.

INTRODUCTION

On my library shelf, I am lucky to have a copy of book titled *Royal Commissions and Boards of Inquiry* written by Leonard Hallett and published in 1982.[2] This was the first comprehensive Australian text outlining the legal and procedural issues associated with commissions of inquiry.

Of course, Hallett's work is now showing its age. The publication of Hallett's work was coinciding with the rapid growth of the field of administrative law in Australia and the

[1] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[2] Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry*. Sydney: Law Book Company, 1982.

development of the principles and increasing application of procedural fairness (natural justice) to administrative decisions in Australia. The work pre-dates the rise of permanent, independent commissions of inquiry in Australia.

This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v Carne*,[3] and considers the doctrines of mutual respect and parliamentary privilege.

ROYAL COMMISSIONS

Hallett notes that Royal Commissions are one of the oldest institutions of government, generally reserved for particularly important inquiries.[4] They are tools of the executive branch of government, but have powers normally only associated with the judicial branch of government.[5] They do not decide issues, make decisions or affect the legal status of persons as do courts, but in conducting some inquiries they act in a manner similar to courts.[6] It is the exclusively 'informative function' that gives them their special character. The primary function of a Royal Commission is to inform government.[7] Commissions make reports and do not make determinations which alter legal relationships.[8] Investigatory Royal Commissions are concerned about finding and exposing the facts, rather than settling disputes between parties.[9]

[3] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[4] Hallett, *Royal Commissions and Boards of Inquiry*, pp.16-18.

[5] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-23.

[6] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[7] Hallett, Royal Commissions and Boards of Inquiry, pp.8-16.

[8] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[9] Hallett, *Royal Commissions and Boards of Inquiry*, pp. 12-14.

THE RISE OF THE PERMANENT COMMISSION OF INQUIRY

Hong Kong's Independent Commission of Inquiry (ICAC), established in 1974 was the model for permanent, independent commissions. The trend to establish such bodies started in Australia in the late 1980s, and two examples will suffice for current purposes. Community concern about integrity in the New South Wales (NSW) public sector and the exposure of corruption among government ministers, within the judiciary and at senior levels of the police force led to the creation of the NSW ICAC in 1988,[10] which began operating in March 1989.[11] Revelations of police misconduct, ministerial misconduct and maladministration in government by the Fitzgerald Inquiry in Queensland led to its report recommending the creation of Queensland's Criminal Justice Commission (CJC) and that body came into existence on 31 October 1989.[12]

Prasser, writing in 2021, identifies that every State and Territory in Australia has a permanent anti-corruption body but notes that there is considerable variance between the form and functions of those bodies.[13]

The reasons for Permanent Commissions of Inquiry

The reasons for Permanent Commissions of Inquiry focussed on anti-corruption (and sometimes organised crime) largely lays in the failure of our system of government to adequately deal with misconduct or corruption.

History demonstrates that they have almost always arisen out of revelations of misconduct and corruption that existed and flourished because of the inadequacies of our system of government. They are established to address what former Australian

[10] Independent Commission Against Corruption, New South Wales, 'History' Accessed 20 September 2023, at: <https://www.icac.nsw.gov.au/about-thenswicac/overview/history>.

[11] *Independent Commission Against Corruption Act 1988* (NSW).

[12] *Criminal Justice Act 1989* (Qld).

[13] Scott Prasser, *Royal Commissions and Public Inquiries in Australia.* 2nd Edition. LexisNexis Australia 2021.

Chief Justice, Sir Harry Gibbs, has been attributed in describing as: 'the symptoms of a … general illness of the body politic'[14]

In my submission, they have been established to address the deficiencies of the Westminster system of government inherent in small, largely government dominated parliaments in Australia with strong party discipline (which I call the 'Westminster paradox') and which leads to inadequate oversight of government.

Of course, permanent commissions of inquiry bring about issues that are not inherent in ad hoc commissions. These issues include the problem of incumbency and the development of their own culture,[15] clashes with parliamentary oversight bodies and being increasingly held by courts to be acting outside of jurisdiction or their statute.

The architect of the CJC, Tony Fitzgerald QC, recently sat as a commissioner reviewing the Crime and Corruption Commission (CCC), the CJC's successor. The report of which he co-authored made it clear that a body such as the CCC still has relevance today:

> *While the form and function of the Crime and Corruption Commission (CCC) have changed over the past three decades, the organisation still has the central role in Queensland's integrity landscape envisaged in the 1989 Fitzgerald Report and remains fundamental to combating major crime and corruption in the state.*
>
> *For that reason, the CCC must remain an independent, fair and impartial body trusted by the public to achieve its important statutory functions.*[16]

The report further stated:

> *A principal recommendation of the 1989 Fitzgerald Report was the creation of a body, outside the QPS and independent of it, to oversee and undertake*

[14] Sir Harry Gibbs as cited in Colleen Lewis, Janet Ransley and Ross Homel, 'The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond' Australian Academic Press, 2010, p. 1.

[15] Prasser, *Royal Commissions and Public Inquiries in Australia*, pp.85-97.

[16] Gerald Edward (Tony) Fitzgerald and Alan Wilson, *Report: Commission of Inquiry relating to the Crime and Corruption Commission*, Queensland, 9 August 2022, p.6.

an array of activities focused upon crime and official misconduct — a permanent embodiment of elements of the work of the Fitzgerald Inquiry.

That Inquiry involved a long and deep examination of what a former Australian Chief Justice, Sir Harry Gibbs, described as: 'the symptoms of a … general illness of the body politic'. Its final report sought, as Sir Harry also remarked: '… not merely to reform the system of criminal justice and to combat corruption, but also to improve the standards of public administration, and to render the workings of Parliament more democratic.[17]

THE RISE OF ADMINISTRATIVE LAW

Hallett's 1982 work of 363 pages, devoted just 15 pages to the topic of procedural fairness.[18] Hallett identified two rules of natural justice: the 'hearing rule' – a person must be given a right (opportunity) to be heard before an adverse finding; and the impartial rule – those who conduct the hearing must be above any reasonable suspicion of bias.[19] However, Hallett also noted previous cases where the strict view of commissions not making decisions or affecting rights led to the view that judicial remedies were not available in respect of Commissions of Inquiry.[20]

Mahon's case

A case from New Zealand was set to change things for Royal Commissions. On 28 November 1979, Air New Zealand Flight 901 crashed into Mount Erebus, a volcano of 12,500 feet on Ross Island, Antarctica. All 237 passengers and 20 crew on board were killed. An investigation by the Chief Inspector of Air Accidents found that the probable cause of the accident was pilot error. Even prior to the Chief Inspectors report being

[17] *Commission of Inquiry relating to the Crime and Corruption Commission*, 9 August 2022, p.6.

[18] Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-183.

[19] Hallett, *Royal Commissions and Boards of Inquiry*, pp.179-193.

[20] *Testro v Tait* (1963) 109 CLC 353; Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-190.

delivered, public dissatisfaction led to the establishment of a Royal Commission of Inquiry into the crash, presided over by Justice Peter Mahon QC. Justice Mahon's report exonerated the captain and crew, laid blame at the feet of Air New Zealand which he accused of presenting to his inquiry 'a litany of lies' and against whom he made an order of costs.[21]

Two years of litigation followed, with the New Zealand Court of Appeal,[22] finding that the judge, in making the order for costs, had acted in breach of the rules of natural justice. The Judicial Committee of the Privy Council in a landmark decision (*Mahon v Air New Zealand*),[23] upheld the Court of Appeal's finding and established that the rules of natural justice (procedural fairness) applied to Commissions of Inquiry. These rules were expressed to include: (a) that findings are based upon material that logically tended to show the existence of facts consistent with those findings; (b) reasons are not self-contradictory; (c) that natural justice required a commission to ensure that any person that might be affected adversely by a finding should know of the risk of such a finding being made, and be given an opportunity to adduce additional material that might deter the commission from making that finding.[24]

Kioa v West

Shortly after the *Mahon* case, In December 1985 the High Court handed down the landmark decision in *Kioa v West*,[25] regarding the extent and requirements of natural justice and procedural fairness in administrative decision making. That decision led to a rapid growth of administrative law in Australia because it established that all administrative decisions which affect rights, interests and legitimate expectations carry with them a duty to act in accordance with procedural fairness. According to Justice Mason in that case:

[21] New Zealand History, 'Erebus disaster', 1 August 2023, Accessed at: <https://nzhistory.govt.nz/culture/erebus-disaster>.

[22] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* (No 2) [1981] 1 NZLR 618.

[23] [1984] 3 All ER 201.

[24] *Mahon v. Air New Zealand* [1984] AC 808, 821.

[25] (1985) 159 CLR 550.

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[26]

APPLICATION OF PRINCIPLES TO ROYAL COMMISSIONS

We must now turn our attention to the application of the above principles of procedural fairness to Royal Commissions. In *Carruthers v Connolly*[27] there was overwhelming evidence[28] of ostensible bias against Commissioner Connolly with respect to matters that his Commission had to consider. Justice Thomas, in dealing with the effects of an inquiry upon people, stated:

> *It is true that the Commissioners' Report will of itself have no direct legal effect upon any person. However the performance of a recommendatory function has not been regarded by the courts as activity of so mean a character that it should not be the subject of judicial review. Indeed, the functions that have been entrusted to this particular Commission are of considerable importance and the investigation and report of the Commission is capable of having extensive consequences both of a public nature and upon reputations.*[29]

The court made a declaration that the Commissioners were disqualified from further proceeding with the subject Inquiry and an injunction was granted restraining them from proceeding.

In *Keating v Morris & Ors; Leck v Morris & Ors*[30] Moynihan J upheld the applicants' claim that the Bundaberg Hospital Inquiry was tainted by the apprehension of bias by the Commissioner. The claim was founded upon the conduct of the Commissioner in

[26] (1985) 159 CLR 550, 585.

[27] [1998] 1 Qld R 339; [1997] QSC 132.

[28] [1997] QSC 132, [57] per Thomas J.

[29] [1997] QSC 132, [66].

[30] [2005] QSC 243.

calling and interrogating the applicants. His Honour held that 'it is now well established that the application of the rules to investigative bodies such as the Inquiry differs from their application to litigation'.[31] His Honour went on to say that it was of fundamental importance 'that parties and the general public have full confidence in the fairness of decisions and the impartiality of decision makers to whom the rules of procedural fairness apply.'[32] According to His Honour,

> *Condemnation without a proper hearing or by an apparently biased tribunal is unacceptable; exoneration by such a tribunal may be worthless.*[33]

The issue according to Moynihan J is 'not whether the decision maker is in fact biased but whether a fair minded observer might reasonably apprehend that the decision maker might not bring an impartial or unprejudiced mind to bear on the task'.[34] His Honour was at pains to stress that an inquiry's inquisitorial and reporting function allowed commissioners to take a 'more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions than applies in litigation' but it did not dilute or diminish the 'expectation that an impartial and unprejudiced mind will be applied'.[35]

Justice Moynihan was 'satisfied that each of the applicants has made out a case of ostensible bias in respect of matters arising under the Inquiry's terms of reference. The circumstances established by the accumulated weight of evidence would give rise, in the mind of a fair minded and informed member of the community, to a reasonable apprehension of lack of impartiality on the Commissioner's part in dealing with issues relating to each of the applicants.'[36]

[31] [2005] QSC 243, [33] per Moynihan J.

[32] [2005] QSC 243, [36] per Moynihan J.

[33] [2005] QSC 243, [36] per Moynihan J.

[34][2005] QSC 243, [36] per Moynihan J.

[35] [2005] QSC 243, [46].

[36] [2005] QSC 243, [158]-[160].

APPLICATION OF PRINCIPLES TO PERMANENT COMMISSIONS

In *R v Criminal Justice Commission; ex parte Ainsworth & Anor*[37] the CJC had prepared a report on the introduction of poker machines for a cabinet sub-committee.[38] Later, this was presented as a report to Parliament.[39] The report was critical of the Ainsworth group of companies. The applicants were not provided a right to be heard. The report was written by a journalist engaged by the CJC and was based on secondary evidence. The applicants sought orders of Mandamus and Certiorari.

The Full Court of the Supreme Court of Queensland (McPherson, Lee and Mackenzie JJ) held (i) that the course adopted by the Commission was not one which attracted a duty of fairness under the Act (ii) there was no duty of fairness under the general law because the report did not affect any right, interest or legitimate expectation of the appellants (iii) even if there was a duty of fairness, the case was not appropriate for the grant of relief, whether by way of certiorari, mandamus or, as was sought in the course of argument, by way of declaration.

This case also raised the issue of parliamentary privilege. The fact that the report had already been tabled was particularly troubling for McPherson J:

> *The Report is presumably now in the possession of the Speaker, or perhaps it is of the Clerk of Parliament. For the Court to order a writ to issue against either the Speaker or the Clerk of Parliament would be accounted a gross breach of privilege. To attempt to enforce it by apprehending either of those individuals so as to bring them before the Court to face charges of contempt would be an act without a parallel since Charles I tried to arrest the Five Members in 1642. The constitutional distribution of power in a democracy proceeds on the footing of mutual respect by legislature and judiciary for the integrity of their respective functions. We should be overstepping the*

[37] *Queen v. The Criminal Justice Commission Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported).

[38] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27 per McPherson J.

[39] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.6 per McPherson J.

> *proper limits of our responsibilities by a wide margin if we were to order a writ of certiorari to issue to bring up a record that now forms part of the proceedings of Parliament.*[40]

The High Court held, on appeal, that the CJC in 'compiling its report' on Poker Machines in Queensland had not afforded the appellant procedural fairness and made a declaration to this effect.[41] Chief Justice Mason, Dawson, Toohey and Gaudron JJ rejected the notion that a duty of natural justice did not arise:

> *The nature and purposes of the Commission and its organizational units are such that it is unthinkable that it might, in any circumstance whatsoever and whether discharging its functions or responsibilities or merely taking some step in the course of or in relation to them, proceed in a way that is partial or contrary to the public interest.*[42]

Later the joint judgement stated:

> *… a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save to the extent of clear contrary provision. That is because it is improbable that, though it did not say so, the legislature would intend that a body of that kind should act unfairly.*[43]

At this point it is worth noting that the report in *Ainsworth* was prepared for a cabinet sub-committee and preceded the *Parliament of Queensland Act 2001* (Qld) provisions that will be discussed in more detail below.

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[40] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27, per McPherson J).

[41] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[42] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [18].

[43] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [21].

Narrow interpretation of statutes

Although not a doctrine stated by any court, an examination of cases involving challenges to the jurisdiction and reports of permanent commissions reveals a tendency for courts to narrowly construe their statutes. For example, in *Balog v ICAC*[44] the High Court found that the ICAC was:

> *…primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour …*[45]

The court construed the statute such that that the only finding which the ICAC may properly make in a report concerning criminal liability is whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.[46]

In another example, in *Greiner v ICAC (No 2)*[47] the majority of the NSW Court of Appeal (Gleeson CJ and Priestley JA), held that the determination by the ICAC in its report, that Greiner had engaged in corrupt conduct within the meaning of the ICAC Act, was made without or in excess of jurisdiction.

More recently in *Independent Commission Against Corruption v Cunneen*[48] the majority of the High Court restricted the jurisdiction of the ICAC to investigate the conduct of third parties in connection with the discharge of official functions by public officials. Justice Gageler (in dissent) noted that the interpretation adopted by the majority would mean that third party conduct such as endemic collusion among tenderers in

[44] (1990) 169 CLR 625.

[45](1990) 169 CLR 625, 636.

[46] (1990) 169 CLR 625, 635.

[47] (1992) 28 NSWLR 125.

[48] [2015] HCA 14.

tendering for government contracts, or serious and systemic fraud in the making of applications for licences, permits or clearances issued under NSW statutes, could not be investigated by the ICAC.[49]

THE INTERSECTION WITH PARLIAMENTARY PRIVILEGE *(CRIME AND CORRUPTION COMMISSION V CARNE)*

As can be seen from the above, it is not uncommon for the activities of ad hoc and permanent commissions of inquiry to be the subject of judicial review. However, the series of decisions that culminated in the very recent High Court decision of *Crime and Corruption Commission v Carne*[50] requires special attention as they deal with the intersection of judicial review of a permanent commission of inquiry's report provided to its parliamentary oversight committee, thereby potentially raising issues of parliamentary privilege.

Statutory Background

The Crime and Corruption Commission (CCC) and its oversight committee, the Parliamentary Crime and Corruption Committee (PCCC) are established by the *Crime and Corruption Act 2001* (Qld) (CCC Act). Section 64(1) of the CC Act provides under the heading 'Commission's reports—general' that the 'commission may report in performing its functions'. Section 69 of the CC Act provides that the section 'applies to the following commission reports — (a) a report on a public hearing; (b) a research report or other report that the parliamentary committee directs be given to the Speaker.' The section goes on to indicate that s69 reports are provided to the Chair of the PCCC, the Speaker and the Minister and then tabled in the Assembly.

Section 8 of the *Parliament of Queensland Act 2001* (POQ Act) provides that 'the freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or place out of the Assembly'. The section essentially repeats and reinforces the historical protection of Article 9 of the *Bill of Rights 1688* (UK).

[49] [2015] HCA 14, [92].

[50] [2023] HCA 28.

Section 9(1) and (2) of the POQ Act provides a statutory definition of the term 'proceedings in parliament'.

Section 55 of the POQ Act provides for the issuing of certificates by an authorised person (including a committee chairperson), to evidence various matters, including that documents were prepared, presented to or made or published under the authority of the Assembly, a committee.

Factual background

Peter Carne was the Public Trustee of Queensland (located in Ann Street Brisbane) from March 2009 until March 2014 and again from March 2016 until his resignation effective from 31 July 2021. By email on 17 June 2019, a police officer attached to the CCC notified Carne of its investigation of a complaint and requested an opportunity to conduct: (i) a formal disciplinary interview to allow the appellant to hear the allegations against him and to provide comment; and (ii) a separate criminal interview concerning matters related to the use of resources of the Public Trust Office.[51]

Between June 2019 and January 2020, the Commission and Carne's solicitors exchanged correspondence about the subject matter of the investigation, and the process for proposed interviews. Meanwhile, the CCC investigation continued. On 27 November 2019, Carne was served with a show cause letter under the hand of the Attorney-General. On 28 January 2020, the Carne was examined by a psychiatrist. On 13 February 2020, Carne's solicitors advised the CCC that the appellant was unable to participate in any interview at that time because of the state of his mental health. Carne did not participate in an interview with the CCC during the period from June 2019 to January 2020 in relation to the CCC's investigation.

On 19 June 2020, the PCCC held a private meeting at which the CCC was giving evidence. In response to an enquiry from the Chairperson of the PCCC, the Chairperson of the CCC advised that the CCC had not made a final decision on whether to prepare a report in relation to the Carne investigation matter, but he thought the CCC should

[51] This summary of facts is taken from the dissenting judgment in *Carne v Crime and Corruption Commission* [2022] QCA 141, [84], [89]-[90] per Freeburn J, except where otherwise noted.

do so 'because it is high profile and it has been in the media'. He said that after the show cause process had taken its course, the CCC 'probably should articulate some of the concerns that [it] had'.[52]

On 31 July 2020, Carne resigned from the position of Public Trustee, bringing the show cause proceedings to an end. On 11 September 2020, at a meeting of the PCCC, the Chairperson of the PCCC asked whether the CCC would be seeking a direction under s 69 of the CC Act for the tabling of the report, to which the Chairperson of the CCC responded in the affirmative. He added that he did not see 'why we should not publicly report in a matter that has so much public interest and is such an important matter in terms of workplace culture, corruption risks and so forth'.[53]

Sometime prior to 6 October 2020, the CCC prepared a report on certain allegations against Carne (the report). On 6 October 2020, the CCC forwarded the report to the PCCC and requested that, under s 69(1)(b) of the CC Act, the PCCC direct that the report be given to the Speaker of the Queensland Parliament for tabling in the Legislative Assembly.

Carne applied to the Supreme Court of Queensland for: (a) a declaration that the document styled 'An investigation into allegations relating to the former Public Trustee of Queensland: Investigation Report' is not a report for the purposes of s 69(1); (b) a mandatory injunction, pursuant to s 332 of the CC Act that the CCC retract its resolution of 6 October 2020 to approve the seeking of a direction from the PCCC to enable tabling of the report and advise the PCCC of the same.[54]

Trial

At trial Davis J dismissed the application by Carne.[55] Justice Davis found that the preparation of the report was authorised by s 64 of the CC Act and was protected by parliamentary privilege. Justice Davis considered the scheme set up by the CC Act. According to Davis J, the CCC has statutory obligations to achieve the purposes of the

[52] *Crime and Corruption Commission v Carne* [2023] HCA 28, [8].

[53] *Crime and Corruption Commission v Carne* [2023] HCA 28, [11].

[54] *Carne v Crime and Corruption Commission* [2021] QSC 228.

[55] *Carne v Crime and Corruption Commission* [2021] QSC 228.

Act, which includes to reduce the incidence of corruption and improve the integrity of the public sector. The CC Act also provides that powers of the CCC are to be exercised in a way which promotes public confidence in government. The CCC fulfils its functions by various means, including conducting investigations and reporting its findings.[56]

Davis J found that a report prepared by the CCC as a result of an investigation pursuant to the powers vested in it by the CC Act, where it is intended by the CCC to supply the report to the PCCC, is a document prepared for 'presenting or submitting a document to the Assembly' and 'for the purposes of or incidental to, transacting business of the [PCCC]'.[57] Davis J found that there was 'no doubt' that the CCC, in preparing the report and delivering it to the PCCC, was acting under the authorisation in s 64 of the CC Act.[58] Further, the PCCC had accepted the report for the purpose of transacting the business of the PCCC.[59]

In terms of evidence, Davis J relied on the certificate of the Chairperson of the PCCC under s 55 of the POQ Act that stated that the report was a document prepared for the purposes of, or incidental to, transacting business of the PCCC. Davis J noted that the certificate is not absolute proof of the matters certified. It is only evidence of those matters. But in Davis J's view the other evidence supported rather than contradicted the certificate, as did the provisions of the CC Act.[60]

Davis J also noted that a finding that the report is not a report for the purposes of s 69 did not necessarily mean that privilege did not attach to the report. According to Davis J it was, as a matter of fact, prepared with the intention of delivery to the PCCC and was in fact delivered to the PCCC. As it was prepared for the purposes of, or incidental to, transacting business of the PCCC it would likely still be protected by the POQ Act.[61]

[56] *Carne v Crime and Corruption Commission* [2021] QSC 228, [117].

[57] *Carne v Crime and Corruption Commission* [2021] QSC 228, [120].

[58] *Carne v Crime and Corruption Commission* [2021] QSC 228, [121].

[59] *Carne v Crime and Corruption Commission* [2021] QSC 228, [122].

[60] *Carne v Crime and Corruption Commission* [2021] QSC 228, [123]-[129].

[61] *Carne v Crime and Corruption Commission* [2021] QSC 228, [141].

Court of Appeal

On appeal to the Queensland Court of Appeal, the majority of the court (Mullens and McMurdo JJ)[62] found that, having investigated a complaint of corruption, the task of the CCC was to decide whether proceedings or disciplinary action should be considered. If the CCC decides that proceedings should be considered, it may report, not publicly, but to a prosecuting authority, a head of jurisdiction or the chief executive officer of the relevant unit of public administration.[63] Otherwise, there is no provision under the CC Act by which it is to report.[64]

Having found the CCC was not empowered or required to make the report, the majority found that the report was not a report to which s 69 applies.[65] The majority then held that parliamentary privilege could not be conferred upon a document made and delivered to the PCCC in purported, but not actual performance of the CCC's functions. In the majority's view, the preparation and delivery of the report, without the operation of s 69, were not 'acts done in transacting the business of the Assembly or its committee'.[66] At this stage it is noted that the majority only deals with the CCC Act, and does not deal with the POQ Act, which does not require that a document prepared or submitted be not tainted by illegality or unlawfulness or alternative is made pursuant to some lawful authority. (Such a limitation would affect the Parliament's ability to fulfil its functions, including that of oversight).

Justice Freeburn dissented and held that the CCC had the statutory power to prepare the report and that the report was subject to parliamentary privilege. His reasoning was similar to the trial Judge. His Honour's recitation of facts is the most comprehensive of the five separate judgements at the three levels. On the interpretation of s 64 of the CCC Act, His Honour stated:

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[62] *Carne v Crime and Corruption Commission* [2022] QCA 141.

[63] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[64] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[65] *Carne v Crime and Corruption Commission* [2022] QCA 141, [68-69].

[66] *Carne v Crime and Corruption Commission* [2022] QCA 141, [80-81].

> *... to interpret s 64(1) as only permitting reports whilst there remains a potential for criminal charges, or for disciplinary action, would be to read down the section too far.*[67]

Justice Freeburn agreed with the trial judge that the report here was brought into existence for the purpose of being submitted to the PCCC and was actually submitted to the PCCC with a request that the PCCC direct that the report be given to the Speaker.[68] Justice Freeburn also had difficulties with the relief sought. According to His Honour the 'core of the relief sought by the appellant is a desire to stop the PCCC from directing that the report be given to the Speaker'.[69] His Honour stated that in his view 'orders to that effect would be contrary to the principle that parliamentary proceedings are immune from outside examination by other organs of the state and would be to trespass inadvertently into the legislature's province'.[70]

Issues before the High Court

The first ground of appeal was essentially the privilege issue. The CCC argued that the Court of Appeal was precluded from making the declaration by the prohibition in s 8(1) of the POQ Act on 'proceedings' in the Legislative Assembly being 'impeached or questioned' in any court. The CCC argued that its preparation and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act. The second ground of appeal went to the construction of the CC Act. The CCC argued that the conclusion of the Court of Appeal, that the report is not a report for the purposes of s 69(1) of the CC Act, was erroneous.

Decision of the High Court

There were two joint judgements, both dismissing the appeal. The majority of the plurality (Kiefel CJ, Gageler and Jagot JJ.) found the CCC's argument that its preparation

[67] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

[68] *Carne v Crime and Corruption Commission* [2022] QCA 141, [176-183].

[69] *Carne v Crime and Corruption Commission* [2022] QCA 141, [199].

[70] *Carne v Crime and Corruption Commission* [2022] QCA 141, [200].

and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act must be rejected on the facts. In the view of the joint judgement, s 9 of the POQ Act was not satisfied because the report was not prepared for, or presented to, the committee for purposes of transacting business of the committee. Rather, it was prepared by the CCC and presented to the PCCC for the CCC's own purposes.[71] In respect of the second ground of appeal the majority of the plurality held that the report is not a report to which s 69(1) of the CC Act applies. Further, there is no provision of the CC Act which authorises a report of this nature.[72]

The minority of the plurality (Gordon and Edelman JJ.) found that the Court of Appeal was correct to find that the October draft was not a report for the purposes of s 69(1) of the CCC Act. In the view of the minority of the plurality, parliamentary privilege does not present any obstacle to the declaration made by the Court of Appeal because, on the facts, no question of parliamentary privilege arose; no act was done in the course of, or for the purposes of or incidental to, transacting business of the PCCC to which parliamentary privilege could attach.[73] In particular, the October draft report was not prepared 'for the purposes of or incidental to, transacting business' of the PCCC, but rather for the purposes of the CCC.[74]

Observations on Carne

As to the second ground, which related to whether the report was one contemplated by s 69 of the CC Act, the High Court's interpretation of the CC Act was not surprising given the increasing tendency of the courts to read statutes narrowly regarding the jurisdiction and powers of permanent commissions of inquiry.[75] The CC Act is an overly complex piece of legislation, one result of the CCC's 'one stop shop' model. The interpretation by the CCC over many years (26 years) was not unreasonable and

[71] *Crime and Corruption Commission v Carne* [2023] HCA 28, [23].

[72] *Crime and Corruption Commission v Carne* [2023] HCA 28, [26-27].

[73] *Crime and Corruption Commission v Carne* [2023] HCA 28, [78].

[74] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31] and [78].

[75] See for example: *Greiner v ICAC No 2* [1992] 28 NSWLR 125; *Balog v ICAC* (1990) 169 CLR 625; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

supported through the litigation by two justices of the Supreme Court. However, the High Court's interpretation was equally open and reasonable as a matter of statutory construction.

The High Court's decision on the first ground and the application of the provisions of the POQ Act is much more difficult to reconcile. Both judgements avoided the issue of parliamentary privilege by findings 'on the facts' that the issue of privilege did not arise, because the relevant acts done did not satisfy the requirements of s 9 POQ Act. That is, that the CCC's report was not prepared and submitted 'for the purposes of the committee'.[76] The fact a document was prepared for a committee's consideration and provided to the committee was itself insufficient to trigger the statute.

In argument before the High Court, Bret Walker SC, counsel for the Speaker of the Legislative Assembly of Queensland put that the motivations or purpose of both the person who produces the document and the person who receives it are irrelevant to the question of whether a document is prepared for the purposes of the Assembly or a committee.[77] On behalf of the Speaker, Walker submitted that it is the functional connection, objectively considered, of the document with the Assembly or committee which must be considered.[78] The majority of the plurality explicitly accepted this proposition and then stated that 'the mere preparation' of a document for the Assembly or a committee, or presentation of a document to the Assembly or committee, by a third party will not suffice if there is no other connection to the work of the Assembly or a committee at the time the document was prepared.[79]

Three points need to be made about this issue. First, it is hard to escape the conclusion that the court in identifying various statements made by the CCC in the material before it, was in fact identifying the motivations for the report and ascribing those motives to the CCC.

[76] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31].

[77] *Crime and Corruption Commission v Carne* [2023] HCATrans 74 (6 June 2023); *Crime and Corruption. Commission v Carne* [2023] HCA 28, [35].

[78] *Crime and Corruption Commission v Carne* [2023] HCA 28, [35].

[79] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

Secondly, the majority of the plurality appeared to adopt the notion of the 'appropriative act' for parliamentary privilege to apply. That is, privilege is not attracted to a document until the Assembly, committee, member or their agent does some act with respect to it for purposes of transacting business. The majority plurality seem to have embraced[80] this concept as enunciated by McPherson JA in *Rowely v O'Chee*[81] who in turn referred to cases like *Rivlin v Bilainkin*[82] and *Grassby*.[83] The embracement of this doctrine will have implications for people like whistleblowers who unilaterally disclose material to committees and members. Further, it is unclear what appropriative act is required to activate the privilege. In *Carne*, the preparation of the report was anticipated by the PCCC, it was prepared for the PCCC's consideration, was presented to the committee and was under consideration when the action was taken in the Supreme Court. In a demonstration of adherence to principles of mutual respect, the committee suspended its consideration of the matter, which it need not have done.

Thirdly, the majority of the plurality did not address the issue that there may be concurrent purposes for the creation and submission of documents to a committee. That is, both submitters and the committee may have differing or the same concurrent purposes.

Similarly, the minority of the plurality stated that the 'current case may be distinguished from one where a parliamentary committee, upon receiving a document unrelated to the business of the parliamentary committee, elects to retain it for the purpose of transacting its business'. According to the minority plurality, 'in such cases, the application of ss 8 and 9 of the POQ Act would have the result that the document would be privileged'.

It is difficult to comprehend how the report in *Carne* was not related to the business of the PCCC within the description stated by the minority of the plurality. Again, the preparation of the report and the intention to present to the committee was discussed in two separate properly constituted proceedings of the PCCC. It was prepared for the PCCC, provided to the PCCC and under consideration by the PCCC.

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[80] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

[81] [2000] 1 Qd R 207, 221.

[82] [1953] 1 QB 485.

[83] (1991) 55 A Crim R 419.

Finally, both High Court judgements turned on a question of fact. Both judgements' findings of fact are clearly different to that of the trial judge. The trial judge's view of the facts were not in issue in the Court of Appeal, the majority's reasoning resting on the interpretation of the Act. Indeed, the dissent by Freeburn J takes a view of the facts in concurrence with the trial judge. In order to come to its view of the facts the High Court rejected the propositions in the s 55 certificate and substituted its view of the facts. The majority of the plurality stated:

> *This conclusion is not altered by the certificate issued under s 55 of the POQ Act, by which the Chairperson of the Committee certified that the Report was prepared for and presented to the Committee for its purposes. Section 55(2)(d) provides that a certificate stating that a document was prepared for the purposes in s 9(2)(a) or (c) is evidence of that fact. It does not, however, provide that it is conclusive. The s 55 certificate may be rebutted by other evidence. The Commission's statements as to its purpose for preparing the Report do just that.*[84]

The judgements appear to ignore the fact that on a routine basis a Committee may have a purpose (for example, to obtain information to make the most appropriate recommendation) and a submitter may likely have a different but concurrent purpose (for example, to influence the matter under consideration to be favourable to the submitter's position).

Let us 'Bell the Cat'. Courts do not like to be ousted from jurisdiction. Parliamentary privilege is an effective ouster from jurisdiction. The High Court have in *Carne* case chosen the facts that did not trigger the application of the statute that applied the privilege. The Court ignored other inconvenient facts.

The public policy issues

It is very important that there is judicial supervision of Commissions of Inquiry and Permanent Commissions of Inquiry. For example, in *Ainsworth*,[85] the CJC ignored any

[84] *Crime and Corruption Commission v Carne* [2023] HCA 28, [40].

[85] *Ainsworth v Criminal Justice Commission* [1992] HCA 10.

form of natural justice. The Commissioners in *Carruthers*[86] were found to have demonstrated ostensible bias and in *Keating v Morris & Ors; Leck v Morris & Ors*[87] the Commissioner's conduct of proceedings and interrogations were found to raise a reasonable apprehension of bias.

The courts have made it very clear that they will interpret statutes regarding permanent commissions of inquiry very narrowly. It is now incumbent on legislatures to ensure that the statutes creating those bodies are extremely clear as to jurisdiction, power and reporting authority. If the legislature wants commissions to be able to report and make findings, it is evident that the court will require clear statutory authority to allow reports that make findings against individuals.

In my submission, it is not necessary for independent commissions to make findings of corrupt conduct or criminal behaviour against individuals in a public report. Such matters can be decided by other more appropriate bodies. However, Commissions should be able to report a narrative of facts, expose broad behaviour and corruption risks and advise that they have referred matters to the appropriate body. It is necessary for the public to be appraised of the wider facts of a matter and the behaviours of public officials and an appreciation of the mischief at hand.

To avoid conflict between the courts and parliament, it would be best to avoid provisions such as the current s 69 if the CC Act, where a report is provided to a Committee to determine whether a report of a commission should be tabled. There are numerous reasons why the approach set out in s 69 is flawed policy.[88]

In the *Carne* case, the High Court's interpretation of the statute means at least 32 commission reports and 256 media releases over 26 years would never have occurred.[89] The significance of the decision and its poor policy implications for the

[86] [1997] QSC 132.

[87] [2005] QSC 243.

[88] For further information re history and policy issues relating to the section see Neil Laurie, Submission, Parliamentary Crime and Corruption Committee, Five-year review of the Crime and Corruption Commission's activities, Queensland, 27 April 2021.Accessed on 20 September 2023 Accessed at <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/RCCC-21CB/submissions/00000036.pdf>.

[89] Letter from the Chair of the Crime and Corruption Commission to the Chair of the Parliamentary Crime and Corruption Committee, Parliament of Queensland, dated 20 October 2022. Accessed at: <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/C-A72F/221020%20-%20IN%20-

future operation of the CCC lays in the examination of that list. Public information about the outcomes of numerous matters of high public importance and interest are at stake.

In the Court of Appeal, Freeburn J warned about a narrow interpretation of the CC Act, stating:

> *It would prevent the Commission from reporting on a matter relevant to the standards of integrity and conduct in units of public administration, or assessing the appropriateness of systems and procedures, or on a matter of public confidence in the integrity of units of public administration, and public confidence in the way in which corruption is dealt with. Reading s 64(1) in that narrow way would mean that the Commission's only power to so report would be if there were a potential for criminal charges, or for disciplinary action.*[90]

That warning has come to pass.

Without statutory amendment, the public will remain 'in the dark' about the outcomes of a large number of corruption investigations where a decision does not result in criminal proceedings but nonetheless contain lessons for, and usually recommendations to reduce the incidence of corruption or misconduct in, Queensland's public sector. Also, the very real benefit in some people under investigation, who may have been wrongly accused or slurred, to have a public report clearing their name cannot also be understated.

Should we be so protective of individual rights (reputation) that it keeps the public in the dark about matters of corruption and misconduct by public officials? Should the public not be able to judge for themselves the conduct of public officials by knowing the factual circumstances of an issue and the behaviours that occurred?

%20Crime%20and%20Corruption%20Commission%20-%20Data%20on%20investigations%20reports_media%20releases%20in%20relation%20to%20CCC%20investigations.pdf>.

[90] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

One result of the litigation in *Mahon v Air New Zealand*[91] was that it took 20 years for the reports of the Chief Inspector of Air Accidents and the Mahon Commission to be tabled in the New Zealand Parliament. It took 40 years, for New Zealand's Prime Minister, on behalf of the New Zealand government, to apologise for the actions of the airline, then in full state ownership, and which according to the apology 'ultimately caused the loss of the aircraft' and the loss of life.[92] Judicial supervision is important, but it also risks public confidence in public institutions if it results in secrecy.

The CCC may be regarded as a permanent commission of inquiry, in that it can inquire into matters, but unlike a commission of inquiry that is expected and able to publicly report 'the truth of a matter', the CCC has largely been silenced. It is a watchdog that still has some bite, in that it has powers of investigation and can refer matters to others to prosecute. But it is a watchdog without a bark. It has been muzzled.

It has long been alleged that the CCC has been used by governments as a 'clearing house'. Issues of public concern are sent for investigation and when no criminal conduct is found, governments then imply there was no wrongdoing -even though wrongdoing that falls short of criminal conduct is often revealed.

Aristotle said:

> *To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.'*[93]

Until the statute is remedied, for anyone to say 'the CCC has investigated and no outcome has occurred, therefore there was no wrongdoing', is not necessarily speaking the truth. The public is capable of handling the truth.

[91] [1984] 3 All ER 201; [1983] NZLR 662.

[92] New Zealand Government Website, 'Prime Minster Delivers Erebus Apology', 20 November 2019. Accessed at <www.beehive.govt.nz>.

[93] David Marion 'Correspondence Theory of Truth' in *Stanford Encyclopedia of Philosophy*, Stanford University, 2005. Available at https://plato.stanford.edu/contents.html.

You Can't Print that in Hansard: Surveying Hansard Expungements in Canada, Australia and New Zealand

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Abstract: Hansard is thought of as being the complete parliamentary record; however, Parliaments in Canada, Australia and New Zealand have occasionally expunged portions of their Hansards. Using newspaper reports, this article surveys examples of this practice to identify both the contexts in which expungements have occurred and their associated parliamentary mechanics.

INTRODUCTION

In the public consciousness, Hansard is a complete record of everything said in Parliament. Yet, portions of debate have been struck out, removed, deleted or expunged[2] from Hansard in Canada, Australia and New Zealand. These rare occurrences are distinct from the routine editing that occurs in the production of Hansard.[3] The circumstances and procedures for Hansard expungement vary but the result is the same: the resulting official parliamentary record is intentionally incomplete.

[1] The views in this work are not those of any employer. The author would like to thank Isla Macphail, Cecelia Edwards and Stefanie Carsley for helpful comments on a previous draft.

[2] While all synonymous terms, there is little uniformity in the parliamentary records to describe the action at issue. This work will use expungement except when quoting from materials that use other terminology.

[3] Caruso, Deborah, Lenni Frohman, Robert Kinsman, and Robert Sutherland, 'Some Editing Required: Producing Canada's Hansards: Roundtable.' *Canadian Parliamentary Review* 38(2) (2015), pp. 7–14.

Hansard expungement raises important questions about the transparency of democratic institutions, the purpose of official parliamentary records and the role of the press in reporting on parliament (in particular, reporting expunged proceedings). It also raises significant questions about free speech and the place of censorship, if any, within parliament.

To date, it does not appear that any work has catalogued instances of Hansard expungement across jurisdictions. This work – prepared in connection with the Australasian Study of Parliament Group conference – seeks to survey Hansard expungements based on newspaper reports.[4] It is not intended to be a comprehensive review of all instances of Hansard expungement; some of them may never be known.[5]

ALTERCATIONS BETWEEN MEMBERS

According to news reports, both the Canadian House of Commons and the Australian House of Representatives expunged portions of Hansard when parliamentarians got into heated scraps. Two notable incidents occurred in the early 1930s that were widely reported in the press.

In Canada, it was reported that Member of Parliament (MP) Heenan got into a scrap with MP Price on the floor of the House of Commons that culminated in an open threat of violence from the former: 'I have been in places where I could smash a fellow's face for half of this, and it would take little encouragement to cross the floor and do it now'.[6] In her regular dispatch on Parliament, MP Agnes MacPhail wrote that the two men 'invited each other to a scrap which afterwards took place in the lobby'.[7] Did members really resort to fisticuffs? An American newspaper reported that Price crossed the floor and shook his fist in Heenan's face and 'other members intervened before blows could

[4] Compiling Hansard expungements from parliamentary records alone is difficult because the records often reflect no discussion on the subject. To find examples not in procedural reference works, archival newspapers were searched for mentions of 'Hansard' in close proximity to 'excise', 'erase', 'expunge', 'delete', 'strike', 'omit', and 'remove'. When articles appearing to report a Hansard expungement were found, the author attempted to locate corresponding parliamentary records.

[5] 'Le Hansard et exactitude'. *Le Droit*. 6 April 1932, p 1.

[6] 'Peter Heenan is quite bellicose in Parliament'. *Brandon Daily Sun*, 11 July 1931, p. A1.

[7] Agnes MacPahil, 'Heat and Length of Session Getting on the Nerves'. *The Durham Review*, 16 July 1931, p. 4.

be struck',[8] adding that later the two men needed to be separated again, albeit this time in a corridor of Parliament.

Regardless of what may have occurred physically between the MPs, Hansard expungement appears to have occurred. For its part, the *Brandon Daily Sun* reports that Heenan moved a motion that his remarks 'be erased' from Hansard. MacPhail wrote that the incident was 'wholly unworthy of the Commons and has by common consent been dropped from Hansard'. The *Sherbrooke Daily Record* states that Heenan 'asked to have his remarks relative to slapping Price's face erased from Hansard', suggesting only a portion of the offending remarks were expunged.[9] The precise terms of any motion and the associated procedural mechanism are unclear – it appears that not only were the remarks expunged but that any motion concerning them was similarly removed.

Perhaps less physically dramatic, Australia's House of Representatives reportedly expunged exchanges from Hansard in 1932 after what the *Sydney Morning Herald* described as a 'unanimously hostile' exchange between Members of Parliament Green and James.[10] In particular, the newspaper reported the 'unsavoury incident' as a 'bitter and disgraceful scene' in which Green brought up an alleged previous criminal act of James from some 25 years ago (which James said was misrepresented). The precise language that followed is glossed over by the paper, which reported tersely as follows:

> *Much more was said by Messrs. Green and James. It was a painful few minutes for the House, which to its credit (and the credit of Mr. Makin, who suggested it) decided to expunge the whole incident from 'Hansard'.*[11]

What was the 'much more' said? Given a Hansard expungement, there is no official record. While the *Sydney Morning Herald* may have sought to protect its readers from

[8] 'Solons Halted in Fist Fight – Members of Canadian House of Commons in Disagreement'. *Butte Montana Standard*, 12 July 1931, p. 2.

[9] 'Fist Fight Threatened as Member Angers Heenan'. *Sherbrooke Daily Record*, 11 July 1931, p. 4.

[10] 'From the gallery'. *Sydney Morning Herald*. 10 November 1932, p. 10.

[11] 'From the gallery'. *Sydney Morning Herald*. 10 November 1932, p. 10.

scandalous content, a different newspaper from New South Wales reported that the fiery remarks of James included the following:

> *Were it not for Mr. Green's incapacity he would not dare say what he has said. He takes advantage of the fact that he has only one leg in order to hurl insults. If the people of Richmond only knew how often he comes into this House absolutely drunk they would know he is the greatest drunkard in this House.*[12]

The West Australian newspaper also reported the 'absolutely drunk' remark as well as the bit about Green taking advantage of having only one leg, closing with an apparently newsworthy detail from the time that 'A party of schoolgirls witnessed the scene from the public gallery'.[13]

The specific mechanism for the Hansard expungement is ambiguous from press reports. *The Northern Star* reported that at the 'suggestion' of Makin, the Speaker agreed 'to discuss with the principal Parliamentary Reporter the exclusion from Hansard of any reference to the episode'.[14] *The West Australian* reports Makin 'moved that the whole incident be expunged from Hansard' and that the Speaker replied 'If it is the wish of members, I shall arrange for that'.[15] As such, it is not clear if there was a motion moved, nor whether the Speaker believed he had the power to expunge as distinct from committing to undertake discussions with those responsible for Hansard.

This would not be the last time that the Speaker of the Australian House of Representatives would work to expunge allegations of drunkenness from Hansard. At the start of the sitting on 29 February 1952, the Speaker stated:

> *I have to inform the House that, yesterday, I arranged that certain interjections that were made in the course of debate on Wednesday night should not be recorded in Hansard. The interjections were to the effect that*

[12] 'Recriminations – *R.F. Green v . James* – Record of Debate Expunged'. *The Northern Star*, 15 November, 1932, p. 4.

[13] 'Politicians at odds'. *The West Australian*, 10 November 1932, p. 10.

[14] 'Politicians at odds', p. 10.

[15] 'Politicians at odds', p. 10.

> *a certain honorable member who was addressing the House was in a state of insobriety.*[16]

Though the Hansard may have been expunged, newspaper reports fill in the missing pieces. The specific allegation was from Cameron (Labour, South Australia), who alleged drunkenness on the part of Wentworth (Liberal, NSW).[17]

A FLESH WOUND?

In February 1912, New Zealand's Parliament passed resolutions of condolence amid reports of former MP Alfred Richard Barclay's death. Later that evening, the Prime Minister was informed that Barclay was not actually dead (but was gravely ill). According to the press, the errant condolence proceedings in Parliament were expunged from both the Hansard and the Journals.[18] Barclay passed away in November 1912.

NATIONAL SECURITY AND WAR

In World War I, Australia's House of Representatives adopted a motion allowing for the expungement of war- and national security-related material on the Speaker's initiative. It read:

> *That, during the progress of the present war, Mr. Speaker be, and is hereby authorized, at his discretion, to direct the omission from Hansard of any remarks made in the House of Representatives in the course of debate, or in any other proceedings in the House of Representatives, to which his attention may be directed by the Law Officers of the Crown as being calculated to prejudice His Majesty's relations with a foreign Power, or the*

[16] A. Cameron, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 February 1952 p. 628.

[17] 'Cameron Warns Members'. *The Newcastle Sun*, 29 February 1952, p. 2.

[18] 'Mr. A. R. Barclay'. *Lyttelton Times*, 22 February 1912, p. 9.

> *successful prosecution of the war, or to imperil the safety of the Commonwealth.*[19]

The power to expunge war-related matters from Hansard was exercised by the Speaker, though not without controversy. In 1918, the Speaker announced to the House that he had directed the omission of remarks from Hansard after receiving a letter from the Acting Solicitor General and consulting with members concerned.[20] Though the Speaker did not name names, a member whose remarks were expunged complained of the Speaker's decision. It may be that portions of that debate were also expunged as the record reflects an intervention on this point in the middle of which it is printed 'Later:' before continuing. Whatever else might have been said, the Speaker concluded: 'I received authority from the House to adopt a certain course at my discretion, and it is only as a matter of courtesy that I report to the House any action I have taken'.[21]

A similar situation arose during World War II. When asked in 1943 if anything had been removed from the Hansard of a previous sitting's debate, the Speaker confirmed:

> *I held the same opinion as the Prime Minister, namely, that these statements giving the boundaries of the area in which it was proposed that Australia should wage war operations should not be disclosed to the public.*[22]

It was suggested that the Speaker had an obligation under practice at the time to inform the House when 'censorship' occurred. The Speaker suggested otherwise because 'It is not the practice to indicate that an honorable member's speech has been

[19] W. Elliot Johnson, Commonwealth, *Parliamentary Debates*, House of Representatives 2 October, 1918, pp. 6560–6572.

[20] W. Elliot Johnson, Commonwealth, *Parliamentary Debates*, House of Representatives 2 October, 1918, pp. 8953–8954.

[21] W. Elliot Johnson, Commonwealth, *Parliamentary Debates*, House of Representatives 2 October, 1918, pp. 8953–8954.

[22] W. Nairn, Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1943 p. 100.

censored, for such an indication might cause interested parties to seek to learn the censored matter'.[23]

Importantly, the Speaker confirmed to the House that the decisions in this regard were his alone:

> *I do not take instructions from the Censor or from anybody else, but I can best perform my duties if I go for information to the best sources available. If the Censor, in the interests of national security, tells me that, in his opinion, something ought to be deleted from the record, I am very glad to consider his representations, but, in the final analysis, I have to make up my own mind, and the ultimate decision is mine. However, I am not above taking advice from the Minister for the Army (Mr. Eorde) or the Censor, or the Leader of the Opposition (Mr. Fadden), or even from the honorable member for Barker (Mr. Archie Cameron).*[24]

The story of Australian Hansard and war does not stop with questions of expungement. According to a press report, on at least one occasion reprints of Hansard were censored by the government and prevented from being sent overseas for they were viewed as being detrimental to the war effort then underway.[25] On another occasion, the Prime Minister ordered the seizure of Queensland Hansard given speeches on conscription; reportedly the Queensland government resorted to disseminating Hansard by throwing copies onto residents' lawns.[26]

It does not appear that Canada has either allowed for expungement from Hansard on national security grounds nor censored Hansard from being sent abroad (though on at least one occasion a redacted Hansard was returned in the initial response to an access to information request).[27] That said, it is perhaps worth noting that Canada's House of

[23] W. Nairn, Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1943 p. 100.

[24] W. Nairn, Commonwealth, *Parliamentary Debates*, House of Representatives, 28 January 1943 p. 100.

[25] W. Farmer Whyte, 'Hansard and War: History Recalled'. *Newcastle Morning Herald and Miners' Advocate*, 2 January 1940, p 4.

[26] 'Government Printing Office, 1917' in R Evans and C Ferrier (eds) *Radical Brisbane: an unruly history.* Victoria: The Vulgar Press, 2004.

[27] 'Canada needs a full reset on transparency'. *The Globe and Mail*, 29 December 2021. p. A10.

Commons held secret sessions from time to time, particularly during periods of war.[28] It may be that the need for expungement based on national security or war is unnecessary if those debates occur in secret session, though secret sessions have not occurred in modern times in the Canadian House of Commons.

NAMES OF THE INNOCENT (OR THE GUILTY?)

In modern times, questions have arisen about naming individuals in Parliament whose identity may be protected by some form of judicial order, such as a suppression order in Australia or a publication ban in Canada. On occasion, parliamentarians have knowingly named such persons, benefiting from parliamentary privilege to do what could be legally actionable outside of parliamentary proceedings.[29] This particular matter has been discussed within the broader question of legal risks associated with publishing parliamentary debates in Australia,[30] and the scope of parliamentary privilege in New Zealand.[31]

Most recently, the issue of suppression orders arose in New Zealand and was the subject of a careful Speaker's Ruling on 29 August 2023 regarding a situation where a name was not used but other identifying information provided.[32] It is worth considering the very thorny situation that can arise for speakers – in addressing whether a member's conduct is appropriate given a judicial order, a speaker could easily confirm (by inadvertence) the existence or scope of such an order. While one might seek to expunge the name of a person who should not be named, expunging a Speaker's Ruling

[28] See Canada, *Parliamentary Debates,* House of Commons, 28 November 1944, p. 6634.

[29] See e.g., Gareth Hutchens, 'Derryn Hinch uses parliamentary privilege to name sex offenders in maiden speech'. *The Guardian* (Australia) 12 September 2016. Accessed at: <https://www.theguardian.com/australia-news/2016/sep/12/derryn-hinch-uses-parliamentary-privilege-to-name-sex-offenders-in-maiden-speech>.

[30] See Barrett, Val. 'Publishing the Record of Parliamentary Proceedings: Identifying and Controlling the Risks'. *Journal of Law, Information and Science*, 20 (2), 2009–2010, p. 106-108.

[31] Best, Richard. 'Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?' *Victoria University of Wellington Law Review* 24(1), 1994, pp. 91–102.

[32] A. Rurawhe, New Zealand, *Parliamentary Debates*, House of Representatives, 29 August 2023. Accessed at: <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20230829_20230829_09>.

in relation thereto would raise significant questions about the accessibly and knowability of parliamentary precedents.

In the Hansard for the Northern Territory for 2 May 1991 reads a bold entry:

> *Note: Mr Bell referred to matters ordered not to be published pursuant to Resolution of the Legislative Assembly dated 30 April 1991 and a ruling of Mr Speaker dated 1 May 1991.*[33]

The Assembly was working carefully with legal advice received in relation to certain investigations and legal proceedings. As the Assembly agreed on 4 October 1990:

> *So as to ensure the fair trial of persons before the court, no part of the report prepared by Mr Mulholland relating to the matters or subject of court proceedings, either in progress or pending shall be tabled or published until such time as those proceedings have been completed.*[34]

While the House was later provided with reports and advice (and a sanitized version made public) the resolution was understood to mean that members could not discuss details as doing so House's would require their publication in Hansard, contrary to the motion. Consequently – and in furtherance of the *sub judice* convention – the Speaker ordered the expungement of certain interventions.

Curiously, an early expungement of names from Hansard concerned the names of those who were decidedly guilty. In 1903, the Speaker of the Queensland Legislative Assembly ascertained the will of parliamentarians to remove a list of names from Hansard, which it gave unanimously.[35] Uproar ensued after the Secretary for Railways read the names of persons who had been convicted of certain offences, having reportedly obtained the names in secret from the Chief of Police. Members expressed various concerns, including:

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[33] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 May 1991. Accessed at: <https://hdl.handle.net/10070/418731>.

[34] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 May 1991. Accessed at: <https://hdl.handle.net/10070/418731>.

[35] A. Cowley, Queensland, *Parliamentary Debates*, Legislative Assembly, 30 July 1903, p. 160.

> *probably some of them have wives and children, and that, for their sake alone, it would be unfair to perpetuate in the volumes of Hansard a record of offences which have long been atoned for.*[36]

Another decried the Minister

> *reading out that list of convictions, knowing well that it would get into Hansard, and once in Hansard it may be reproduced in every newspaper from one end of Australia to the other.*[37]

The Hansard for the Legislative Assembly of Ontario may be unique in containing a footnote in the print edition of Debates for 4 December 2000 reflecting an expungement ordered months later:

> *The names of the young offenders have been expunged by Order of the House dated Tuesday, April 24, 2001, in the spirit of compliance with the Young Offenders Act (R.S. 1985, c Y-1).*[38]

On that December day, a member read into the record the names of persons who recently graduated a program for young offenders. While the spirit may have been to celebrate their accomplishments, the importance of protecting the identity of young offenders was keenly in the mind of legislators; some called for a police investigation and the minister responsible for corrections stepped down.[39] Pending any police action, the Assembly agreed to hold off publishing Hansard and held a debate:

> *That all records of remarks by the members during the debate of the motion regarding Bill 144 on Monday, December 4, 2000 not be published electronically or in print, or in any other public form until such time as the police have completed any investigation of remarks during that debate, and*

[36] A. Cowley, Queensland, *Parliamentary Debates*, Legislative Assembly, 30 July 1903, p. 158.

[37] A. Cowley, Queensland, *Parliamentary Debates*, Legislative Assembly, 30 July 1903, p. 134.

[38] Ontario, *Parliamentary Debates*, Legislative Assembly, 4 December 2000, p. 6064.

[39] See discussion in Tom Blackwell, 'MPP's Error Brings Down Minister: Tory Backbencher Also Resigns After Reading Out Names of Young Offenders'. *National Post*, 5 December 2000, p. A1.

> *further, that Hansard maintain and preserve all records and evidence of that debate […].*[40]

As the police investigation concluded with no charges (recall that parliamentary privilege may shield Hansard interventions from scrutiny) it was nonetheless agreed by the Assembly that the Hansard was to be published with the names expunged.

While names might be removed for privacy reasons, related information may also be expunged. In 2014, the Speaker of the Legislative Assembly of the Northern Territory ruled

> *I will be having all mobile phone numbers and phone numbers you referenced in your speech, member for Namatjira, expunged from the Hansard record.*[41]

It is worth considering that parliamentary bodies might avoid proactively expunge identifying information in certain contexts. For example, a recent Australian Senate committee report included a footnote reading:

> *The committee notes that some details which may potentially identify individuals have been removed from Hansard to protect women at risk of domestic violence.*[42]

OFFENSIVE COMMENTS

In some cases, comments to which parliamentarians took great offence were expunged from Hansard. The Speaker of the Canadian House of Commons reportedly struck some 900 words on one occasion in 1944, including that 'men were being sent to their death on the battlefield to allow the government to find its way out of a cabinet crisis'.[43]

[40] Ontario, *Votes and Proceedings,* Legislative Assembly, 4 December 2000.

[41] K Purick, Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 May 2014, p. 4408.

[42] Senate Finance and Public Administration References Committee, Parliament of Australia, *Domestic violence in Australia Report*, August 2014, p. 2.

[43] 'Expunge Words from Hansard'. T*he Lethbridge Herald*, 6 December 1944, p, 5.

According to the press, the Speaker found those remarks were a 'blot' on the House and expunged interventions from several members and, in particular, several paragraphs of a speech from MP Choquette. Choquette's full remarks were published in the original French in *Le Devoir.*[44]

In New Zealand, Hansard expungement ostensibly occurred in 2000 after offence was taken to a question suggesting that certain MPs engaged in bestiality. The Speaker ruled the question out of order and indicated it 'will not appear in Hansard', but noted that this wouldn't preclude press reports.[45] Indeed, the remarks were widely reported in the press.[46]

In a very different episode, in 1901 the Premier of New Zealand took offence to a charge levelled by another parliamentarian suggesting that the Premier was responsible for the death of troops. After arguments about what should appear in Hansard, it was reported that the Speaker left the Chair to allow the two members to conference together and resolve the question – the other MP agreed to withdraw certain words and have them expunged from Hansard.[47]

For its part, the Legislative Assembly of Alberta has expunged at least two interventions from its Hansard that legislators found offensive. In March 1976, the Assembly adopted a motion

> *that the remarks made by the hon. Member for St. Paul this afternoon concerning certain Canadians of French origin, and the reply if any, be stricken from the record.*[48]

[44] 'Texte du discours de M. Armand Choquette', *Le Devoir,* 6 December 1944, p 2.

[45] J. Hunt, New Zealand, *Parliamentary Debates,* House of Representatives, 4 July 2000.

[46] See e.g., Audrey Young, 'MP's sheep joke sparks uproar in Parliament'. *New Zealand Herald,* 5 July 2000. Accessed at: <https://www.nzherald.co.nz/nz/mps-sheep-joke-sparks-uproar-in-parliament/KBP6MKABJPPCLBPR36IJ2Q2NZA/>.

[47] 'The Tagus Troopers', *New Zealand Mail*, 18 September 1901, p. 47.

[48] Alberta, *Parliamentary Debates*, Legislative Assembly, 25 March 1976, pp. 395-396.

The debate reveals that the member wished for the removal to receive unanimous support, in part because – in his words – the remarks were in jest. The *Globe and Mail* story reporting the remarks carried the headline 'A stunning non-joke'.[49]

In 1977, a different member of the Legislative Assembly of Alberta moved 'that passages 83.18 to 84.19 be struck from [unofficial] Hansard' to which the House agreed. The Speaker additionally proposed that

> *the Hansard Editor might have discretion to make any consequential changes in the text which might be necessary to give effect to the wishes of the Assembly.*[50]

The remarks in question concerned Indigenous peoples.[51]

Expungement occurred by motion in both Alberta cases with leave granted to dispense with notice. In contrast, the Canadian House of Commons Acting Speaker expunged an offensive interjection of his own volition in 1956 because

> *I did consider that the expression used was one which should not become part of the permanent record of the Canadian House of Commons.*[52]

The remark? As reported by *The Globe and Mail:* 'I think you are making a bawdyhouse of this place'.[53]

Lest one think 'bawdyhouse' is mild vocabulary to be expunged, the Speaker of the Canadian House of Commons is also reported to have expunged 'unadulterated baloney' when used to describe another member's speech in 1954.[54] According to a press report, the comments of the member defending the phase were struck out along with the riposte that the member who used the phrase was an expert on baloney. That

[49] Brian Butters, 'A stunning non-joke' *The Globe and Mail*, 3 April 1976, p. 8.

[50] G Amerongen, Alberta, *Parliamentary Debates*, Legislative Assembly, 3 March 1977, pp. 102-103.

[51] A paraphrased version of the remarks expunged from Hansard are reported in *The Lethbridge Herald*, 14 March 1977, p. 29.

[52] E.T. Applewhaite, Canada, *House of Commons Debates,* House of Commons, 11 July 1956, p. 5861.

[53] 'Deleted From Hansard: Rivals Agree Commons Is Not Bawdyhouse'. *The Globe and Mail,* 12 July 1956, p. 3

[54] 'Speeches can't be 'baloney''. *The Ottawa Citizen*, 18 May 1954, p. 9.

same speaker also reportedly expunged the French 'pot de chambre des pisse-vinaigres', which a member used in reference to *Le Devoir* newspaper, which reported the expungement.[55] Under a different Speaker, a Hansard expungement from 1942 is indicated in the Hansard itself as '(Mr. Speaker having ruled that certain words be expunged from the record)';[56] the phrase in question was reportedly referring to the opposition as a 'mob'.[57]

While the foregoing expunged remarks could be found in newspapers, the offending words from an incident in the New South Wales House of Assembly prove (to this author at least) elusive. The Hansard for 28 May 1997 has several instances of '[words expunged]', including in the motion adopted:

> *That the records of the House be expunged to remove from the Parliamentary Debates the words giving effect to the accusation that the Opposition are [words expunged] withdrawn by the Minister for Roads, Minister for Public Works and Services, Minister for Ports, Assistant Minister for Energy, and Assistant Minister for State and Regional Development earlier this day.* [58]

The whole of the debate that day is perhaps not a Hansard high point. The Speaker orders the Serjeant-at-Arms to remove a member from the Chamber and that member is, later in that sitting, suspended for two days by a vote of 49–46. A similar low point can be found in the Queensland Parliament in 1884, when a member was censured and his speech expunged in part after a protracted debate from all sides.[59]

Along similar lines, a motion was once found so offensive that it – and the debate – was expunged from the records of the Legislative Assembly of New South Wales in

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[55] Pierre Viceant, 'Un député fédéral s'en prend au journal *Le Devoir*'. *Le Devoir,* 20 February 1954, p. 1. See bottom of p. 3, 'Epilogue'.

[56] Canada, *House of Commons Debates,* House of Commons, 27 July 1942, p. 4798.

[57] 'Hong Kong Debate'. *The Winnipeg Tribune*, 28 July 1942, p 10.

[58] New South Wales, *Parliamentary Debate,* Legislative Assembly Hansard, 28 May 1997. Accessed at: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-15392/link/1945>.

[59] 'Queensland Parliament'. *Ipswich Herald and General Advertiser,* 2 February 1884, p 42.

1889. The motion of expungement as adopted is recorded in the Votes and Proceedings as follows:

> *That the action of the Honorable Member for West Macquarie, Mr. W. Crick, in giving notice of a motion in unworthy and offensive terms, impugning the conduct, ability, and impartiality of Mr. Speaker, is deserving of and now requires the condemnation of this House; and that no record of the Honorable Member's motion be entered upon the proceedings of this House.*[60]

PROCEDURAL RULES, CUSTOMS AND PRACTICES

Parliamentary traditions have also inspired expungements from Hansard. On at least two occasions, Speakers of the Canadian House of Commons expunged the reading of correspondence where the member refused to identify the author, keeping with what one commentator described as 'one of the oldest and most firmly established rules of procedure of the House of Commons'.[61] In 1936, the expunged correspondence reportedly revealed:

> *Intrigue between United States financiers, the Bank of Canada, and other unnamed Canadian authorities to amend the British North America Act in such a way as to place Canada in bondage to Wall Street.*[62]

The Deputy Speaker ordered those charges withdrawn.[63]

A similar expungement occurred in 1938 when a member sought to read from a letter without naming its author because of the 'treatment this person sometimes gets'.[64] A

[60] New South Wales, *Votes and Proceedings,* Legislative Assembly*,* 17 December 1889, p. 37.

[61] Wilfrid Eggleston, 'Old Rule is Behind Expunging in J.H. Blackmore Case'. *The Lethbridge*, 22 May 1936, p. 1.

[62] 'Ottawa Correspondence'. *The Brandon Daily Sun*, 21 May 1936, p. 11.

[63] 'Ottawa Correspondence', p. 11.

[64] *Lethbridge Herald*, 28 April 1938, p. 3 (third column).

minister insisted that the MP name the author or have the letter expunged and, according to the press, 'the Speaker ordered the letter deleted from Hansard'.[65]

The above examples reflect situations where a letter exists, even if the author is not being identified. In 1921, the Commons Speaker expunged an MP's reading of letters that turned out to be imaginary.[66] In 1947, New Zealand's Speaker reportedly ruled out the reading of a telegram and ordered its content erased from Hansard.[67]

A different parliamentary practice was behind a Canadian Hansard expungement in 1933. Writing in the *Durham Review,* MP Agnes McPhail relayed that the Speaker had asked that a portion of her reading of a petition be deleted form Hansard for procedural reasons:

> *Apparently petitions can be presented to the House but not read to the House until passed upon by the Committee of Petitions. However, before the Speaker could prevent me, I had read the words of the Petition. The Speaker then said it was not possible to have a petition read before the Committee had passed on it and asked that it be deleted from Hansard.*

Her column then goes on to reproduce the material that the Speaker expunged.[68]

Traditionally, it is seen as unparliamentary to reflect on members of the public who cannot defend themselves in the legislature, judges, presiding officers, or the royal family. In that regard, serious allegations against a public servant were expunged from the Hansard of the Australian Capital Territory Legislative Assembly in 1993.[69] Similarly, a 'sensational onslaught' on the Chief Justice of Canada was reportedly expunged from

[65] *Lethbridge Herald*, p. 3.

[66] 'Mcmaster's fictitious letter ordered expunged from official records term 'sheep' resented'. *The Globe*, 13 May 1921, p. 3.

[67] 'Matter raised again in House.' *Wanganui Chronicle*, 5 July 1947, p 4.

[68] *The Durham Review,* 9 March 1933, p. 8.

[69] Peter Clack, 'Stevenson comment struck from records'. *The Canberra Times*, 21 May 1993, p. 4.

Senate Hansard in 1918.[70] The Canadian House of Commons reportedly expunged a portion of a speech attacking its Speaker in 1912.[71]

As a matter of parliamentary procedure, one needs to be recognized by the Speaker to speak. So, what happens when members speak when not recognized? In 2002, a Speaker in New South Wales reminded a member that what he said after being directed to return to his seat will not appear in the Hansard.[72] What was then a simple reminder was previously controversial: A heated debate erupted in the House of Representatives in 1974 when the Speaker was addressed by a member not recognized and said 'Order ! The right honourable gentleman has no right to make a statement. I ask Hansard to delete his remarks from the report'.[73] The Speaker's ruling was challenged and ultimately sustained.[74]

Rude interjections also pose a Hansard challenge. The Northern Territory Speaker indicated to a member in 1994 that 'those interjections are unparliamentary and they will be expunged from the Hansard record',[75] suggesting a speaker's power to strike material out. However, in 1996 that same legislature ordered offensive interjections expunged by motion,[76] suggesting this could be the proper course. For what it may be worth, in 1979 the Speaker of the Australian House of Representatives felt that a motion would be necessary to strike certain comments from Hansard even though they were – in the Speaker's words –

[70] 'Bitter attach on the Chief Justice'. The St. John Standard, 24 May 1918, p. 1.

[71] 'Le député de Rimouski fait des excuses au Dr Sproule'. *La Patrie.* 20 March 1912. See also: *Journals of the House of Commons,* 20 March 1912, p 358.

[72] J Murray, New South Wales, *Parliamentary Debates,* Legislative Assembly, 19 September 2002, p. 5096.

[73] J. Cope, Commonwealth, *Parliamentary Debates,* House of Representatives, 2 April 1974 p. 804.

[74] Commonwealth, *Votes and Proceedings*, House of Representatives, No. 11, 2 April 1974.

[75] N. Dondas, Northern Territory, *Parliamentary Debates,* Northern Territory, 17 May 1994. Accessed at: https://hdl.handle.net/10070/418336.

[76] Northern Territory, *Minutes of Proceedings*, Legislative Assembly, 9 October 1996.

> *most offensive […], contrary to the Standing Orders, and a transgression of the Standing Orders of a kind that he, the honourable member for Newcastle, knows is most improper.*[77]

OOPS… I READ THE SPEECH AGAIN?

An interesting case of Hansard expungement comes from the Legislative Assembly for Victoria, which expunged a second reading speech under following motion:

> *That the proceedings of the Legislative Assembly immediately following the calling of the order of the day for the second reading of the Building (Further Amendment) Bill up to the completion of the second-reading speech and subsequent adjournment of debate be expunged from the Hansard record.*
>
> *That so much of standing orders be suspended so as to allow the motion for the second reading of the Building (Further Amendment) Bill and for the adjournment of the debate on the bill to be moved again.*[78]

As explained in the press, at second reading the Minister responsible read a speech about a different bill, one from her portfolio that had already passed.[79] The Clerk explained that:

> *The reason for expunging it from Hansard is that under the Interpretation of Legislation Act, the courts can look at the detail of what is in a Minister's second reading speech when making interpretations of what the House intended to do.*

It seems Victoria's Parliament had a spate of speech mistakes in the early 2000s leading to expungements. Other examples include the expunged second reading speech in the Legislative Council Hansard for 1 June 2000 on the Equal Opportunity Amendment Bill, 2001 and a second reading speech on the Training and Further Education Acts

[77] B. Snedden, Commonwealth, *Parliamentary Debates,* House of Representatives, 21 November 1979, p. 3280.

[78] Victoria, *Votes and Proceedings,* Legislative Assembly*,* Session1999–2002, 14,15 and 16 May 2002, pp. 591–592.

[79] 'Minister in Hot Water over Second-Hand Speech'. *The Age*, 15 May 2002. Accessed at: <https://www.theage.com.au/national/minister-in-hot-water-over-second-hand-speech-20020515-gdu7j1.html>.

(Amendment) Bill, expunged on 24 October 2000. A later incident in 2003 saw expungement proposed when portions of a second reading speech were skipped; however, the omitted portions were later incorporated into the record.[80]

'BUN TUCK'

While New Zealand's Hansard expungements are few and far between, an extensive debate was held in 1898 regarding the expungement of allegations made by a member against Premier Seddon.[81] In short, they revolved around whether Seddon was an individual known as 'Bun Tuck' among a group of Chinese business associates of questionable repute. A parliamentary committee investigated and unanimously vindicated Seddon. The House reportedly voted 35-21 to expunge the allegations and subsequent references to them from bound volumes of Hansard.[82] It seems from media reporting that unbound copies may have circulated but parliamentarians thought better to erase the allegations than have them remain in the official record.

CONCLUSION

As the official record of what was said in Parliament, readers of Hansard assume its completeness. Yet, as the foregoing illustrates, there are instances in which that record has been purposefully expunged in Canada, Australia, and New Zealand. Though Hansard expungement is sometimes on the Speaker's initiative and sometimes by motion of the legislative body, it is always of questionable effectiveness if the press reports the impugned remarks.

Public expectations for transparency and democratic accountability have evolved tremendously over time. It is unfathomable today to imagine things like the report that Canadian parliamentarians voted in secret session in 1894 to expunge the Hansard

[80] Victoria, *Parliamentary Debates,* Legislative Assembly, 16 September 2003, pp. 400–404.

[81] 'House of Representatives', *Otago Daily Times*, 5 November 1898, p 6.

[82] 'In Seddon's Day', *Evening Star*, 2 August 1930, p. 3.

from a public session![83] However, in researching this work, it became apparent that Hansard expungements were suggested far more often than they occurred and covered a wide range of interventions: a comment in the Canadian Senate in 1911 about taking multiple wives;[84] an insinuation in 1984 that an Australian parliamentarian fathered an illegitimate child;[85] a eulogy in 1953 to Stalin on the occasion of his death in Ontario's Hansard;[86] and even the Speaker's recognition of a person in the gallery of the Canadian House of Commons in 2023.[87]

Parliaments control their Hansards and may do unexpected things. A unique case where the Hansard record is intentionally spotty is worth recalling for contrast: it is decidedly not expungement. In 1933, the Australian House of Representatives sat for several consecutive days and the Hansard staff needed a break:

> *I rise to suggest that honorable members agree to discharge members of the Hansard staff from further attendance, and that those who desire to raise questions should forward a precis of their remarks to the Principal Parliamentary Reporter, to be recorded in Hansard. Members of the Government also will forward a precis of their replies.*[88]

The record thus reveals a unique notation: '[The Hansard reporter accordingly retired]'. What then follows are the precis referred to in the motion adopted.

It is doubtful in the modern era we will see gaps in Hansard 'to give the staff a break'. It is expected, however, that calls for expungement will continue to be raised from time to time, particularly when offense in taken in debate. It is perhaps opportune for

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[83] 'At the Capital: efforts to uphold the dignity of the Senate'. *The Globe*, 5 May 1894, p. 13.

[84] See motion in the name of Mr. Donville dated 15 March 1911 in the Senate: Commonwealth, *Parliamentary Debates,* Senate, 16 March 1911, p. 622.

[85] 'Bullying in Politics' in Rigby, Ken, 'New perspectives on bullying'. (2002) J. Kinglsey: London ; Philadelphia, PA, p. 98. Incident erroneously reported as expunged (but better contextualized) in Peter Hartcher, 'Fire was lit a long time ago' *The Age,* 6 October 2012*.* Accessed at: <https://www.theage.com.au/politics/federal/fire-was-lit-a-long-time-ago-20121005-274o5.html>.

[86] 'Oliver Doubtful Frost Can Avert New Hydro Boost.' *The Globe and Mail,* 12March 1953, p. 8.

[87] Aaron D'Andrea, 'Liberals Try to Strike Hunka Recognition from Official Record. What That Means'. *Global News,* 4 October 2023. Accessed at: https://globalnews.ca/news/9988421/canada-parliament-nazi-unit-veteran-tribute-hansard/.

[88] G J McKay, Commonwealth, *Parliamentary Debates,* House of Representatives,6 December 1933, p. 5898.

legislatures to clarify practices – such as whether a speaker's decision is sufficient, or a chamber motion is necessary – and whether certain interventions may be excised regardless of process (such as an interjection from the gallery).

On the broader question of when, if ever, Hansard expungement is appropriate, this author has the following personal views to share: [EXPUNGED].

Article 9 of the Bill of Rights: An Historical, Philosophical and Practical Primer

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Abstract: Parliamentary privilege at Westminster derives from each House constituting part of the High Court of Parliament. The supreme court of England was part of Parliament when it enacted Article 9 of the Bill of Rights 1688, guaranteeing parliamentary privilege. The High Court of Parliament was a 'supreme court – legislature', until specialisation separated the supreme court in O'Connell (1844). Following the creation of specialist and separate supreme courts, at Westminster and elsewhere, neither lower nor upper Houses, nor legislatures at large, can be considered courts. Further, lower Houses have been divided from upper Houses, a political division that obscures the separation of supreme courts from legislatures. The question then arises of how any legislature can be continue to be regarded as part of a High Court of Parliament, and so participate in parliamentary privilege. This paper is to help readers access, navigate and explore the key historical, philosophical and practical aspects of both Article 9 and its interplay with parliamentary privilege in Westminster parliaments.

INTRODUCTION

We are at a remove of over 330 years from the history, philosophy and practices that originally attended the *Bill of Rights*. This paper is designed to help us access, navigate and explore that distance. Parliamentary privilege is founded upon the authority of the High Court of Parliament, according to *Erskine May*:

> *Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies*

> *or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.*[1]

Historically the Supreme Court of England, later the United Kingdom, was a constituent part of the High Court of Parliament.[2] The Lords sat as the Supreme Court as an ordinary part of their parliamentary duties, in addition to sitting as the upper house of the legislature. In 1844 the Lords finally conceded that the professional judges who 'assisted' them constituted the true supreme court and departed, allowing it to become specialised and separate from the legislature in *O'Connell v R*[3] Yet the Supreme Court continued to be a parliamentary body. Section 4 of the *Appellate Jurisdiction Act 1876* (UK) characterised it as 'Her Majesty the Queen in Her Court of Parliament'. The judicial House of Lords became the 'Appellate Committee of the House of Lords' in 1948.[4] The new Supreme Court of the United Kingdom was established in 2009, under the *Constitutional Reform Act 2005* (UK) which repealed the *Appellate Jurisdiction Act* but 'does not adversely affect — (a) the existing constitutional principle of the rule of law'.[5] The Justices of the Supreme Court continue

[1] *Erskine May*, UK Parliament, What constitutes privilege. Accessed at: <https://erskinemay.parliament.uk/section/4570/what-constitutes-privilege> ('*Erskine May*'). As to freedom of speech and debate generally see Enid Campbell, *Parliamentary Privilege*. Federation Press, Annandale, NSW, 2003, ch. 2.

[2] See A.F. Pollard, *The Evolution of Parliament*. London: Longmans, Green, 1926 ('Pollard').

[3] *O'Connell v R* (1844) 11 Cl & Fin 155; 8 E.R. 1061. See Robert Stevens, *Law and politics: the House of Lords as a judicial body, 1800-1976*. London: Weidenfeld and Nicolson ('Stevens'). Later history is set out in Louis Blom-Cooper QC, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1870-2009*. Oxford: Oxford University Press, 2009 ('Blom-Cooper'); and Alan Paterson, *Final judgment: The Last Law Lords and the Supreme Court*. London: Bloomsbury, 2013. Pollard, *Evolution of Parliament*, records how the Lords reduced the king's council in parliament to a house of peers, and increasingly stressed peerage as the sole qualification for membership of the House of Lords, to progressively exclude non-hereditary and conciliar elements even from the position of advisers (pp. 309-12).

[4] Supreme Court of the United Kingdom, 'Appellate Committee of the House of Lords'. Accessed at: <https://www.supremecourt.uk/about/appellate-committee.html>.

[5] *Constitutional Reform Act 2005* (UK), Schedule 17, s 9; Part 1 'The Rule of Law' 'The Rule of Law' (a); respectively.

to be styled 'Lord' or 'Lady', a formality that ensures consistency[6] and, it is submitted, reflects the parliamentary history of the Supreme Court.

That history falls to be examined in terms of the legality, courtliness or 'curiality' of the High Court of Parliament. The fact that 'Parliament' was a court bears directly upon the application of the *Bill of Rights 1688* (Eng),[7] because it suggests that Article 9 confirms a juridical basis for parliamentary privilege and more broadly reflects a neglected, curial jurisprudence. I argue that parliamentary law and custom derive from the legal or 'juridical' character of the High Court of Parliament, rather than from its political, representative functions or the *Bill of Rights* which embodies that 'juridicality'. The High Court of Parliament is thus a 'supreme court – legislature', rather than a lower and upper House that asserts political power without reference to a supreme court. Curial jurisprudence, drawn from parliamentary history, philosophy and practice, complements the political basis regarding the provenance and rationale for Article 9, with which we may be more familiar.

CURIAL JURISPRUDENCE

For centuries English jurisprudence was explicitly curial, in defining sovereignty as in other matters.[8] To place the modern concept of parliamentary privilege, it is useful for us to reflect on its origins, and specifically curial jurisprudence and the emergence of parliamentary sovereignty in England. AF Pollard sets out how English sovereignty grew, from a weak juvenile condition, through the growth of the jurisdiction or *sovereignty* of Parliament demonstrating that supreme monarchical, aristocratic or

[6] Supreme Court of the United Kingdom, 'Courtesy titles for Justices of the Supreme Court'. Accessed at: https://www.supremecourt.uk/docs/pr_1013.pdf (From personal correspondence with a Court officer, 16 September 2021).

[7] The Bill of Rights received Royal Assent on 16th December 1689. However, legislation.gov.uk elaborates how it (and previous, successive, official editions of the revised statutes from which the online version is derived) assigns the enactment to the year 1688, following *The Statutes of the Realm*, Vol. VI (1819). The Republic of Ireland, where the Bill of Rights continues to have effect, does likewise under its own legislation.

[8] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England*, 1450-1642. Cambridge: Cambridge University Press, 2006) ('Cromartie'); W.S. Holdsworth, *History of English Law*. London: Methuen, vol. 2, pp. 404-5.

democratic power acted ultimately inside the High Court of Parliament.[9] He cites Fleta, a pseudonymous author in the time of Edward I or II:

> *The king has his court in his council in his parliaments, in the presence of earls, barons, nobles, and others learned in the law, where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to every one according to his deserts.*[10]

Specialist judicial courts, administrative courts and the High Court of Parliament subsequently crystallised from a constitutional protoplasm of judicial, executive and legislative authority.[11] England required supreme power to act through and be mediated by autonomous courts; ultimately the sovereign Crown's High Court of Parliament, a supreme court and legislature.[12]

Early Stuart England defined sovereignty by juridically requiring that Bodin's 'sovereign power' act through autonomous courts. The separation of autonomous courts in England can be traced to the fourteenth century. In 1305 a Chief Justice said to counsel

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[9] In Chapters XI-XVII he addresses 'The growth of sovereignty in Parliament', 'The separation of powers', 'The Crown in Parliament', 'The Council in Parliament', 'The Peers in Parliament', 'The Commons in Parliament', and 'The State in Parliament'. In *The Sovereignty of Parliament*. Oxford: Clarendon, 1999, Jeffrey Goldsworthy defines sovereignty as jurisdiction, emphatically, in his chapter 'From James I to the Restoration', when identifying Coke's characterisation of Parliament's sovereignty as its jurisdiction:

> In the First Institute he treated ordinary law-making as part of the 'jurisdiction' of the 'court' of parliament: '[t]he jurisdiction of this court is so transcendent, that it makes, enlarges, diminishes, abrogates, repeals, and revives laws, statutes, acts, and ordinances'. He concluded that discussion by noting that 'this properly does belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice', anticipating his more detailed treatment of the topic in the Fourth Institute. At the time, the word 'jurisdiction' commonly meant the power of ruling in general, and not just the authority of a judge; for example, 'supreme jurisdiction' was the same as maiestas, which we now call sovereignty (115) (footnotes omitted).

[10] Pollard, *Evolution of Parliament*, pp. 23-5.

[11] See Pollard, *Evolution of Parliament*, pp. 25, 239; H.D. Hazeltine, G. Lapsley, P.H. Winfield (ed), *Selected Essays, 'Introduction to Memoranda de Parliamento'* by F.W. Maitland, Cambridge: Cambridge University Press, 1935. C.H. McIlwain, *The High Court of Parliament and its Supremacy: An historical essay on the boundaries between legislation and adjudication in England*. New Haven: Yale University Press, 1910.

[12] Holdsworth contrasts this with the Continent, where local governments were instead becoming the mere delegates of a politically supreme state, in the late Middle Ages (W.S. Holdsworth, *A History of English Law*. London: Methuen, 1923, vol. 2, p. 405.

'(d)o not gloss the Statute; we understand it better than you do, because we made it'.[13] However, in 1365 the chancellor, before the king's council, reversed a decision by the court of common pleas.[14] Lord Coke referred to it in the *Case of Prohibitions*,[15] stating that 'one had a judgment reversed before the Council of State; it was held utterly void for that it was not a place where judgment may be reversed'.[16] JF Baldwin remarked that the King's Council was not regarded as the proper place, because it was not a court of common law,

> *and all the courts were ready to resist any such subjugation to the utmost. Parliament, on the other hand, was a court of record, which might review its own judgements on appeal of error.*[17]

That the House of Lords still constituted the supreme court strongly indicates why Parliament was recognised as a court of record. The Council, however, was neither a court of common of law nor a court of record. The specialisation of the judiciary separated it from the Council. That separation manifested judicial independence from the executive power which the Council originated in the executive branch. The executive power was to be extruded from the executive branch, through the events of the seventeenth century that culminated in the Revolution of 1688 and the Bill of Rights. In *Prohibitions* itself, Coke observed that the common law courts had specialised, such that the king lacked 'the artificial reason and judgment of law, which

[13] Year Books, Boston University School of Law, Accessed at: <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=1813?>. See Pollard, *Evolution of Parliament*, p. 34 and footnotes.

[14] (1365) 39 Edw. III 14. In the 'Case of the King's Council': '… the Chancellor reversed this judgment before the Council, where it was adjudged in the same course as the bishop had certified, and they sent the record back into the Common Pleas. And there, … it was awarded that the plaintiff recover her seisin and her damages. But the Justices did not take any regard to the reversal before the Council, because this was not a place where a judgment could be reversed'. Year Books, Boston University School of Law, Accessed at: <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=13473>. David J. Seipp of the School of Law compiled a long awaited index and paraphrase of Year Books from 1268-1535. He discusses the experience in 'Big Legal History and the Hundred Year Test'. *Law and History Review* 34(4) (2016) p. 857-872.

[15] *Prohibitions del Roy* (1607) 12 Co Rep 63 *('Prohibitions')*.

[16] *Prohibitions*, p. 64.

[17] J.F. Baldwin, *The King's Council in England during the Middle Ages*. Oxford: Clarendon, 1913, pp. 335-6.

law is an act which requires long study and experience'.[18] We might wonder whether James could have studied and qualified in law, yet the principle would have remained. The presumption of independence from the executive branch gained by such specialisation would have been negated by his personally embodying executive power. In the *Case of Proclamations*,[19] James I sought to prohibit new buildings in and about London. In response, Coke foreshadowed the *Bill of Rights*. The King could not change the law 'by his prohibition or proclamation'.[20] More precisely, just a few sentences earlier Coke stated that 'the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, *without Parliament*'.[21] The *Prohibitions* separation of the judiciary was a preliminary to *Proclamations*. It facilitated the later requirement that the prerogative of the Crown, in right of the Executive, be exercised and supervised ultimately inside the High Court of Parliament. These decisions accorded with Natural Law requiring that law and power be validated not by their mere assertion, but by their participation in greater, antecedent principles; in England, autonomous courts. James I asserted the medieval view of jurisprudence in *Prohibitions*, when Coke reports 'then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges'.[22] In *Proclamations* we also see James asserting that the private morality

[18] *Prohibitions*, p. 65.

[19] *Case of Proclamations* (1611) 12 Co Rep 74 *('Proclamations').* De Smith and Brazier described it as 'perhaps the leading case in English constitutional law' (Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, p. 74, ('de Smith and Brazier').

[20] *Proclamations*.

[21] *Proclamations* (emphasis added). In *Miller, R (on the application of) v The Prime Minister* [2020] AC 373, the UK Supreme Court referred to *Proclamations*, when holding that that an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful. However, it identified the Crown and its prerogative with only the Executive and the executive branch: '… in the *Case of Proclamations* the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land' [41]. Their Ladyships and Lordships juxtaposed 'parliamentary sovereignty' against the prerogative as if the Crown, a symbol of sovereignty, does not exercise the prerogative ultimately inside the dualistic High Court of Parliament itself. Again, at [49]: 'A prerogative power is therefore limited by statute and the common law', as if statutes are not themselves the Crown's exercise of its prerogative in its Parliament.

[22] *Prohibitions* (n 17) 64-5. Goldsworthy records in detail how royalists were adamant the King 'was accountable only to his own conscience, and to God, and not to any human tribunal or power' (*Evolution of Parliament*, p. 80). He then propounds this view as a precedent for parliamentary sovereignty.

of the Sovereign, unaided by an external framework, founds the constitutional order. Yet participatory, Natural Law, implicit in the medieval view of morality, was now embodied in autonomous courts; political power was to be mediated through autonomous courts, ultimately the High Court of Parliament, rather than directly. As we shall see Article 9 founded parliamentary privilege, by entrenching the High Court of Parliament, a supreme court and legislature, as an autonomous court through which even supreme power was required to ultimately act. Only thus can we see the later separation of the supreme court, from the legislature, as a cataclysm for the legislature's participation in parliamentary privilege.

The specialisation of the English judicature and specifically the Crown's High Court of Parliament separated the Crown's courts from its executive branch. This made supreme power accountable by requiring that it act through autonomous forums rather than arbitrarily, in isolation. Cicero wrote of true law being right or correct reason 'in agreement with nature'.[23] Medieval Europe and Hooker conceived true human law as based on and conforming to the higher or Natural Law of God.[24] It is submitted that in the new, juridified, English form of Natural Law, parliamentarians and other common lawyers differentiated legal authority from individual morality. Then, they required individual conscience and Bodin's 'sovereign power' to act lawfully and be validated through autonomous courts. However, the consolidation of political supremacy in the Executive was delayed by the Interregnum which saw rule by parliamentary committees for example.[25] It let in a novel philosophy that did not

[23] Marcus Tullius Cicero, *On the Republic*, 'On the Law of Nature' (tr. with introduction, notes, and indexes by David Fott). Ithaca, Cornell, 2014, p. 98.

[24] Richard Hooker, *Of the laws of ecclesiastical polity*, Book One; cf James Daly, 'Cosmic Harmony and Political Thinking in Early Stuart England'. *Transactions of the American Philosophical Society* 69(7) (1979), pp. 21-2.

[25] Clayton Roberts, *The Growth of Responsible Government in Stuart England*. Cambridge: Cambridge University Press, 1966) pp. 118-9, 145-51 ('Roberts'); Martin Loughlin refers to the inadequacy of this experiment becoming 'widely recognised' within just four years of the Commonwealth, leading to the replacement of parliamentary committees by the investiture of legislative power in the legislature, and executive power in the Lord Protector and Council, which after Cromwell's death led to the dominant faction in the army inviting Charles II to recover the throne (*Foundations of Public Law*. Oxford: Oxford University Press, p. 258. Loughlin also examines 'political jurisprudence' at length (ch. 6):

> But before coming directly to the power/liberty dynamic as it functions in public law, we should first address the question of why public law cannot be conceived as involving the perennial search for the key to a science of political right. Rather than being treated as an explication of the science of political right, public law should be recognized as an exercise in political jurisprudence (158).

require monarchical, aristocratic, or democratic power to act through autonomous courts.

POLITICAL JURISPRUDENCE

Jeffrey Goldsworthy has traced the emergence of Parliament's distinctly legislative function to the 1640s.[26] Yet he describes this 'legislative sovereignty'[27] in terms of a political supremacy. Despite acknowledging that 'parliaments … exercised a legislative as well as judicial power',[28] Goldsworthy neglects the participation of the supreme court in the High Court of Parliament.[29] His precedent for 'legislative supremacy'[30] is the political supremacy of the monarch before the 1640s, despite the curiality of the monarch described above. A 2022 article[31] refers to *Jackson v Attorney General*,[32] where the judicial House of Lords affirmed the validity of Prime Minister Blair's fox-hunting legislation. Goldsworthy goes so far as to claim that statements by three Law Lords were 'based on known falsehoods'.[33] Further, in a footnote:

> *Lord Steyn's assertion at [102] that the judges created the principle of parliamentary sovereignty is demonstrably false, as is Lord Hope's related*

Instead it is argued here that this approach neglects the curial origination of political jurisprudence in the 1640s, described shortly.

[26] Goldsworthy, *Sovereignty of Parliament*, pp. 132-5.

[27] Goldsworthy, *Sovereignty of Parliament*, pp. 135.

[28] Goldsworthy, *Sovereignty of Parliament*.

[29] He likewise defends 'legislative sovereignty' in *Parliamentary Sovereignty: Contemporary Debates*. Cambridge: Cambridge University Press, 2010, ch. 3.

[30] Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*. Cambridge: Cambridge University Press, 2010, , ch. 2.

[31] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Popular Sovereignty in the UK Constitution'. *Cambridge Law Journal* 81(2) (2022), pp. 273.

[32] *R. (Jackson) v Attorney General* (2006) 1 AC 262.

[33] Goldsworthy, 'Parliamentary Sovereignty', p. 291. Professor Goldsworthy was refuting Rivka Weill who in her article ('Constitutionalism Reborn', *Columbia Journal Transnational Law* 60 (2021) 132, pp. 198-9) was citing *R. (Jackson) v Attorney General* (2006) 1 AC 262, [102] (Lord Steyn); [104], [107], [126] (Lord Hope); [159] (Baroness Hale).

> *assertion at [126] that the principle was 'created by the common law', if he means judge-made law.*[34]

As proof of these strong assertions, Goldsworthy cites his chapters on 'The Philosophical Foundations of Parliamentary Sovereignty', and 'Defining Parliamentary Sovereignty'.[35] In each of these chapters he fails to discuss? how members of the House of Lords sat as judges, the supreme court of England, at the Glorious Revolution, which he recognises created the principle of parliamentary sovereignty.

Alan Cromartie, instead, describes the new parliamentary authority in the 1640s as 'an adjudicative supremacy'.[36] A parliamentary vote used curial language to explain parliamentary authority to Charles I:

> *When the Lords and Commons in parliament which is the supreme court of judicature in the kingdom nation shall declare what the laws of the land is, to have this not only questioned and controverted, but contradicted, and a command that it should not be obeyed, is a high breach of the privilege of parliament.*[37]

As in the Middle Ages, described above, Parliament furthered its sovereignty by acting as a court. The *Nineteen Propositions of Both Houses of Parliament*, given on 19 May 1642, were even more juridical as Cromartie notes:

> *… if the question be whether that be law which the Lords and Commons have once declared to be so, who shall be the judge? (T)he king's judgement (is) in his highest court, though the king in his person be neither present nor assenting thereunto.*[38]

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[34] Goldsworthy, 'Parliamentary Sovereignty', 129.

[35] Goldsworthy, *Sovereignty of Parliament*, chs. 10, 2.

[36] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642*. Cambridge: Cambridge University Press, 2006. ('Cromartie').

[37] Edward Husbands, *An exact collection of all remonstrances, declarations, votes … betweene the Kings most Excellent Majesty and his high court of Parliament*. London: publisher not stated, 1643, p. 195 ('Husbands'); cf Cromartie, *Constitutionalist Revolution*, p. 264.

[38] Husbands, *Collection*, 206-7; cf Cromartie, *Constitutionalist Revolution*, p. 264.

At this time, the king's legislative judgment bore the authority of the Crown. However, it is submitted that Charles was not content for the Crown to remain the transcendent authority that united Parliament, the common law courts, and the executive branch itself. Two advisors gave the more famous *Answer to the Nineteen Propositions of Both Houses of Parliament*,[39] to establish the executive power as part of the positive, law-making, supervisory structure of Parliament:

> *What concerns more the Publike, and is more (indeed) proper for the high Court of Parliament, than the making of Laws, which not only ought there to be transacted, but can be transacted no where else; but then you must admit Us to be a part of the Parliament, … and most unreasonable it were that two Estates, proposing something to the Third, that Third should be bound to take no advice, whether it were fit to passe, but from those two that did propose it.*[40]

AF Pollard regarded the doctrine of the three estates as grafted onto Parliament comparatively late, and imperfectly, partly as a political convenience for foreign relations.[41] His scholarship has recently been reviewed, upon the centenary of his founding the Institute of Historical Research in Britain.[42] Paul Cavill recounts how Pollard related the powers in Parliament to the Crown, and discounted assertions of parliamentary independence from the Crown as fortunately mistaken, given the failure of Parliaments on the Continent where sovereignty was not a common project.[43] Cromartie similarly casts the monarchy's claim to be one of the three estates, as a political step down; 'inexplicable'[44] except as a reaction to Parliament's 19 May

[39] *Joyce Lee Malcolm, The Struggle for Sovereignty: Seventeenth-Century English Political Tracts (Vols 1 and 2)*, '1642: Propositions made by Parliament and Charles I's Answer'. Indianapolis: Liberty Fund, 1999 (*'Lee Malcolm')* pp. 146-7.

[40] *Malcolm, Struggle for Sovereignty*, pp. 163-4.

[41] See Paul Cavill, 'AF Pollard', *Parliamentary History*. London: Parliamentary History Yearbook Trust, 2021, p. 52, fn 53 ('Cavill').

[42] Cavill, 'AF Pollard', p. 52. G.R. Elton, an intellectual heir of Pollard, had Pollard's 'bad and misleading book', *The Evolution of Parliament*, removed from Cambridge University reading lists (see Cavill).

[43] Cavill, 'AF Pollard', p. 52.

[44] Cromartie, *Constitutionalist Revolution*, p. 265.

declaration. The revival of the estates of King, Lords and Commons was a 'startingly sudden revival of an obsolete idea'.[45] Professor Vile addresses this period in detail, upon the following political premise: 'In England the acceptance of the idea of a single source of sovereign power led to the concept of parliamentary supremacy'.[46] However, it is submitted that Coke was leading the common lawyers including parliamentarians to curially differentiate the Crown's power from the Crown's forums of power, ultimately its High Court of Parliament.

Before the Interregnum, the King was politically superior to the Lords and Commons, being the Executive. Therefore, it was disingenuous for the monarchy to assert that the three were merely equal. Even more importantly, the Lords and Commons were juridically superior to the Executive. They formed a single 'supreme court – legislature' that curially reviewed and defined the politically superior Executive itself; an archetype of the Crown's juridical definition of Crown power in the Crown's courts at large. The three estates did not produce political balance in the seventeenth century. Charles himself would be tried and executed, and the monarchy and House of Lords abolished in 1649, the monarchy restored in 1660, followed by the bloodless or 'Glorious Revolution' of 1688.[47] Curial jurisprudence, not political jurisprudence, would embody parliamentary privilege as Article 9 of the Bill of Rights.

As discussed below, the new 'parliamentary state' recently described by Martin Loughlin[48] was the success of the 'supreme court – legislature', in juridically fortifying the Executive, by requiring that the executive power act ultimately inside the High Court of Parliament, outside the executive branch. The contest between the three estates was instead merely political. In *Leviathan*,[49] Hobbes referred to sovereign power but not to Bodin, nor to the central project of English lawyers in the seventeenth

[45] Cromartie, *Constitutionalist Revolution*, p. 265.

[46] Vile, *Constitutionalism*, p. 46.

[47] However, Warren Johnston disputes that it was bloodless. *English Historical Review*, 125 (2010) No. 515, 994-7; reviewing Steve Pincus, *1688: The First Modern Revolution*. New Haven: Yale University Press, 2009.

[48] Martin Loughlin, *Foundations of Public Law*. Oxford: Oxford University Press, 2010, ch. 9.

[49] Thomas Hobbes, *Leviathan*, (ed JCA Gaskin). Oxford: Oxford University Press, 1996.

century, requiring supreme power to act through autonomous courts.[50] His jurisprudence was political rather than curial.

The *Answer* was hastily retracted by the monarchy. As indicated above the *Answer* was written by two advisors, one of whom later pleaded inadvertence.[51]Yet it introduced a new form of 'political jurisprudence' to England. Bodin had not juxtaposed his 'sovereign power' against autonomous English courts. In the years after the *Answer*, the separation of legislative, executive and judicial powers came to the forefront of political theory.[52] Professor Vile describes the doctrine as rehabilitating the older doctrine of mixed government, to balance the constitution.[53] However, both the separation of powers doctrine and the model of three estates were neglectful departures from the common lawyers' juridification of public debate, in which the Crown and other political powers were features of the Crown's judicial, administrative

[50] Instead, Hobbes criticised 'Some Foolish Opinions of Lawyers Concerning the Making of Lawes'. We saw that in *Prohibitions*, Coke referred to the 'artificial reason' of lawyers (*Prohibitions*, p. 65). Hobbes, however, identified sovereignty with the political supremacy of the Commonwealth, an artificial legal person whose artificial Reason is superior to that of 'the subordinate Judge'. Hobbes then failed to differentiate the Crown from the Executive, and said: 'In all Courts of Justice, the Soveraign (which is the Person of the Common-wealth,) is he that Judgeth: The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto; which then is his Soveraigns Sentence; otherwise it is his own, and an unjust one'.

[51] Malcolm, *Struggle for Sovereignty*, pp. 146-7. Lee Malcolm concludes that the king may not have actually read the reference to the three estates, and that in important respects it does not reflect Charles' earlier or later views (pp. 146-7).

[52] Vile, *Constitutionalism and the Separation of Powers*, ch. 2, 'The Foundation of the Doctrine', sets out this area in detail. In 1648, Sir Charles Dallison took a more robust stance against Parliament, asserting that where 'the Supremacy, the Power to Judge the Law, and the Authority to make new Lawes' are unified, the known Law 'is vanished, instantly thereupon, and Arbitrary and Tyrannical power is introduced' (*The Royalists Defence*. London: [Publisher not stated] 1648, p. 80.) It fell to George Lawson to note the 'judicatory' power in the Lords, and divide government power into three: 'There is a threefold power civil, or rather three degrees of that power. The first is legislative. The second judicial. The third executive' (*An examination of the political part of Mr. Hobbs his Leviathan*. London: Francis Tyton, 1657, p. 8). Perhaps even more importantly, it is submitted here, Lawson also narrowed the 'Power of Jurisdiction' to the 'administration of justice', and included that in the executive power, alongside the right of appointing officers. Judicial authority thus began to acquire its modern, substantive sense of judicial power, in juxtaposition against legislative and executive power rather than as a supervisory jurisdiction.

[53] Vile, *Constitutionalism* ch. 3. He notes (p. 59) that the royalist *Answer* referred to the 'judicatorie' power of the House of Lords, but it is submitted that they perhaps sought to undo the joint 'supreme court - legislature', and so obscure that joint forum's definition of the Executive.

and legislative courts. Decades after the *Answer*, in his *Two Treatises of Government*,[54] John Locke systematised this political abstraction of jurisprudence away from the juridical, pre-1642 model. Goldsworthy delineates the transition to a Lockeian philosophy.[55] In the sixteenth century the removal of papal supremacy in Britain transferred supreme authority over the English church to secular authority. This absorption of ecclesiastical authority by a renaissance King in Parliament, assisted by Low Church reformers endorsing legislative power to oppose High Church policies,[56] disembodied ecclesiastical criticism of the king. Religious questions came to be rendered a largely spiritual matter, removed from the ongoing exercise of Crown power through Crown courts including the High Court of Parliament. Goldsworthy charts how, in the seventeenth century, John Locke could seize what had now become an abstract theological restraint and couple it to community authorisation, to then manifest it as the consent of the governed with religious overtones.[57]

Like the monarchy in 1642, Locke reduced the Crown's curial, supervisory jurisdiction to a political jurisprudence. Locke needed a juxtaposition or 'separation' of powers against each other, to prevent tyranny, because he identified legislative, executive and treaty-making or 'federative' powers[58] as unmediated, having neglected the Crown's curial jurisdiction. More systematically than the monarchy or pamphleteers who followed the *Answer*, Locke reduced the Crown's curial jurisdiction to political power which he juxtaposed against the parliamentarians' political power. In accordance with Bodin's sovereign power before its English juridification, and Hobbes' sovereign power after its juridification, Locke describes a clash of mere political power. He neglected the new, curial jurisprudence that distinguished the old political jurisprudence, and encompassed it within the new requirement, that power act through autonomous courts. He neglected how Coke had characterised Crown power as a feature of the Crown's jurisdiction, a power that was required to act through the Crown's specialist judicial courts, administrative courts, and its dualistic High Court of Parliament as

[54] *Two Treatises on Government*. London: Awnsham Churchill, 1679-81.

[55] Goldsworthy, *Sovereignty of Parliament*, chs. 4-7.

[56] Goldsworthy, *Sovereignty of Parliament*, p. 55.

[57] Goldsworthy, *Sovereignty of Parliament*, p.151 ff. As to Locke's own religious beliefs see Diego Lucci, *John Locke's Christianity*. Cambridge: Cambridge University Press, 2020.

[58] Locke, *Two Treatises*, ch. XII.

lawful authority. Locke emphasised democratic power, yet he neglected the rule of law as founded by Coke's requirement that power, whether monarchical, aristocratic or legislative, act through autonomous courts.

Medieval and early Stuart jurisprudence characterised sovereignty as requiring that even supreme power act through a mediating court. Instead, Locke vested sovereignty directly in the people's consent through their spiritual patriarch, Adam,[59] as expressed in a legislative supremacy[60] with overtones that were private and spiritual rather than public and ecclesiastical. A century before Locke, philosophers were enamoured of the Great Chain of Being that was said to harmonise the whole world, reaching up to the heavens and ultimately to God.[61] Locke merely sought 'a defensible theology',[62] to relieve the confines of a much more limited view of human understanding: 'We shall not have much reason to complain of the narrowness of our minds, if we will but employ them about what may be of use to us; for of that they are very capable'.[63] After Locke, Montesquieu's separation of powers to prevent tyranny;[64] Austin's supreme,

[59] Locke, *Two Treatises* , ch. III. Of Adam's title to sovereignty, IV; Of Adam's title to sovereignty, by donation, Gen. i. 28; V. Of Adam's title to sovereignty, by the subjection of Eve; VI. Of Adam's title to sovereignty, by fatherhood; VII. Of fatherhood and property considered together as fountains of sovereignty; VIII. Of the conveyance of Adam's sovereign monarchical power; IX. Of monarchy, by inheritance from Adam; X. Of the heir to Adam's monarchical power.

[60] Locke, *Two Treatises* ch. XI 'Of the Extent of the Legislative Power' (para 134): '… the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it…'

[61] Daly, 'Cosmic Harmony', argues that the Reformation sharply restricted what human reason could know about the universe, and encouraged one 'to see law, even natural law, as pure Will, having no ultimate meaning beyond the power which promulgated it' (p. 22).

[62] John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government*. Cambridge: Cambridge University Press, 2012.

[63] John Locke, *An essay concerning humane understanding*, ch. 1, 'Introduction'. London: Thomas Basset, 1690, Section 5.

[64] 'When legislative power is united with executive power in a single person in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically' (Baron Montesquieu, *The spirit of the laws*. Cambridge: Cambridge University Press, 1989, 157.

uncommanded commander;[65] and HLA Hart's hierarchical 'rule of recognition' which derived from Austin[66] — each can be traced to Locke's restrictive neglect of the Crown's curial architecture that strove for justice by requiring that all power act through autonomous courts. This view tends to assert the political supremacy of the two political Houses of Parliament, rather than the curial authority of a forum of which the supreme court was still part.

The 'political jurisprudence', which followed the reductionist *Answer* of 1642, was ineffectual. It did not resolve the political conflict of the seventeenth century that characterised the Stuarts as merely juxtaposing monarchical power against aristocratic and democratic power. We will address the Revolution shortly. Recent scholarship has shown that Locke wrote *Two Treatises of Government* between 1679 and 1681, rather than in response to the Revolution of 1688 as previously thought.[67] He was reacting to the Exclusionary Crisis caused by Bills purporting to exclude the future James II.[68] In 1690, however, Locke commented on the Glorious Revolution. In what has been designated *A Call to the Nation for Unity*,[69] Locke made a partisan demand for allegiance to the new king on a *de jure* rather than *de facto* basis. He feared that assent to the mere fact of William's kingship might allow Tories to backslide and betray what

[65] John Austin, *The Province of Jurisprudence Determined*. London: John Murray, 1861. Daly defines law in early Stuart harmonism, as a 'concord reflecting intrinsic relationship' (p. 22), in contrast to the Legal Positivism that Austin systematised centuries later: 'That was what law was – not an arbitrary command representing power, but the expression of an intrinsic necessity, springing from the nature of things, and governing their harmonious operation')

[66] Austin, 'The Province of Jurisprudence Determined', pp. 6-7.

[67] Mark Goldie, 'John Locke on the Glorious Revolution: A New Document' *History of Political Thought* (2021) 74.

[68] John Dunn, *John Locke*, argues: 'What is clear is that at some point in 1681 at the very latest Locke set himself to provide a systematic refutation of absolutist theory … In short it was a theoretical proclamation of the ultimate right of revolution' (48).

[69] See Goldie, *John Locke*. That was the title both applied to it in a 1922 auction, and used by Peter Laslett, *John Locke, Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press, 1965) p. 59 fn 5. Referring to a parliamentary friend of Locke's, Laslett remarked that the *Call for Unity* 'was sold with other Clarke papers at Sotheby's in 1922 and seen in the 1940's (*sic*), but it has now been lost sight of' (ibid). However, Mark Goldie impugns rather than admires the rhetorical quality of that title, to then dispute Laslett's designation, precisely because the paper is fiercely partisan rather than unifying, and says it is 'without textual warrant' (Goldie, *John Locke*, 74).

Whigs called 'Revolution principles'[70] by denying the right to kingship. Instead, the High Court of Parliament and William's kingship there could have been addressed in curial or political terms, because it was both. The supreme court did not become a specialist court, separate from the legislature, until the nineteenth century as we shall see. Until then, at least, the monarch was defined by a 'supreme court – legislature', permitting lawful allegiance on the basis of right or fact. Yet Locke's separation of powers doctrine provided for the later separation of the supreme court, in the nineteenth century, to be regarded as isolating the supreme court from the legislature. He obscured the joint authority of the 'supreme court – legislature', and hence how each House constitutes part of the High Court of Parliament and so participates in parliamentary privilege.

A REVOLUTIONARY, CURIAL JURISPRUDENCE

The late medieval author 'Fleta' wrote 'The king has his court in his council in his parliaments…'[71] The Revolution of 1688 restored and entrenched that ancient, curial distribution of lawmaking power across the executive branch and the High Court of Parliament, ending the Stuarts' tumult. James I claimed for the Sovereign a prerogative outside of Parliament, such that he could even sit as a common law judge. Advisors to Charles I similarly obviated the jurisdiction of the High Court of Parliament, by instead focusing solely on the powers that acted there. In 1672, Charles II issued the Declaration of Indulgence that disapplied parliamentary legislation, to give religious freedom to Catholics.[72] Stuart courts subsequently upheld the monarch's prerogative

[70] Goldie finds that Locke feared that such betrayal could provide cover to Jacobitism, and later introduces Locke's actual text by concluding: 'There is a touch of Robespierre about the philosopher of the Glorious Revolution' (88).

[71] Pollard, *Evolution of Parliament*, pp. 23-5.

[72] See Alfred F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II'. *Law Quarterly Review* 66(1) (1950) 62, 72-5.

to dispense with the operation of a statute.[73] At the Glorious Revolution,[74] parliamentarians extruded the executive power from the executive branch, thereby differentiating the Executive from the Crown. They required the new monarch to participate in the Crown's prerogative lawfully, as the Crown, inside the autonomy of the jurisdiction or sovereignty of the High Court of Parliament. Parliamentary committees had weakened the Executive during the Interregnum,[75] and parliamentarians undid the Executive by replacing James II with William III. However, parliamentarians established the new 'parliamentary state' that Martin Loughlin describes as a product of a stable aristocratic club.[76] The 'supreme court – legislature', rather than political doctrines such as the three estates or the separation of powers, fortified the political supremacy of the Executive, by establishing the 'executive power in the High Court of Parliament', separately from the executive power in the executive branch. Parliamentarians now participated in the sovereignty of the Crown, as the sovereignty of Parliament, a court with jurisdiction over even the Executive. That is not to say that parliamentarians were always wise or careful in doing so; we come shortly to *Stockdale v Hansard*.[77] Instead, parliamentarians defined the Executive curially and so participated in its exercise of the Crown's prerogative.

The parliamentary court enacted the legislation known as *The Act 1688*, which affirmed that the Lords Spiritual and Temporal and Commons convened at Westminster 'are the Two Houses of Parlyament', despite any formal defect in any writ of summons. The *Bill of Rights* then fortified the right, prerogative or privilege of the Crown in Parliament to suspend laws, dispense with laws, and levy money.[78] Article 9 likewise asserts the Crown's freedom of speech in Parliament, as against supreme political power, which parliamentarians themselves had just established as the monarchical Executive:

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[73] See *Thomas v Sorrell* (1674) Vaughan 330 and *Godden v Hales* (1686) 11 St. Tr. 1165; cf Tom Spencer, 'An Australian Rule of Law'. *Australian Journal of Administrative Law* 98 (2014) 21 ('Spencer').

[74] For the historical details of both the Revolution and the *Act of Settlement 1700* (Eng), see Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence'. *Oxford University Commonwealth Law Journal* 1(2) (2001) 253.

[75] See Roberts, *Responsible Government*, p. 120-1.

[76] Loughlin, *Public Law*, pp. 265-6.

[77] *Stockdale v Hansard* (1839) 9 A & E I ('*Stockdale*').

[78] Articles 1, 2 and 4 respectively.

> *Freedom of Speech: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'.*

Article 9 excluded the Stuart courts that had supported the Executive prior to the Revolution. However, it did not exclude the jurisdiction of the supreme court which was part of the defining 'supreme court – legislature' that enacted Article 9. Subsequent legislation such as the *Crown and Parliament Recognition Act 1689* (Eng) confirmed the authority of the new king and queen, and the Acts of the new 'High Court of Parlyament', independently of James II. The *Act of Settlement 1700* (Eng) similarly established the Crown's prerogative to remove judges, in law, by requiring an address of both Houses of Parliament at section 3.[79] To reiterate, parliamentarians fortified the political supremacy of the monarchical Executive, in the executive branch, and then established parliamentary privilege as a Crown immunity, in Parliament, from that supremacy.

We must note, here, that Maitland found only a political basis for the Revolutionary Convention and the Parliament it became: 'We cannot work it into our constitutional law'.[80] However, he neglected the participation of the supreme court of England in the Convention and Parliament. The participation of the supreme court in both offered a basis for common law courts to remain independent from the political supremacy of the Executive in the legislature. When accepting legislation as superior to their own precedents, they could have been presumed to be deferring to a court of which the supreme court was part.

[79] Section 3: 'That after the said limitation shall take effect as aforesaid, judges commissions *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them'. ('During their good behaviour'.)

[80] F.W. Maitland, *The Constitutional History of England*. Cambridge: Cambridge University Press, 1908, pp. 285. Sir William Wade held similarly, as did de Smith and Brazier. See H.W.R. Wade, 'The Basis of Legal Sovereignty'. *Cambridge Law Journal*, (1955) p. 172, 188; Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, p. 70, 72. In America, Richard S Kay states his book *The Glorious Revolution and the Continuity of Law* 'aims to show how the distortion of legal concepts necessary to accomplish the Revolution influenced the actions, the institutions, and the rhetoric of the new settlement'. Washington DC: Catholic University of America, 2014, p. 2.

The Revolution is perhaps best understood as the triumph of curial jurisprudence over political jurisprudence. It fortified the political executive branch, through curially extruding executive power from that branch, and requiring that it act ultimately inside the dualistic High Court of Parliament instead. The Revolution differentiated political power from curial authority, by encompassing the politically supreme yet arbitrary Executive, within the lawful jurisdiction or sovereignty of Parliament. As for the morality of the Revolution, parliamentarians and other common lawyers in the seventeenth century succeeded in juridifying Bodin's 'sovereign power', and his Renaissance definition of the sovereignty of God. Pollard argues that the Revolution 'robbed the crown of liberty of conscience and imposed upon it a whole decalogue of prohibitions'.[81] Instead, the medieval conscience and private morality of monarchs was now fortified by the public requirement that they act ultimately through an autonomous 'supreme court – legislature', the High Court of Parliament.

POLITICAL JURISPRUDENCE STRIKES BACK

AF Pollard has been cited at length in this paper, because he articulated the curiality of the dualistic High Court of Parliament. He also identifies, with regret, the political division of the High Court of Parliament into the Commons and Lords after the Glorious Revolution. The Commons sought to participate in the Lords jurisdiction as the supreme court, while the Lords sought to participate in the Commons taxing power, before each accepted the other's ability to reject its own claim:

> *Both houses were, in fact, appropriating the effects of a languishing monarchy, and they agreed to divide the spoil. The divergence of parliament into two houses prevented the common enjoyment of the fruits of parliamentary triumphs; and the lords acquiesced in the commons' control of taxation, while the commons accepted the claims of the lords to the sole exercise of appellate jurisdiction.*[82]

[81] Pollard, *Evolution of Parliament*, p. 179.

[82] Pollard, *Evolution of Parliament*, p. 310.

It is submitted that this political divergence has had extensive consequences for parliamentary privilege. It obscures the participation of the supreme court in the High Court of Parliament, and hence the 'supreme court – legislature'. Privilege has come to be founded upon political jurisprudence, Parliament's representative and other political claims, rather than upon curial jurisprudence which included the supreme court in the High Court of Parliament.

In 1832, parliamentarians instituted a parliamentary executive power that required a Commons majority, as responsible government. The *Representation of the People Act 1832* (UK), or the 'Great Reform Act' abolished the patronised 'rotten' and 'pocket' boroughs, to draw the Executive from the legislature rather than the monarch's Council.[83] This was the opposite of the aristocratic club whose stability allowed political organisations to form in the eighteenth century. Less than a decade later, in *Stockdale*, the Commons' private printers were sued for defamation.[84] Prison inspectors had criticised the publishers of an illustrated treatise on reproduction found circulating among prisoners. The Commons ordered Hansard to plead its own privilege in defence. The Court of Queen's Bench rejected Hansard's plea as beyond privilege, and awarded the plaintiff damages. Jeffrey Goldsworthy characterises the case as a contest as to which of the Commons or Queen's Bench 'had superior jurisdiction to judge the existence and extent of the House's privileges',[85] and states it was 'fortunately defused'[86] when the Court acquiesced in the House imprisoning the two sheriffs who executed the Court's judgment, for contempt. Parliament then legislated to confirm its privilege.[87]

The two sheriffs may not have seen the defusing as fortunate, likewise Stockdale and his solicitor, committed in subsequent litigation.[88] De Smith and Brazier instead note

[83] Stevens, *House of Lords*, pp. 23–34. Also Spencer, 'Rule of Law', pp. 101-2.

[84] See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, pp. 331-3.

[85] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[86] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[87] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[88] See *Howard v Gossett* (1845) 10 QB 359, 411; de Smith and Brazier, *Constitutional and Administrative Law*, pp. 331.

the courts' refusal to award *habeas corpus* to the Sheriff and release him from arbitrary detention -

> *It was supported by precedent and was defended on grounds of principle; but the court had chosen to blind itself to notorious reality, and to countenance injustice.*[89]

It is submitted that the resolution was not fortunate, but the court could not have done otherwise. The supreme court had not yet separated from the legislature. Therefore, when courts deferred to the legislature, they could still be presumed to be deferring to a curial body that was not differentiated from the supreme court whose rulings bind them under the doctrine of precedent.

The High Court of Parliament originated a distinctly legislative function only in the 1640s, well after it was a supreme court. Likewise, supreme courts were established without legislatures in Australasia in the early nineteenth century.[90] At Westminster the supreme court became specialised and separated from the legislature in 1844.[91] Daniel O'Connell had been convicted in relation to his political activism. He appealed to the judicial House of Lords on a technicality. The professional judges who 'assisted' the Lords on judicial matters held for his release. The Lords themselves disagreed and sought to overrule the judges, but eventually conceded the superior juridicality of the specialists and finally left the House, never to return on judicial business.[92]

Specialisation separated the British judiciary from the Executive in the legislature in 1844, as it had separated the English judicature from the executive branch in

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[89] De Smith and Brazier, *Constitutional and Administrative Law*, pp. 332.

[90] See Supreme Court of New South Wales, Charter of Justice. Accessed at: <https://www.supremecourt.nsw.gov.au/about-us/history/charter-of-justice.html.> Also, 'The Supreme Court of Tasmania', 'History'. Accessed at: <https://www.supremecourt.tas.gov.au/the-court/history/>. Likewise, Courts Administration Authority of South Australia. Accessed at: <https://www.courts.sa.gov.au/court-history/>.

[91] *O'Connell* (n 3); Stevens, *House of Lords*.

[92] In *Bradlaugh v Clarke* (1883) 8 App Cas 354, Lord Denman, 50 years a barrister and son of a former Chief Justice, offered his vote. It was ignored. In 1905, Earl Spencer said: 'Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was in my opinion one of the best of reforms' (*In Re Lord Kinross* [1905] AC 468, 476.)

Prohibitions in 1607, and again in *King's Council* in 1365. The supreme court continued to be a form of the Crown's High Court of Parliament, after 1844. The judicial House of Lords, later the 'Appellate Committee of the House of Lords', continued to be a parliamentary body after *O'Connell*. In 2002, Lord Bingham cited s 4 of the *Appellate Jurisdiction Act 1876* (UK) and referred to it as 'Her Majesty the Queen in Her Court of Parliament',[93] before its repeal by the *Constitutional Reform Act 2005*.[94] In 1842, the Privy Council held in *Kielley v Carson*[95] that the Commons exercised by 'ancient usage and prescription'[96] the functions of the High Court of Parliament. That was different from colonial legislatures which exercised analogous functions on the basis of necessity.[97] Their Lordships recalled that Parliament possessed its privileges by acting as a court, yet noted that the political division of Parliament into two Houses had been recognised as dividing that curiality. The decision can be distinguished as preceding the *O'Connell* separation of the supreme court. The Westminster legislature, like colonial legislatures created separately from supreme courts, cannot be presumed to be a court, since *O'Connell* separated the supreme court from the legislature.

In *Green v Mortimer*,[98] just 17 years after *O'Connell*, Lord Campbell held a statute to be absurd because it was impossible to perform: 'There must be the same power in the defendant to encumber his life-estate as if the Act had never passed…'.[99] In *British Railways Board v Pickin*,[100] Lord Morris distinguished *Green*, when holding that fraud was not a basis for judicial review of parliamentary proceedings:

> *It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the*

[93] *Grobbelaar v News Group Newspapers Ltd* [2002] WLR 3024 [25].

[94] Schedule 17 of the *Constitutional Reform Act 2005* (UK), Part 2, clause 9, provides 'The Appellate Jurisdiction Act 1876 ceases to have effect'.

[95] *Kielley v Carson* (1842) 4 Moo PC 63.

[96] *Kielley v Carson* (1842) 4 Moo PC 63,89.

[97] *Kielley v Carson* (1842) 4 Moo PC 63, 70.

[98] *Green v Mortimer* (1861) 3 LT 642.

[99] *Green v Mortimer* (1861) 3 LT 642, 643 (emphasis added).

[100] *British Railways Board v Pickin* (1974) AC 765.

> *internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.*[101]

However, his Lordship did not sit in the High Court of Justice. The *Supreme Court of Judicature Act 1873* (UK) remade the High Court of Justice by recasting the King's Bench, Common Pleas, Exchequer, and Chancery, and added the new Probate, Divorce and Admiralty division.[102] It was under the *Appellate Jurisdiction Act 1876* (UK) that the role of the judicial House of Lords 'as the highest court of appeal in the land was finally placed on a proper judicial footing'.[103] It became the Appellate Committee of the House of Lords in 1948.[104] His Lordship sat in the judicial House of Lords in the High Court of Parliament, not the High Court of Justice. However, Lord Denning MR had in the Court of Appeal held that whether the Act of Parliament was improperly obtained is a triable issue, such that the legislature 'could put the matter right, if it thought fit, by passing another Act'.[105] Further:

> *In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament, and, I might add, in aid of justice.*[106]

This juncture of curial and legislative authority recalls the sovereignty of the High Court of Parliament, as a Crown forum that is independent of the monarchical, aristocratic, democratic or other political powers acting through such forums.

The legislature and supreme court formed a single body, the 'supreme court – legislature', which exercised parliamentary privilege at the passage of Article 9. The supreme court was part of the forum described since in terms of an 'exclusive

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[101] *British Railways Board v Pickin* (1974) AC 765, 790. The Appellate Committee held unanimously for the Board. Lord Simon concluded that 'If the respondent thinks that Parliament has been misled into an enactment inimical to his interests, his remedy lies with Parliament itself, and nowhere else' (800).

[102] UK Parliament, The Judicature Acts of 1873 and 1875. Accessed at: <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/>.

[103] UK Parliament, The Judicature Acts of 1873 and 1875. Accessed at: <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/>.

[104] House of Lords, Library Note: The Appellate Jurisdiction of the House of Lords. Accessed at: <https://researchbriefings.files.parliament.uk/documents/LLN-2009-010/LLN-2009-010.pdf>.

[105] *Pickin v British Railways Board* (1973) QB 219.

[106] *Pickin v British Railways Board* (1973) QB 219, 231.

cognisance' or 'exclusive jurisdiction'[107] that pits the legislature against the courts. Despite the Revolution of 1688, and his opposition to the royalists, Locke entrenched the political jurisprudence of the royalist *Answer* of 1642, by theorising a separation of all three powers. This separated the supreme court from the legislature conceptually. In 1832, responsible government completed the fusion of legislative power and executive power. In 1844, *O'Connell* separated the supreme court from the legislature in practice. Legislatures have come, thus, to be associated with the executive power and hence the executive branch. This has occurred under Dicey's doctrine of 'legislative supremacy',[108] first published less than a decade after s 4 of the *Appellate Jurisdiction Act 1876* (UK) described the judicial House of Lords as 'Her Majesty the Queen in Her Court of Parliament'. However, the sovereignty of Parliament and specifically parliamentary privilege derives from the legislature acting as part of a court, the High Court of Parliament. The question is then: How can legislatures be regarded as part of the High Court of Parliament, even after the creation of specialised and separate supreme courts, at Westminster and elsewhere?

PRACTICALITIES

In 2021, UK Prime Minister Boris Johnson explored natural justice as the basis for reviewing procedures in the House of Commons.[109] The Leader of the House Jacob Rees-Mogg also used the phrase repeatedly. They abandoned that plan shortly afterwards, amid claims that their party had acted improperly. A new model of natural justice was not forthcoming from the Westminster legislature. It can come instead from the Westminster Supreme Court and other supreme courts. Section 1 of the *Constitutional Reform Act 2005* (UK) specifies that the Act does not adversely affect the existing constitutional principle of the rule of law. The history of the supreme court

[107] *R v Chaytor* (2011) 1 AC 684, 697 [13] (Lord Phillips).

[108] A.V. Dicey, Introduction to the Study of the Law of the Constitution. Macmillan, London, 1920 (originally 1885), p. 68.

[109] See T. Spencer, 'Natural Justice in Parliament: A Courageous Proposal, Prime Minister', U.K. Const. L. Blog (15th Nov. 2021). Accessed at: <https://ukconstitutionallaw.org/2021/11/15/tom-spencer-natural-justice-in-parliament-a-courageous-proposal-prime-minister/>.

indicates that the new Court continues to be part of the 'High Court of Parlyament', as at the passage of the *Bill of Rights*. Further, *Erskine May* records that parliamentary privilege derives from each House of the legislature constituting part of the High Court of Parliament. Like Australian Federal, State and Territory legislatures, the House of Commons and the House of Lords can no longer be presumed to constitute courts in themselves. Yet to exercise parliamentary privilege as guaranteed by Article 9, they are required to constitute part of the High Court of Parliament.

Parliamentarians' freedom of speech derives from their participation in the privilege of the Crown, in the High Court of Parliament since 1688. Throughout the seventeenth century and finally at the Revolution of 1688, the Stuart dynasty asserted its own political power as the basis of sovereignty. The sovereignty of the High Court of Parliament was the contrary claim that the Crown is ultimately a forum, a "supreme court – legislature" through which the Crown's power is required to act. The Executive was not immune from the supervisory jurisdiction of the Crown's High Court of Parliament, of which the supreme court was part. Such immunity threatened to reduce the Crown-ness or lawful *sovereignty* of the Executive in Parliament, to a mere assertion of its own political supremacy. Since *Stockdale* however, legislators have asserted their own political supremacy as founding their privilege. A curial basis for natural justice and specifically parliamentary privilege, today, would allow legislators to again participate in the curial authority of the parliamentary court that founded the sovereignty of Parliament. Also, it must be reiterated that the High Court of Parliament did not assert a political supremacy over the monarchical Executive in 1688, let alone a political immunity for itself from a supreme court; the supreme court of England was part of "Parliament". In *Kirk v Industrial Relations Commission*,[110] the High Court of Australia established that a State Supreme Court was not to create "islands of power immune from supervision and restraint".[111] The High Court did not cite *Kirk*, in *Crime and Corruption Commission v Carne*,[112] when considering whether the Commission had privileged a report by preparing it for its supervising Committee in the Queensland

[110] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

[111] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99].

[112] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737.

Parliament. Instead, Gordon and Edelman JJ[113] recalled *R v Richards; Ex parte Fitzpatrick and Browne*:

> *(I)t 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.*[114]

They concluded: 'once it is accepted that the privilege exists, and that the Parliament has determined the occasion of its exercise, nothing further falls to be determined'.[115] This binary is based on a sequel to *Stockdale*, which Dixon CJ cited in *Richards*.[116] However, we saw that *Stockdale* preceded the *O'Connell* separation of the supreme court from the legislature. Following *O'Connell*, legislatures can no longer be presumed to be courts. Therefore, courts can no longer both defer to the democratic claims of legislatures and yet remain independent of political influence, since *O'Connell*. Courts were similarly unable to defer to the monarchical claims of the Stuarts and yet remain independent of political influence, after *Prohibitions* separated the common law courts from the executive branch. In *Carne*, Kiefel CJ, Gageler and Jagot JJ held that the appellant Commission's preparation of a report was for itself alone, despite a parliamentary Committee statutorily certifying 'that the Report was prepared for and presented to the Committee for its purposes'.[117] Justices Gordon and Edelman likewise held that the Commission was not the agent of the Committee, despite holding it to be 'unnecessary and inappropriate to determine the metes and bounds of parliamentary privilege in this case'.[118] The Clerk of the Queensland Parliament, Neil Laurie, later took issue with the decision.[119] He argued that 'Parliamentary privilege is an effective ouster

[113] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [113].

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

[115] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [113].

[116] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162. His Honour followed the *Sheriff of Middlesex'* case (1840) 11 A. & E. 273, where the court dismissed the Sheriff's claim for habeas corpus. See de Smith and Brazier, *Constitutional and Administrative Law*, pp. 331-2.

[117] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 745 [40].

[118] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [114].

[119] Neil J. Laurie, 'Mount Erebus to Ann Street', (Conference Paper, Australasian Study of Parliament Group, 29 September 2023).

from jurisdiction',[120] that the Court chose facts that did not trigger the statute applying the privilege and ignored other facts, and said it is now 'very incumbent'[121] on Parliaments to ensure that statutes as to permanent Commissions 'reflect their precise intention'.[122]

The creation of Loughlin's 'parliamentary state', in 1688, shifted the forum of political debate from the executive branch to the legislature. It is submitted that founding parliamentary privilege upon natural justice, as articulated ultimately by independent, specialist courts, would invest the legislature with curial authority, rather than legislators having to politically assert their privilege against the courts as currently. The courts could more readily entrust control over parliamentary privilege to legislators, with the confidence that legislators were adjudging 'the occasion and of the manner' of the exercise of their privileges, in conjunction with the courts rather than against them. Parliamentary privilege would again be a shield against external powers such as the Executive, rather than against the supreme court - the former partner of the legislature. A duty to act judicially, complementing political authority, offers a broader rationale for the freedom of speech and debate, 'right-of-reply' submissions, the sub-judice convention, greater consistency as to who has a 'voice' in the legislature and in committee inquiries, and legislatures' social licence.

The discussion above explains that throughout important points in the development of the English Parliament, Article 9 guaranteed a new Crown immunity, the privilege of the Crown inside Parliament, against the fortified executive branch. The Executive in Parliament and other parliamentarians participated in the 'supreme court – legislature', a forum that required an externally originating political power to act judicially in the High Court of Parliament. This conception of an immune, free zone of political communication closely coincides with the High Court of Australia's articulation of free political communication that must not be burdened.[123] Parliamentarians can again fortify political power, their own right that speech and debate be free and frank in the public interest, by expressly founding the privilege of the Crown in Parliament

[120] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[121] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[122] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[123] See e.g. *McCloy v New South Wales* (2015) 257 CLR 178.

upon a duty to act judicially. Legislating shield laws for journalists on the same basis could affirm parliamentarians' own commitment to natural justice, under the joint authority of the High Court of Parliament, a 'supreme court – legislature' that since *O'Connell* is both a specialist, independent court and a legislature.

Curating the Record of Free Speech in Parliament*

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* Double-blind reviewed article.

Abstract: *The value of freedom of speech in parliamentary debates is enhanced when it is recorded and communicated beyond the debating chamber and its immediate audience (members, the press, and the public). It can inform and influence a future readership. This paper takes a gentle look at some bruising encounters in the nineteenth and twentieth centuries in the struggle to curate the parliamentary record in New Zealand and across the Tasman. 'Curating' rather than 'editing' the record speaks to the origins of Hansard as an attempt by members to have their speeches reported fully and accurately. The paper takes as its starting point the principle that our understanding of the past can inform how we approach present and future challenges.*

INTRODUCTION

The exercise of freedom of speech in Parliament occurs as a brief moment in time, but traditional and social media communicate just a tiny fraction of that parliamentary

[1] This paper draws on ongoing research for my PhD topic, 'The Making of New Zealand's Hansard from 1867 to 1992'. Some of the examples discussed in this article draw upon insights gleaned through that research. The publication of the larger research project will include extensive references to primary source documents. Where possible, examples of this material are referenced in this article. I acknowledge my PhD supervisors, Professor Jim McAloon and Dr Valerie Wallace; the senior leadership team of the Office of the Clerk of the House and Hansard manager Erin Grace, for generous study assistance; Hansard colleagues who have shared my delight in researching the history of New Zealand's Hansard; and Sraddha Venkataraman, who read the draft and offered helpful suggestions.

discourse. As Georgina Stylianou asks, adapting the oft-quoted philosophical question: '… if a political speech is made and nobody witnesses it, does it make a sound?'[2] Anthony Marinac similarly notes:

> *Simply allowing any member to express themselves freely in the parliament is of limited utility if their words are only ever heard by those few people able to attend the parliamentary sittings.*[3]

Unlike print and social media, Hansard does not just report the hot-button topics; it records and communicates the lot. It endures across time, serving both a contemporary and unknown future readership. In that sense, it provides access to the free and frank exchange of views of elected representatives and the contest of ideas that play out in parliamentary debates. Hansard therefore has a critical role in giving meaning to freedom of speech in Parliament.

Although Hansard serves a wide range of research purposes, it is not well researched itself. Histories of specific Hansard services have generally been written by Hansard or parliamentary staff. The long evolution of Hansard reporting in Britain has been quite well covered, yet there is a very slim literature on the history of New Zealand's Hansard.[4] Histories of the many Hansard reporting services in Australia are similarly under-researched.[5] Hansard's editorial policies have been the subject of research in the domain of historical linguistics, mostly based on the Hansard services in the House

[2] Georgina Stylianou, 'To engage voters, politicians have to be authentic', *The Post*, 10 July 2023.

[3] Anthony Marinac, 'Shaking the foundations of parliamentary privilege', *ON LINE opinion – Australia's e-journal of social and political debate*, 18 September 2006.

[4] William Law, *Our Hansard or The True Mirror of Parliament, A Full Account of the official reporting of the debates in the House of Commons*. London: Pitman, 1950; John Vice and Stephen Farrell, *The History of Hansard*, London: House of Lords and House of Commons Hansard, 2017; Kezia Ralphs, 'Recording Parliamentary Debates: A Brief History with Reference to England and New Zealand', *Australasian Parliamentary Review*, 24(2), 2009, pp. 151-163. See also John E. Martin, *The House: New Zealand's House of Representatives 1854—2004* , Palmerston North: Dunmore Press, 2004.

[5] J S Weatherston, *Hansard: Its Establishment and Development*, Canberra: Commonwealth Government Printer, 1940. The 150th anniversaries of the Victoria and Queensland Hansard reporting services generated a pamphlet publication and exhibition respectively.

of Commons and House of Lords.[6] That scholarship has demonstrated the variations between what is said in the House of Commons and how that has been reported in its Hansard with differing views on the significance of those variations. Across the Commonwealth, legal scholarship on the use of parliamentary materials in statutory interpretation is a narrow, yet quite rich, field of scholarship that reveals an underlying sense of unease about the reliability of historic Hansards. That unease speaks more to the political environment in which speeches are made, rather than the reporting and editing applied to those speeches.[7]

Today, Hansard has been described as one of four 'democratic parliamentary pillars' because it enables transparency and accountability.[8] Its hallmarks are impartiality, accuracy, timeliness, readability, and accessibility. But the principles of Hansard reporting that we associate with it today are not fixed in meaning or time. For example, what did 'accuracy of reporting' mean in an era without sound amplification and recording? And what were the trade-offs between readability and accuracy? Do we want to read every single word spoken by MPs if they stumbled their way through a speech? Who even are Hansard's readers in a contemporary sense and in the future?

[6] Stef Slembrouck, 'The parliamentary Hansard 'verbatim' report; the written construction of spoken discourse', *Language and Literature*, 1(2), 1992, pp. 101-119; Sandra Mollin, 'The Hansard hazard; gauging the accuracy of British parliamentary transcripts', *Corpora*, 2(2), 2007, pp. 187-210; V Michael Cribb and Shivani Rochford, 'The Transcription and Representation of Spoken Political Discourse in the UK House of Commons', *International Journal of English Linguistics*, 8(2), 2018, pp. 1-14.

[7] See, for example, Gordon Bale, 'Parliamentary Debates and Statutory Interpretation: Switching on the Light or Rummaging in the Ashcans of the Legislative Process', *The Canadian Bar Review*, 74(1), 1995, pp. 1-28. Stephán Beaulac usefully surveyed the legislative changes relevant to the use of parliamentary materials in statutory interpretation in the Commonwealth of Australia and Australian states, as well as New Zealand and Canada in 'Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?', *McGill Law Review*, 43, 1998, pp. 287-324. See also John James Magyar, 'The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation', *Statute Law Review*, 33(3), 2012, pp. 363-389; Allan Bracegirdle, 'The Courts and Parliament: Further Cases and Other Developments in New Zealand', *Australasian Parliamentary Review*, 21(2), 2006, p.164; Graham Steel, 'Who Speaks for Parliament?: Hansard, the Courts and Legislative Intent', *Canadian Parliamentary Review*, 40(1), 2017, pp. 6-11; Catherine J Iorns Magallanes, 'The 'Just do it' Approach to Using Parliamentary History Materials in Statutory Interpretation', *Canterbury Law Review*, 15, 2009, pp. 205-236; Jacinta Dharmananda, 'Using Parliamentary materials in Interpretation: Insights from Parliamentary Process', *University of New South Wales Law Journal*, 41(1), 2018, pp. 4-39.

[8] June Verrier, 'Benchmarking Parliamentary Administration: The United Kingdom, Canada, New Zealand and Australia', *Australasian Parliamentary Review*, 22(1), 2007, p. 44.

How have newer technologies redefined not just accuracy but timeliness of delivery and accessibility of Hansard over time?

Historically, producing the record of free speech in Parliament has not always been straightforward. This paper introduces four aspects relevant to how Hansard reports were assembled or curated in New Zealand in the nineteenth and twentieth century. The first is the importance of impartiality. The second is constraints on achieving accuracy. The third is attempts to retract unfortunate utterances using the members' corrections process. The final aspect is the curious anomaly of, historically, not reporting certain debates where, arguably, the most free and frank expression took place. The historic examples are drawn mainly from New Zealand but also from some Australian jurisdictions. They each exemplify at least one of the defining characteristics or hallmarks of Hansard, and reveal somewhat bruising encounters in the past.

Why are these historic encounters relevant today? This paper makes the case for a nuanced reading of past Hansards and newspaper articles by researchers interested in how the exercise of free speech in Parliaments of the past influenced decisions that have consequences today. But first, the paper discusses the idea of 'curating' rather than 'editing' Hansard reports.

'CURATING' VERSUS 'EDITING' THE PUBLISHED DEBATES

Hansard is often referred to as an edited report of the spoken proceedings in Parliament.[9] But the term 'edited', with its focus on the structure and wording of the Hansard report, has a fairly narrow scope. In this paper, I suggest thinking about the publishing of Hansard reports more broadly over time as an act of curating the record of free speech in Parliament. That is because the term 'curating' encompasses a range of activities beyond editorial matters. Establishing Hansard as an in-house service was

[9] Most Hansard reporting services in the Commonwealth refer in some way to their official report as 'edited' or containing edits or being sub-edited. The House of Commons describes its Hansard as 'an edited verbatim record'. Accessed at: <https://www.parliament.uk/about/how/publications/hansard/>. New Zealand no longer describes its report as an edited report, but does refer to the general editing principles that Hansard editors apply. Accessed at: <https://www.parliament.nz/en/pb/hansard-debates/hansard-general-editing-principles/>.

an attempt by politicians to control the narrative rather than leave parliamentary reporting to the whims of the press.[10]

Far from it being a simple process of words in, report out, with some editorial tweaks, Hansard reports are the product of an array of challenges overcome, decisions and judgments made, and the combined skills of the many individuals who were involved in its production. The reports reflect the complexity of rendering a spoken language in written form; decisions about what would or would not be included in the report;[11] the juggling of limited resources to report lengthy debates; reliance on the human ear and hand to capture sound until at least the mid-twentieth century; and balancing the need to provide a readable, accurate report with getting it published and distributed in a timely manner—all this in a political environment.

IMPARTIALITY

Today we take for granted that Hansard is an impartial record of what is said in the House. But this reputation was hard won, despite the fact that it was the very reason for establishing New Zealand's Hansard in-house in 1867.[12] Unhappy with selective and biased newspaper reporting that could not possibly cover everything, Members were willing to appropriate money to rectify the imbalance. Queensland, Victoria, South Australia, and New South Wales had a similar experience in the nineteenth century.[13]

Even when an in-house Hansard service was in operation in New Zealand, it was not all plain sailing. Members regularly complained about the quality of Hansard reports, and sometimes accused Hansard staff of not reporting impartially. Until the early twentieth century, all the Hansard reporters were former newspaper reporters or editors of

[10] Ralphs, 'Recording Parliamentary Debates', pp. 157-9.

[11] Slembrouck, Mollin, and Cribb and Rochford provide examples from the UK House of Commons (see footnote 6). From a sample of a 2006 debate in the House of Commons, Mollin found that 43,793 spoken words were reduced to 35,661 words in the Hansard, a reduction of 18 percent. (Mollin, p. 192)

[12] A point made by both Ralphs, 'Recording Parliamentary Debates', pp. 157-9, and Martin, 'The House', p. 53.

[13] All four parliaments initially contracted out (or relied on) parliamentary reporting to newspapermen but later moved to in-house reporting: Queensland 1860-64; Victoria 1856-66; South Australia 1857-1914; New South Wales relied on some form of newspaper reporting prior to 1879.

longstanding.[14] They retained their press contacts and sometimes wrote articles themselves, usually under a pseudonym. And even after they were replaced by professional shorthand reporters, some members still accused them of bias.[15] But there were two safeguards against Hansard reporters going rogue and reporting in a partial manner: the members corrections' process and oversight of Hansard by Parliament, whether by a select committee or the Speaker.

Premier Richard Seddon and Chief Reporter J. Grattan Grey

In 1900, a very public stoush between the Premier and the Chief Reporter revealed conflict between the Chief Reporter's freedom to publicly express his own political views and his responsibility for creating an impartial record of parliamentary debates. An important outcome was this idea: impartiality was not just about what is reported in Hansard but also how the reporters conducted themselves outside of their time working for Hansard.

Premier Richard Seddon led a Liberal Government that introduced women's suffrage and elements of the modern welfare state. He loomed large in the popular imagination, partly because he was a renowned orator, an astute politician, and a charismatic personality, but also because he was Premier for 13 years and died in office.[16] To this day, he is memorialised through countless statues, including one on Parliament's front lawn, a small town named Seddon, another settlement called Seddonville, and lots of Seddon Streets scattered around New Zealand. The Chief Reporter was J Grattan Grey. Originally from Ireland, he was a seasoned journalist who came to work in Hansard in the late 1870s. Grattan Grey, like other Hansard reporters at that time, worked only

[14] John E Martin, *The House, New Zealand's House of Representatives 1854 – 2004*, Palmerston North: Dunmore Press, 2004, p. 161.

[15] The *New Zealand Parliamentary Debates* (NZPD) and reports of the Reporting Debates and Printing Committee contain numerous examples.

[16] Seddon, Richard John, *Dictionary of Biography*. Accessed at: <https://teara.govt.nz/en/biographies>.

during the session. The rest of the time he worked as a freelance journalist and had been published not only in New Zealand and Australia but also in the United States.[17]

In the recess of late 1899, Grey strayed into criticising the Liberal Government's legislation in two stories that he sold to the *New York Times* under his own name.[18] As luck would have it, the first article turned up in New Zealand a month or so later, and one eagle-eyed newspaper editor republished extracts from it.[19] In a two-hour debate in the House of Representatives, Premier Seddon argued that civil servants should keep out of politics. While Seddon's opponents defended Grey, it was conceded he had been 'highly indiscreet and injudicious'.[20] Grey was called to the Reporting Debates and Printing Committee, which resolved that Grey and all Hansard reporters were 'not to actively participate in New Zealand politics, by writing articles for publication or otherwise.'[21] The report was read out to members, tabled in the House but not debated, and widely reported in the newspapers.[22]

Grey then requested a substantial pay increase to compensate for potential loss of earnings, but was turned down.[23] The war in South Africa had broken out and, unlike most New Zealanders, Grey strongly disagreed with New Zealand's intentions to

[17] 'Mr James Grattan Grey', *The Cyclopedia of New Zealand [Wellington Provincial District]*, Wellington: Cyclopedia Company, 1897. New Zealand Electronic Text Collection. Accessed at: <https://nzetc.victoria.ac.nz/tm/scholarly/tei-Cyc01Cycl-t1-body-d3-d13-d18.html>.

[18] Extracts were republished in 'Criticism of Government', *New Zealand Times*, 5 May 1899, p.5.; extract of letter from J Grattan Grey to the *New York Times*, 27 October 1899 [appearing in the *New York Times*, 26 November 1899], reprinted in *Dunedin Evening Star*, 29 January 1900 and in *Appendices to the Journals of the House of Representatives*, 1900, H-29, pp. 1-2.

[19] 'Parliamentary Echoes', *Hastings Standard*, 4 September 1899, p. 3.

[20] 'A Lame Conclusion', *Evening Star*, 15 September 1899, p. 1.

[21] Minutes of Parliamentary Reporting and Printing Committee [House of Representatives], 14 September 1899, R17688143, Archives New Zealand.

[22] For example: 'Stray Notes', *Lyttelton Times*, 16 September 1899, p. 8; 'The Hansard Staff and Politics', *Evening Post*, p. 14 September 1899, p. 6; 'The Hansard Staff', *Auckland Star*, 15 September 1899, p. 2; 'Political Notes—The Hansard Staff', *Press*, 15 September 1899, p. 5; 'Political Gossip', *Evening Star*, 15 September 1899, p. 4; 'Public Servants as Critics of Politics', *Mount Ida Chronicle*, 15 September 1899, p. 7; 'Summary of Business', *Nelson Evening Mail*, 15 September 1899, p. 2; 'Sessional Notes', *New Zealand Herald*, 15 September 1899, p. 5; 'The Hansard Staff', *New Zealand Times*, 15 September 1899, 3; 'The Hansard Chief as a Political Writer', *Oamaru Mail*, 15 September 1899, p. 4. Similar accounts appeared on 15, 16, and 21 September 1899 in the *Otago Daily Times*, the *Christchurch Star*, the *Wanganui Herald*, the *North Otago Times*, and the *Otago Witness*.

[23] *New Zealand Parliamentary Debates* [House of Representatives], Vol. 110, 23 October 1899, p. 882.

support British and other forces in the Empire, including Canada, India, and Australia. Just four days after his application was turned down, he wrote a second article for the *New York Times*, criticising the Government's decision to send troops to the Transvaal.[24] He had a further article published, critiquing the British handover of Samoa to Germany.[25] Once again, he was sprung when the *New York Times* reached New Zealand shores in late January 1900 and several newspaper editors seemingly took great pleasure in publicising the Chief Reporter's flouting of the select committee's resolution.[26]

Seddon wrote a short 'please explain' letter to Grey.[27] Was Grey penitent? Not at all. 'I adhere to the opinions therein expressed regardless of the consequences', he replied.[28] For the Premier's benefit, he then outlined his case against Britain's and New Zealand's involvement in South Africa, his belief in pacifism, and his role as a journalist to 'stem the current of popular frenzy.'[29]

Showing that he had learnt from his past experience, Seddon stayed his hand. Having taken it upon himself to despatch the first Chief Reporter into early retirement in 1896 and appoint Grey as his successor, he had spent years weathering Opposition taunts about side-lining both the Speaker and the Reporting Debates and Printing Committee in this and other Hansard staffing matters. So, when interviewed in February 1900, Seddon played the long game. There would be no response, he told one newspaper, until the session was convened in late June, and it would be up to the Speaker and the

[24] Extract of letter from J Grattan Grey to the *New York Times*, 27 October 1899, [appearing in the *New York Times*, 26 November 1899], reprinted in *Dunedin Evening Star*, 29 January 1900 and in *Appendices to the Journals of the House of Representatives* 1900, H-29, pp. 1-2.

[25] J Grattan Grey to Premier Seddon, 21 February 1900, and extract from the *New York Times* article, 24 December 1899, *Appendices to the Journals of the House of Representatives* 1900, H-29, p. 4.

[26] 'A Pro-Boer's Opinions', *Evening Star*, 29 January 1900, p. 1.

[27] Premier Seddon to J Grattan Grey, 6 February 1900, *Appendices to the Journals of the House of Representatives* 1900, H-29, p. 4.

[28] J Grattan Grey to Premier Seddon, 15 February 1900, *Appendices to the Journals of the House of Representatives* 1900, H-29, p. 2.

[29] Letters from J Grattan Grey to Premier Seddon, 12 and 15 February 1900, *Appendices to the Journals of the House of Representatives* 1900, H-29, pp. 1-3.

Parliament.[30] But he did release the correspondence, which was widely reported in many newspapers.[31]

Over the next three months there was a feeding frenzy in the press. Much of it went against Grey, but Seddon's political opponents backed Grey, as did those who saw him as a champion for the freedom of the press. Grey was by now a minor celebrity. In April he published an 80-page booklet entitled *A serious menace to Liberty: Mr Seddon, Premier, Mr J Grattan Grey Journalist—an interesting correspondence*.[32] He followed that up in May with another lengthy publication: *The Story of the Boers, Things Worth Knowing and Facts Hitherto Suppressed*.

In late June, the House voted unanimously for a select committee inquiry into Grey's actions.[33] Before Grey was examined, he took the opportunity to insert into the Hansard a letter written by Seddon's Agent-General in London.[34] The letter had been referred to by a member during the course of a debate, but not read out. It criticised the British campaign in South Africa and New Zealand's involvement. Premier Seddon was all for Grey being called to the bar of the House to be questioned, but the Speaker said it would not be 'consonant with the dignity of the House to bring one of its paid officers to the bar in order to hear him either vindicating himself or apologising for what he has done.' The House decided to wait for the select committee inquiry into the original complaint.[35]

Appearing before the committee, Grey defended his actions on technical grounds.[36] Yes, he was familiar with the committee's instruction that reporters refrain from

[30] 'The Chief of Hansard avows himself a pro-Boer and glories in his rank republicanism', *Evening Star*, 23 March 1900, p. 4.

[31] According to the *New Zealand Herald* correspondent, 'The Premier made public certain correspondence which had passed between Mr Grey and himself.', 'An Extraordinary Correspondence', *New Zealand Herald*, 28 March 1900, p. 5.

[32] J Grattan Grey, *A Serious Menace to Liberty, Mr Seddon, Premier, Mr J. Grattan Grey, Journalist, An Interesting correspondence*, No. 1, City Printing Co., Wright & Grenside: Wellington, 2 April 1900. Accessed at: <https://nzetc.victoria.ac.nz/tm/scholarly/tei-Stout76-t12.html>.

[33] *New Zealand Parliamentary Debates*, Vol. 111, 29 June 1900, p. 159.

[34] *New Zealand Parliamentary Debates*, Vol. 111, 11 July 1900, p. 433-34.

[35] *New Zealand Parliamentary Debates*, Vol. 111, 13 July 1900, pp. 536-39.

[36] Examination of J Grattan Grey, 17 July 1900, I-3, R17688255, Archives of New Zealand.

writing political articles, but it was never communicated directly to him, nor had the House debated the select committee's report. As such, he claimed, a committee's recommendation could not trump the terms of his contract which allowed him to earn a living outside the session. For the committee, the key point that counted against him was 'his refusal to recognise the authority of the committee' even when asked several times whether he would recognise its authority.[37] They therefore recommended his services be dispensed with.

Their report was read out and tabled in the House that afternoon, and debated two days later.[38] Grattan Grey was present in the gallery for the entire debate taken in committee of the whole House, which lasted several hours.[39] It ranged widely over the extent of the limits, if any, on the right of Hansard staff to publish their own views on Government policy and the extent of Parliament's right to interfere with work that staff did in the recess. Seddon had prepared for the debate by seeking legal opinions about the status of Grey as Chief Hansard Reporter. He now revised his earlier view. Hansard staff were not part of the civil service, 'but are servants of the House itself.'[40] By a majority of 44 to 12, the committee resolved to accept the recommendation and the House adopted the committee's report at 2 a.m.[41] Shortly afterwards, the Speaker, by letter, advised Grey he was removed from his job with immediate effect.[42] The letter appointing his successor spelt out clearly that while he was free to undertake reporting work during the recess, he was 'not to take part in New Zealand politics'.[43]

Hundreds of articles in dozens of newspapers throughout the country were published over the next month under headings such as 'The Chief of Hansard Staff', 'Civil Servants and Politics', 'The Case of Grattan Grey', 'Grattan Grey's Case', 'Mr Grey's retirement',

[37] Reporting Debates and Printing Committee, House of Representatives, Report, 17 July 1900, R17688255, Archives New Zealand.

[38] *New Zealand Parliamentary Debates*, Vol. 111, 17 and 19 July 1900, pp. 12, 596.

[39] Something noted by gallery journalists, which was reported in several newspapers, including the *Mataura Ensign*, 31 July 1900, p. 2.

[40] *New Zealand Parliamentary Debates*, Vol. 112, 19 July 1900, p. 14.

[41] *New Zealand Parliamentary Debates*, Vol. 112, 19 July 1900, p. 50.

[42] *New Zealand Parliamentary Debates*, Vol. 112, 19 July 1900, p. 53.

[43] Premier Seddon to Silas Spragg, 2 August 1900, R24861456, Archives New Zealand.

'Liberty of Speech', 'An Inevitable Decision', 'The Grey case', 'The Grattan Grey Episode', 'Despotic Tyranny', 'The Grattan Grey Incident', and so on. The *Otago Daily Times* considered the debate and its outcome to be 'One of the most interesting incidents in the parliamentary annals of New Zealand for a number of years', and pointed out that Grey's more recent behaviour had ultimately forced the issue: 'A spirit of insubordination was manifest in his bearing when he appeared before the Reporting Debates Committee; and insubordination cannot be tolerated even in a chief of the Hansard staff'.[44] Conversely, the Catholic newspaper *New Zealand Tablet* reported 'intense indignation at the Government's treatment of Mr. J. Grattan Grey' and the appointment of a committee to hold a public meeting 'to decide as to the course of action to be adopted.'[45]

Inevitably, much of the press coverage focused on free speech and the unpopularity of Grey's pro-Boer, anti-war stance. Some, though, wrote about the irreconcilable position of a parliamentary officer engaging in political activity in defiance of parliamentary direction and criticised the journalists who defended Grey: '… Mr Grey being sacrificed to a spirit of rampant Jingoism is just so much sheer, unadulterated rubbish'.[46] Grey left New Zealand a few months later, eventually settling in Perth, where he continued to write about causes dear to his heart—ridiculing New Zealand and Australian politicians, anti-imperialism, Home rule for Ireland, and advocating against conscription in the First World War.[47] But he did so as a journalist, not as Chief Reporter of Hansard. The letter appointing his successor explicitly stated 'You are not … to take part in New Zealand politics.'[48]

Relevance of the clash in the twenty-first century

In various ways, the past and the present collide and the passage of time produces its own ironies. In its prominent position on Parliament's front lawn, Seddon's statue has come to symbolise the idea of Parliament as a place of free and frank debate. It is

[44] 'Political Intelligence—The Hansard Chief', *Otago Daily Times*, 20 July 1900, p. 3.

[45] 'Archdiocese of Wellington', *New Zealand Tablet*, 2 August 1900, p. 3.

[46] 'The Hansard Staff', *Marlborough Express*, 27 July 1900, p. 2.

[47] *Trove* reveals a substantial legacy of newspaper and journal articles and several books.

[48] Premier Seddon to Silas Spragg, 2 August 1900, R24861456, Archives New Zealand.

enmeshed in every protest staged there. Sometimes it has been a prop for protest. For example, in 2004, protestors against legislation that assumed Crown ownership of the foreshore and seabed popped the Māori tino rangatiratanga flag into Seddon's hand—so that he was holding aloft the banner for Māori sovereignty. In 2019, Extinction Rebellion Aotearoa attached a ball and chain to his ankle and put up a sign at the base of the statue proclaiming 'Colonisation = exploitation = climate change'.[49] In 2020, a petition was got up to remove the Seddon statue—the #DitchDick campaign—accusing him of being a 'notorious autocrat, imperialist and racist'.[50] And in 2022, the statue found itself right at the heart of a 23-day occupation of Parliament grounds and surrounding streets that ended in rioting and fires.[51]

While Seddon's reputation is seemingly tarnished in the modern era, Grey has been recently redeemed as a stout defender of freedom of speech. In a 2014 biography of Seddon and a 2021 history of New Zealand's involvement in the war in South Africa, Seddon is said to have hounded Grey for criticism of New Zealand's position. The Speaker's dismissal of Grey is cast as a most serious injustice, and Grey emerges as the brave journalist who refused to be intimidated by Premier Seddon—a martyr to the cause of the defence of free speech.[52] But for Hansard, Grey's legacy is quite different. He served as a reminder to staff until at least the mid-1970s that, as servants of

[49] Vita Molyneux, 'Extinction Rebellion Aotearoa Vandalises Statute Outside Parliament to Protest Colonisation, Climate Change', Newshub, 8 October 2019. Accessed at: <https://www.newshub.co.nz/home/new-zealand/2019/10/extinction-rebellion-aotearoa-vandalises-statue-outside-parliament-to-protest-colonisation-climate-change.html>.

[50] Scott Palmer, 'Campaign launched to pull down Parliament's Richard Seddon statue', *Newshub*, 13 June 2020. Accessed at: <https://www.newshub.co.nz/home/new-zealand/2020/06/campaign-launched-to-pull-down-parliament-s-richard-seddon-statue.html>.

[51] Adrian Lambert, 'Covid-19 anti-mandate protest, Parliament's grounds' [image], Museum of New Zealand/Te Papa Tongarewa Collections. Accessed at: <https://collections.tepapa.govt.nz/object/2080677>; 'Shaping the Parliamentary Grounds'. Accessed at: <https://www.parliament.nz/mi/get-involved/shaping-the-parliamentary-grounds/>.

[52] Tom Brooking, *Richard Seddon, King of God's Own*, Penguin Books, 2014, pp. 331-32; Nigel Robson, *Our First Foreign War, The Impact of the South African War 1899-1902 on New Zealand*, Massey University Press: Auckland, 2021, pp. 84-86, 338.

Parliament, they should not engage actively in politics.[53] And while Grey has retreated from the institutional memory, this important principle has not.

Editor of Debates attempts to bypass Clerk of the House of Representatives

Concerns about Hansard's reputation as an impartial reporting service reappeared briefly in the mid-1980. New Zealand's first female Editor of Debates, Eileen Edwards, set out to win independence for Hansard from the various institutions within which she, as manager, operated. These included the Legislative Department, its successor the Parliamentary Service, and the State Services Commission, which played a role in staff establishment and grading of positions. Further, Edwards wanted Hansard to be responsible solely to Parliament via the Speaker; that is, to bypass the Clerk of the House of Representatives, Charles Littlejohn.[54] Although she firmly believed that Hansard's reputation for impartiality was at stake, difficult working relationships with senior staff on staffing and operational matters lay behind her quest, rather than concerns about political or other interference with editorial matters.[55]

After the Clerk of the House was established under its own statute in 1988, with its own vote, Edwards advocated that the Editor of Debates should enjoy the same standing as the Clerk of the House—in that way, achieving independence from both the Clerk of the House and the General Manager of Parliamentary Service. Lacking any support whatsoever for the idea of Hansard having its own statute and vote, she failed. Instead, the role of Editor of Debates was disestablished in 1992, and responsibility for Hansard transferred to the Clerk of the House of Representatives.[56] But the transfer

[53] Allan Conway, Editor of Debates, 'The New Zealand Hansard Staff', Paper presented to first conference of the Australasia and Pacific Hansard Editors Association, 30 January 1974, Melbourne, OCB00656, Office of the Clerk.

[54] See representations made to Speaker Kerry Burke and the Parliamentary Commission in the file 'An Independent Hansard', held by Office of the Clerk.

[55] There is a substantial record of this conflict in States Services Commission and Parliamentary Service files held by Archives New Zealand: Occupational Classification - Hansard (reporting and editorial) 1975 to 1983, R22446831; Occupational Classification - Hansard (reporting and editorial) 1983 to 1986, R22446832; Occupational Classification - Hansard (proof reading and typing) 1986 to 1987, R22473318; Occupational Classification - Hansard (reporting and editorial) 1986 to 1988, R22446833; Hansard Administration - Transfer of Hansard, R24491780, Archives New Zealand.

[56] *Clerk of the House of Representatives Act 1988* (NZ), s3(e) as amended, on 1 February 1992, by *Parliamentary Service Amendment Act 1991* (NZ), s10.

met the spirit—if not Edwards' preferred modus operandi—of maintaining the reputation of Hansard as an impartial reporting service of the spoken proceedings in Parliament. And this case demonstrates the extent to which Hansard managers continued to fiercely guard that reputation.

CONSTRAINTS ON ACCURACY

Before the advent of sound amplification and recording, accurate reporting depended on the reporter's ability to hear and understand what was said, to take it down in shorthand, and transform those notes into a readable report. Unsurprisingly, the reporting style placed an emphasis on readability. All of the characteristics of spoken language were trimmed from the report—the false starts, the stumbles, the repetitions, the excess verbiage, the broken syntax, and the slips of the tongue.[57] But the combination of poor acoustics and considerable editorial licence opened the door to misinterpretation. Hence the convention of allowing members to check the draft of their speeches prior to publication emerged, which sometimes raised questions about the integrity of Hansard as a truly accurate record of spoken proceedings.[58]

Speaker Henry Willis and Chief Reporter Charles Robinson

There is perhaps no better example of the difficulties faced by Hansard staff before sound could be recorded than what occurred in 1911 in the New South Wales Parliament. This case involved their first Principal Reporter, Charles Robinson, standing on a point of principle against alterations that the Speaker was making to the Hansard. Henry Willis's short stint as a Speaker was marked by controversy partly because of the iron hand he wielded as Speaker, but also because he was elected Speaker in a hung Parliament.[59] Willis had taken it upon himself to delete parts of the Hansard that he

[57] Slembrouck and Mollin list in detail the differences between spoken and written discourse (see footnote 6)

[58] John E Martin, *The House*, pp. 53-55.

[59] See David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales, 1856-2003*, Sydney: Federation Press, 2006, pp. 216-221; Anne Twomey, 'How to Succeed in a Hung Parliament', *Quadrant* Online, 1 November 2010. Accessed at: <https://quadrant.org.au/magazine/2010/11/how-to-succeed-in-a-hung-parliament/>.

considered objectionable after the Principal Reporter refused to do so.[60] These were alterations to speeches given by other members. In December 1911, an acrimonious exchange of correspondence between them was tabled in the Legislative Council and reported on by the newspapers.[61]

A debate in the Legislative Assembly on the following day quickly descended into chaos with the Opposition taunting Speaker Willis about whether he intended to sack Charles Robinson.[62] Willis responded: 'Any officer of this House who is disrespectful to the chair will be dismissed immediately', but he anticipated that Robinson would apologise. Such was the uproar that Willis had to eventually be escorted from the debating chamber. In the lobby, it was reported that 'one or two members had their coats off and others were talking fight.'[63] Inevitably, Willis suspended Robinson because he had not apologised.[64] Once suspended, Robinson apparently felt able to defend himself publicly. He disputed Willis' version of the events.[65] The Government ordered an inquiry.[66]

Willis detailed a long list of Robinson's offences:

> *disobedience, wilful insubordination, disrespect, petulance, flouting authority, offensive language, disparaging and belittling remarks, presumptions, superabundant correspondence, disloyalty, treachery, wastefulness, ill temper and giving vent to unbridled opinions upon Mr Speaker.*[67]

Robinson emphatically denied the charges and quoted various testimonials from Premiers and Speakers over 30 years. On the facts, Willis argued that he had issued instructions to cut down speeches 'because members of the Hansard staff did not use

[60] *Braidwood Dispatch and Mining Journal* (NSW), 23 December 1911, p. 2.

[61] *Advertiser* (Adelaide), 18 December 1911, p. 9.

[62] *Argus* (Melbourne), 18 December 1911, p. 13.

[63] *Sydney Morning Herald*, 19 December 1911, p. 8.

[64] *Sun* (Sydney), 20 December 1911, p. 7.

[65] *Singleton Argus* (NSW) 6 January 1912, p. 4.

[66] *Leader* (NSW), 11 January 1912, p. 2.

[67] *Sydney Morning Herald*, 13 January 1912, p. 15.

their literary faculties in making speeches readable, but recorded every word of a long rambling oration'. Robinson countered that the parts Willis had excised were those that reflected 'disrespectfully on the House and the Chair.'[68] The judge who presided over the Royal Commission of inquiry found that the Speaker had 'rightly exercised his power in suspending Mr Robinson, who was guilty of insubordination.'[69] The Cabinet decided to compulsorily retire Robinson but, in light of his faithful and lengthy service, granted him a pension.[70]

This case shows how Hansard staff navigated a difficult course between accurately reporting without any technological aids and the editorial role assumed by a difficult presiding officer. It also reveals a tension between upholding the integrity of both the office of the Speaker and that of Hansard, when those interests were in conflict. That tension was never more apparent than in the treatment of members' requests for corrections to the Hansard.

MEMBERS CORRECTIONS' PROCESS

It is self-evident that mishears could occur when members spoke inaudibly and there was no audio record. Allowing members to check the draft of their speeches prior to publication was therefore an important step in ensuring that the meaning of what was said in Parliament was not altered. But allowing members to check for misreporting or misunderstanding sometimes opened the door to actual, or suspected, retrospective revision of speeches, and a corresponding degree of cynicism about the truthfulness of the Hansard report. For example, when Hansard reporting staff in Perth went on strike for better pay in 1908, a local reporter thought the strikers would enjoy the 'hearty support of the public' because they would not have to

[68] *Muswellbrook Chronicle* (NSW), 17 January 1912, p. 4.

[69] *Age* (Melbourne), 31 January 1912, p. 10.

[70] *Sun* (Sydney, 19 February 1912, p. 8.

> *[wade] through the garbage … which frequently represents not what a member has said; but what, after revision, he thinks will please his constituents.*[71]

From time to time, similar sentiments were expressed about New Zealand's Hansard; that is, that members had a free hand to rewrite the Hansard for political purposes. These comments cropped up occasionally in the parliamentary debates and in newspaper articles.[72] Although such gibes were usually aimed at denigrating members, they reflected poorly on the reputation of the Hansard debates.[73]

However, contrary to what members may have believed, they did not have freedom to amend their draft Hansards however they pleased. Since 1896, the first port of call in New Zealand was a Hansard Supervisor, who sent drafts out to members and dealt with any requests for change.[74] Decisions were usually straightforward—simple corrections from mishears or misunderstandings. The Speaker would only intervene when the Hansard Supervisor did not agree with a request.[75]

Only a few such requests have survived. One that did, from 1928, is a notable exception where the Speaker allowed a 223-word exchange to be excised from the Hansard on the grounds of reputational damage to the Prime Minister. In the exchange, an Opposition member had accused Prime Minister Gordon Coates of 'justly earning the title of the Mussolini of New Zealand' after his Government bypassed the Railways Board to directly appoint a general manager.[76] Even though Coates could not have anticipated the disastrous consequences of Mussolini's fascist rule for the next 17

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[71] Reprinted in *Waikato Argus*, 1 August 1908, p. 2.

[72] John E Martin, *The House*, pp. 53-55.

[73] The members corrections' process continued to generate headlines from time to time. See Cecilia Edwards, 'The Political Consequences of Hansard Editorial Policies: the case for greater transparency', *Australasian Parliamentary Review*, Vol. 31(2), 2016, pp. 145-161.

[74] Premier Seddon to Marcus F Marks [backdated letter of appointment], 20 September 1898, R24835766, Archives New Zealand

[75] Specific cases are documented in the Office of the Clerk files: Hansard correspondence 1896 – 1966, barcode: OCR005361-67.

[76] *Auckland Star*, 23 August 1928, p. 10; *Evening Post*, 23 August 1928, p. 12; *Evening Star*, 23 August 1928, p. 10; *Hawera Star*, 23 August 1928, p. p. 9; *Poverty Bay Herald*, 23 August 1928, 7; *Sun* (Auckland), 23 August 1928, p. 11.

years, he did not wish to go down on the official record as 'the Mussolini of New Zealand', and sought the excision of the entire exchange between him and the Opposition member.[77] But the newspapers had a field day and reported the exchange widely.[78] Unfortunately for Coates, the digitisation of old newspapers has ensured its survival into the twenty-first century, even if not in the Hansard, which highlights the value of reading both the Hansard and contemporary newspaper reporting for research purposes.

The availability of Parliament TV and video replays in the twenty-first century reduced the potential for any sleight of hand through the members corrections' process, because members and staff can freely check the written record against the video. In 2011 the New Zealand Parliament agreed to move away from a 'substantially verbatim' reporting style to a 'more verbatim' style, recognising 'the convergence of audio, video, and print publishing'.[79] This substantially limited the scope for misinterpretation in the reporting and of members' requests for correction. In this way, new technologies have greatly enhanced the integrity of the record of free speech in Parliament.

DEBATES NOT REPORTED

Until 1996, New Zealand did not report debates of the committee of the whole House.[80] There were practical reasons for not reporting these debates: there simply weren't enough staff, and the cost for printing all those extra volumes was another factor particularly before time limits for debates were introduced progressively from 1894.[81] Instead, for the first 129 years, Hansard provided a summary of important

[77] Speaker's secretary to Hansard Supervisor, 11 September 1928, Hansard correspondence 1924-1935, File barcode: OCR005357

[78] See footnote 75.

[79] Report of the Standing Orders Committee, Forty-Ninth Parliament, I.18B, September 2011, p. 10. The report's recommendations were subsequently adopted by the House. See *Journals of the House of Representatives*, Forty-Ninth Parliament, No. 11.23, 5 October 2011, p. 1351.

[80] McGee, *Parliamentary Practice in New Zealand* (eds. Mary Harris and David Wilson), 4th ed, Auckland: Oratia, 2017, p. 88.

[81] McGee, *Parliamentary Practice in New Zealand*, 4th ed, p. 222.

contributions to debates on supply (financial estimates) and recorded any votes that took place in committee.[82] But for any of the content and flavour of what was discussed, researchers must fall back on the newspaper coverage—the very source that contemporary politicians found to be selective, partial, inaccurate, and generally unreliable. For historians, the lack of reporting of committee debates is a shame, because committee discussion was generally very free and frank—to such an extent that the debates often went well into the early hours and sometimes continued over a matter of days if a stonewall was in progress.

In rare cases, other debates were not reported, which contributed to a significant gap in Hansard. One reason was security concerns. In May 1940, the Parliamentary (Secret Session) Emergency Regulations were approved. They enabled the exclusion of strangers from the Galleries and Hansard staff from the floor of the House. The measure was to prevent 'the possibility of information of value to the enemy being disclosed' and it was used on at least 24 sitting days, particularly between 1940 and 1942. In place of a Hansard report, a brief description was inserted into the Hansard, based on the Clerk's notes, broadly listing the topics. A 21-hour debate on the outbreak of the war in the Pacific was described in just 126 words.[83] In Hansard terms, the missing content over 24 sitting days can be estimated at about 1,900 pages between 1940 and 1944.[84]

Another reason was concerns about matters of public taste. In the following example, Hansard reported a debate in 1888 on the Contagious Diseases Bill, but the House then resolved to suppress its publication because the talk about sexually transmitted diseases was deemed too risqué and offensive to women readers.[85] The newspapers were similarly unable to publish the discussion, but referred coyly to 'the social evil'

[82] Full reports of debates of the committee of the whole House first appear in volume 553 of the *New Zealand Parliamentary Debates* (from 21 February 1996). Prior to that, McGee estimates that just 10 percent of deliberations by the House in committee ended up in the Hansard (McGee, 4th ed, p. 88).

[83] *New Zealand Parliamentary Debates*, Vol. 261, 11 December 1941, pp. 26-27.

[84] Calculated using the average number of Hansard pages generated per sitting day.

[85] *New Zealand Parliamentary Debates*, Vol. 60, 1 June 1888, p. 416.

and 'interesting subjects'.[86] Another paper simply noted that the Ladies Gallery had been cleared for the debate because 'Language and arguments [were] indelicate.'[87]

Seemingly, there are few, if any, topics considered too sensitive for publication in the twenty-first century on the grounds of morality. But fear of inciting harm led to a notable decision in 2006 by the Legislative Council in the South Australian Parliament to excise from the online Hansard parts of a speech that detailed methods of self-administered euthanasia.[88] The historic record remained intact, to a certain extent, however, because they allowed its publication in the printed volume.

Another aspect of historic non-reporting is when speeches were not reported in the language delivered. This was a particular challenge for New Zealand from 1868, when the first Māori members were elected to the House of Representatives. Speeches delivered in their own language were interpreted in the House, the Hansard reporters took down shorthand notes of the interpretation, and wrote their report based on that.[89] By 1913, there were no interpreters and Māori members were expected to deliver their speeches in English.[90] Not all did, especially after the Second World War, when some members chose to address the House in their own language. They were then expected to provide the text for Hansard.

There were clearly some practical barriers to reporting their speeches in the Māori language, such as the lack of a Māori language skills by Hansard reporters and the lack of a shorthand writing system for the Māori language at this time. But reporting speeches given in Māori using only a summarised form of the English interpretation has consequently created a massive gap in the historic record of Māori oratory at a time when significant legislation was passed; legislation that resulted in confiscations following the wars of the 1860s/1870s, land loss, and cultural and material

[86] 'Parliamentary Notes', *Auckland Star*, 9 July 1888, 8; 'Parliamentary Notes', *Bruce Herald*, 5 June 1888, p. 3.

[87] 'Notes on Change', *Wanganui Herald*, 2 June 1888, p. 2.

[88] Anthony Marinac, 'Shaking the foundations of parliamentary privilege', *ON LINE opinion*, 18 September 2006.

[89] Evidence given to the Legislature Expenditure Committee, *Appendices to the Journals of the House of Representatives* 1886, I-10, pp. 3, 7, 14.

[90] Martin, *The House*, p. 216.

dispossession, with ongoing consequences that are still being investigated by a standing inquiry, the Waitangi Tribunal, and effects that are felt to this day.[91]

Nevertheless, there exists a record of sorts in the Māori language. From 1881 until 1906 a Māori version of Hansard was published. It took the English translations of speeches delivered in Māori and printed in the *New Zealand Parliamentary Debates* and translated them back into the Māori language. But the interpretation that the English translation was based on was given on the fly, and summarised just some of the speech content, which the Hansard reporter would have then tidied up into a concise report. Consequently, the Māori Hansard can only be a pale reflection of the original speeches.[92] It was only in the 1990s, and with technological advances, that Hansard was able to include not just speeches delivered in Māori but also a translation into English.

In the twenty-first century, the challenge of providing a comprehensive report of speeches delivered in indigenous languages is not to be underestimated, particularly where there is more than one indigenous language. Hansard reporting services across the Commonwealth originated from a mono-lingual model, which means that countries like New Zealand and Australia have much to learn from our Pacific neighbours who cater not just for dual languages but multiple languages within the debating chamber or in the Hansard report itself.[93]

[91] The Waitangi Tribunal, established under the Treaty of Waitangi Act 1975, has inquired into and issued hundreds of reports since 1978, supported by thousands of historical reports, oral histories, and a vast archive of documents. Accessed at: <https://www.waitangitribunal.govt.nz/publications-and-resources/bibliography/>.

[92] 'Nga Korero Paramete 1881 – 1906',Wellington: New Zealand Electronic Text Centre, 2009. This is an online version of *Niu Tireni: nga korero Paremete: nga whai korero a nga mema Maori*, Wellington: Government Printer, 1881-1906.

[93] Julian R. Murphy surveys these issues generally in 'Indigenous Languages in Parliament and Legislation – comparing the Māori and Indigenous Australian experience', *Māori Law Review*, July 2020. Accessed at: <https://maorilawreview.co.nz/2020/07/indigenous-languages-in-parliament-and-legislation-comparing-the-maori-and-indigenous-australian-experience/>.

CONCLUSION

This paper ranged widely across aspects of curating a report of the parliamentary debates from the nineteenth century until today. The stories of Chief Reporter Grattan Grey and Principal Reporter Charles Robinson, who, on a point of principle, took on the Premier and Speaker and lost are instructive. In Grey's case, it is a reminder that impartiality remains an important principle for Hansard's reputation as a trusted and reliable source of information. In contrast, Robinson entered the public arena to defend the integrity of Hansard, but the integrity of the office of Speaker carried more weight. And in the way that past defeats sometimes become today's victories, Chief Reporter Grey's reputation has been recovered as a champion of free speech and Premier Seddon's is legacy is increasingly challenged.

The advent of new technologies in the twentieth century very much helped the accuracy of the published debates, not just by amplifying sound but also recording it. Since then, computer technology has sped up production times and allowed greater accessibility via the web. The availability of videoed debates has greatly reduced the potential for clashes over corrections to the draft Hansard between members, the Hansard staff, and the presiding officer. Newer technologies have made it possible to provide comprehensive coverage of all debates. While it remains challenging to provide a bi-lingual or multilingual Hansard service, there is now a greater understanding of its important for contemporary and future readers.

Today, we are the future readership of Hansard debates published in the nineteenth and twentieth centuries. To read and use those debates with confidence for research purposes requires some understanding of the limitations that applied to the way they were historically curated. This paper pointed to the strong commitment for Hansard to function as an impartial reporting service and suggests that instances of members tampering with the report were the exception rather than the rule. The paper listed matters that were not reported on in New Zealand's Hansard during most of the nineteenth and twentieth centuries; specifically, debates of the committee of the whole House, debates during the Second World War that were held in secret session; and contributions given in the Māori language that were rendered in translation only.

In New Zealand the digitised newspaper collection *Papers Past* is an invaluable archive of many newspapers, as is *Trove* in Australia.[94] Articles in these collections represent the highlights or the controversies that took place in the debating chamber, just as they did when they were first published. Despite any flaws and omissions in the way that Hansard reports were historically assembled or curated, newspaper articles are no substitute for the record of the entire debate in Hansard. When both are read together, however, present-day researchers are better able to understand what lay behind decisions made by Parliaments of the past that have consequences for the world we now inhabit. In that sense, the enduring legacy of the privilege accorded to the exercise of free speech in Parliament is twofold: the freedom of the press and a Hansard reporting service based on the principles of impartiality, accuracy, timeliness, readability, and accessibility, however they were defined over time.

[94] *Papers Past*, National Library of New Zealand. Accessed at: <https://paperspast.natlib.govt.nz/>; Trove, National Library of Australia. Accessed at: <https://trove.nla.gov.au/>.

The power to compel the attendance of witnesses and the giving of evidence before committees – lessons from the NSW Legislative Council

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Abstract: It is well-established that the central purpose of parliamentary committees is to perform functions which the houses themselves are not well equipped to perform. This includes conducting inquiries, hearing from witnesses, examining evidence and formulating conclusions based on the information presented to them. In order to ensure this occurs, Australasia's parliaments have legislated or delegated the requisite powers. These powers include provisions to compel witnesses to appear, to produce papers and to impose penalties for non-compliance. This paper explores the New South Wales committee system and operation of the Parliamentary Evidence Act 1901 as experienced by a Legislative Council committee inquiry in 2022-2023.

INTRODUCTION

It is well-established that an essential function of Australia's parliamentary committees is to conduct inquiries. As a result, Committees are delegated powers to carry out specific tasks including but not limited to, the ability to take submissions, hear evidence and report their findings. Further, among these powers is the ability to summon witnesses, order the production of documents and compel witnesses to appear or answer questions. Most Australian jurisdictions have adopted the privileges of the House of Commons or have legislated in this area. However, the privileges of the Houses of New South Wales derive from the common law test of necessity, as well as certain statutes including Article 9 of the Bill of Rights. Additionally, the *Parliamentary*

Evidence Act 1901 (NSW) governs the powers of committees to compel witnesses to attend hearings and give evidence.

In late 2022, early 2023 the Legislative Council's Portfolio Committee No 7 - Planning & Environment's inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region tangibly demonstrated the limitations of the *Parliamentary Evidence Act* and highlighted potential negative consequences for committee scrutiny of issues relevant to the community. The interaction between the *Parliamentary Evidence Act*, historical criticisms, the behaviour of witnesses during the conduct of the inquiry and examples of the arrangements utilised by other Parliamentary jurisdictions to address compulsion and contempts are examined below.

THE PARLIAMENTARY EVIDENCE ACT 1901

While most witnesses called to appear before New South Wales' Legislative Council committees appear voluntarily, a committee may summon a witness to give evidence under Section 4 of the *Parliamentary Evidence Act*, which states:

> *(1) Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be, and personally served upon such person.*
>
> *(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.*[1]

Prior to 2000, Legislative Council committees routinely summoned all witnesses other than members.[2] However, on advice from Bret Walker SC 'that summoning witnesses

[1] *Parliamentary Evidence Act 1901* (NSW), s 4.

[2] Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice: Second Edition*, Sydney: The Federation Press, 2021, p. 797.

as a general practice was supererogatory, and should be avoided,'[3] since 2000 there are very few examples of committees summoning witnesses to attend and give evidence.[4]

While the threat of being summoned is often enough to convince reluctant witnesses to appear before a committee, there are a number of situations where a committee may summon a witness, including:

- where a witness declines an invitation to give evidence voluntarily;
- where a witness has refused to provide certain information to committees voluntarily;
- where a witness specifically requests that they be summoned in order to ensure the protection of parliamentary privilege, although a summons is not in fact required to ensure that parliamentary privilege applies.[5]

In accordance with section 4(2) of the *Parliamentary Evidence Act*, if a summons is issued, it must:

- specify the name of the committee and inquiry to which the summons relates, including the time, date and place of the hearing;
- be signed by the committee chair on behalf of the committee;
- state a particular purpose, such as to answer specific questions or to produce particular documents; and,
- be served on the recipient personally.[6]

[3] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p 797.

[4] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p 797.

[5] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, pp. 797-798.

[6] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, pp. 799-800.

Service of a summons is usually undertaken by the Usher of the Black Rod or an officer of the Legislative Council and on service being effected it is usual practice for an affidavit of service to be prepared and presented to the committee.[7]

Additionally, s6 of the *Parliamentary Evidence Act* requires a summoned witness to be paid reasonable expenses of attendance. Failure to do so would likely constitute 'just cause or reasonable excuse' for a witness not to attend and give evidence before a committee as per s7 of the *Parliamentary Evidence Act*.[8] If a witness is summoned and fails to appear without 'just cause or reasonable excuse', the committee can call on s7 to escalate the matter. This involves the committee reporting the matter to the President and requesting

> *'that the President certify the facts to a judge of the Supreme Court … with a view to having the witness apprehended for the purposes of being brought before the committee to give evidence'.*[9]

Sections 8 and 9 then detail the issue of a warrant by a judge to apprehend the witness for the purpose of bringing the person before the committee to give evidence and allows for the person in question to be retained in custody 'for the purposes of giving evidence, until discharged by order of the President'.[10]

In regards to the practical functioning of the *Parliamentary Evidence Act*, it is important to note a number of issues. Firstly, in order for the service of a summons to be effected, the summons must be personally served. To do so the nature of the summons must be explained to the person named on the summons and the summons must either be given to them or left in their presence if they refuse to accept it.[11] The primary reason for the requirement for personal service is very much a function of the time that the *Parliamentary Evidence Act* was enacted in 1901 and whilst most legal processes in

[7] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p. 800.

[8] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p. 800.

[9] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p. 800.

[10] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p. 801.

[11] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p. 800.

New South Wales can be served electronically, this does not apply to summonses required to be personally served.[12]

Secondly, while the Parliament of New South Wales has the constitutional power to legislate extra-territorially as established by High Court decisions and s2(1) of the *Australia Acts 1986*, it is unlikely that this would apply to the *Parliamentary Evidence Act* as it does not use explicit language to that effect.[13] Additionally, given that the *Parliamentary Evidence Act* was enacted in 1901 it would be difficult to suggest or infer that the Parliament intended for a committee to be able to issue a summons to a witness that resided outside of New South Wales. Whilst an argument could be made that an extra-territorial extension of the operation of section 4 is required for the Act to fulfil its objective of providing the Legislative Council and its committees with the power to perform their legislative and scrutiny functions, it seems unlikely that the courts would find this way.

However, if a witness chooses to give evidence to a Legislative Council committee from another Australian jurisdiction, they are be protected by national defamations laws enacted in all Australian states which extend to the publication of a matter in the course of the proceedings of a 'parliamentary body', including the giving of evidence. As a result, while interstate witnesses cannot be summoned, they can choose to give evidence from another jurisdiction with the protection of absolute privilege.

[12] Division 2 of Part 2 of the *Electronic Transactions Act 2000* (NSW) establishes a general presumption in New South Wales that requirements to provide information in writing can be met by means of electronic communications. Of note, Section 9 of Division 2 concerns instances under the law where a signature is required, and circumstances where that requirement is taken to have been met in relation to an electronic communication. However, section 5 of the *Electronic Transactions Regulation 2017* (NSW) specifically excludes a number of circumstances from the flexible signature requirements in the Act. They include under section 5(e) 'any requirement under a law of this jurisdiction for a document to be served personally or by post'. Due to the requirement in section 4 of the *Parliamentary Evidence Act 1901* (NSW) for summonses to personally served, the effect of section 5(e) would appear to be that summonses cannot be validly issued if signed electronically. Other processes under section 5 of the Regulation that cannot be met with electronic signature including lodging, filing and signing documents in connection with legal proceedings and producing documents and evidence for judicial bodies.

[13] Correspondence from Professor Gabrielle Appleby, University of New South Wales Law and Justice to the Clerk of the Parliaments providing legal advice on the power of committees to summon witnesses outside of the state of New South Wales, received 9 April 2021, p 7.

CRITICISM OF THE PARLIAMENTARY EVIDENCE ACT

While the *Parliamentary Evidence Act* provides committees with considerable powers relating to the summoning, attendance, and examination of witnesses there are a number of significant criticisms that call into question the practical application of the *Parliamentary Evidence Act*. Firstly, where a witness who is not a member of the Legislative Assembly or Legislative Council has been successfully served with a summons and then fails to appear before a committee without just cause, the *Parliamentary Evidence Act* allows for the non-member to be punished for contempt. Specifically, as previously mentioned, ss7 to 9 allow for the President of the Legislative Council or the Speaker of the Legislative Assembly to apply to the Supreme Court for a warrant to be issued that would allow for the person named in the warrant to be detained:

> *… in custody, to the intent that the person may from time to time be produced for the purpose of giving evidence, or be remanded and finally be discharged from custody, pursuant to any order under the hand and seal of the President or Speaker.*[14]

Further, s11 allows for the detention of a witness if they refuse to answer a lawful question when before a committee. In this situation:

> *… the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the Usher of the Black Rod or Serjeant-at-Arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker.*[15]

Additionally, if a 'witness wilfully makes any false statement, knowing the same to be false, the witness shall, whether such statement amounts to perjury or not, be liable to imprisonment for a term not exceeding five years.'[16]

[14] *Parliamentary Evidence Act 1901* (NSW), s 9.

[15] *Parliamentary Evidence Act 1901* (NSW), s 11.

[16] *Parliamentary Evidence Act 1901* (NSW), s 13.

These are extraordinary provisions. Despite penal punishments being available to Australian, New Zealand and other Westminster Parliaments, they have, in the modern era, been used sparingly. As noted by Ohnesorge and Duffy, with the exception of a case in Western Australia in 1904, the only cases of imprisonment for contempt by an Australian legislature in the 20th century were those of Fitzpatrick and Browne in 1955 and Mr Brian Easton in Western Australia in 1995.[17] In the case of Mr Easton the media portrayed the actions of the Western Australian Legislative Council as nonsensical. A Federal Minister at the time commented that:

> *The very idea of a chamber of elected people threatening and then imposing imprisonment ... has the overtones of a Gilbert and Sullivan farce. The mindset that prompts this self-righteous pomposity is archaic and typical of those who think that-dressing up in wigs, frilly shirts and knee breeches represents the symbols of modern democracy.*[18]

It is not surprising that to date the Houses of the New South Wales Parliament have not attempted to enforce the penal punishments contained within the *Parliamentary Evidence Act*. In their paper examining the appropriateness of the powers of the *Parliamentary Evidence Act*, Ohnesorge and Duffy reflect that 'political pressure and media scrutiny may be more persuasive than never-used punitive powers to persuade reluctant witnesses to co-operate with a committee.'[19]

The debate about the appropriateness of parliaments having a penal jurisdiction and its acceptance by the community has been ongoing for over a century[20] and it is likely that this will not be resolved in the near future. In the context of New South Wales, Ohnesorge and Duffy argued for the retention of strong powers to ensure compliance

[17] Sharon Ohnesorge and Beverly Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' *Public Law Review*, 27 (1) 2016, p 47.

[18] H. Goodwin, A. Stewart and M. Thomas, 'Imprisonment for Contempt of the Western Australian Parliament', *The University of Western Australia Law Review*, 25 (1) 1995, p 196.

[19] Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', p 51.

[20] Joint Select Committee on Procedure in Cases of Privilege, Parliament of Australia, Progress Report, 1902, p 2.

with committee inquiries,[21] however they proposed that the introduction of a *Privileges Act* alongside Senate-style privilege resolutions would:

> *… provide an ideal opportunity to update s 11 [of the Parliamentary Evidence Act], and … give thought to the argument that aspects of the Parliament's penal jurisdiction should be transferred to the courts.*[22]

Additionally, they speculated that the introduction of Senate-style privilege resolutions would act 'to ensure that a fair and appropriate process is in place to deal with reluctant witnesses appearing at committee inquiries' and prevent misguided or politically motivated committees from setting an undesirable precedent by attempting to enforce the penal powers in the *Parliamentary Evidence Act*.[23]

In 2018, the New South Wales Legislative Council, on the recommendation of its Privileges Committee adopted the 'Procedural Fairness for Inquiry Participants' resolution which outlines the procedures that Legislative Council committees must follow to ensure proper process and fair treatment for inquiry participants. Among other procedures, the resolution specifically provides that:

- witnesses are normally invited to appear at a hearing and a summons is only issued where a committee decides that it is warranted;
- witnesses are normally given reasonable notice of a hearing to which they are invited or summoned to appear, and are supplied with a copy of the committee's terms of reference, membership and other information prior to appearing;
- a committee chair will ensure that all questions put to witnesses are relevant to the inquiry, that is to say, within the terms of reference of the inquiry;
- with the prior agreement of a committee, witnesses may be accompanied by, and may consult, a legal adviser or support person;

[21] Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', p 51.

[22] Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', p 52.

[23] Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', pp. 51, 53.

- witnesses may object to answering a question, and a committee should consider any such objection.[24]

Additionally, witnesses must be treated with courtesy at all times which places a responsibility on committee members, and in particular the chair, to ensure that the questioning of witnesses is respectful and civil.[25]

While undoubtedly a step in the right direction the introduction of the resolution was not accompanied by a review of the *Parliamentary Evidence Act* or the adoption of new legislation to ensure that witnesses are appropriately protected.

NEW SOUTH WALES LEGISLATIVE COUNCIL COMMITTEES AND THE PARLIAMENTARY EVIDENCE ACT

The 57th New South Wales Parliament from 2019 to 2023 saw a significant increase in the number of summons issued to ensure witness attendance and participation in inquiry hearings particularly towards the end of the parliamentary term. In some cases, witnesses were issued summons after expressing concerns about giving evidence due to confidentiality obligations and were apprehensive that parliamentary privilege alone would not protect them from legal proceedings as a result of evidence given to the committee.[26] However, there was also a small subset of witnesses that actively evaded the service of a summons after attempts to persuade them to appear voluntarily were unsuccessful. The following details the challenges encountered by Portfolio Committee No. 7 - Planning & Environment during its inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region.

[24] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, pp. 818-819.

[25] Frappell and Blunt, *New South Wales Legislative Council Practice,* 2021, p 819.

[26] Public Accountability Committee, NSW Legislative Council, *Transport Asset Holding Entity*, Legislative Council (2022), p xii.

PORTFOLIO COMMITTEE NO 7 - PLANNING & ENVIRONMENT'S INQUIRY INTO ALLEGATIONS OF IMPROPRIETY AGAINST AGENTS OF THE HILLS SHIRE COUNCIL AND PROPERTY DEVELOPERS IN THE REGION

Background

On June 23 2022, Ray Williams, Liberal member for Castle Hill, made a number of allegations in the New South Wales Legislative Assembly about the preselection of Liberal candidates for the Hills Shire Council election in December 2021 and raised concerns about the interactions between the council and property developers in the region.[27] As a result, on 8 December 2022, Portfolio Committee No 7 - Planning & Environment resolved to inquire into allegations of impropriety against agents of the Hills Shire Council and property developers in the region.[28]

By way of context, New South Wales' Legislative Council's Portfolio Committees consist of seven members including three government members, two opposition and two cross bench members.[29] The Coalition Government was therefore in a minority on the committee. In regard to the Hills Shire Council, at the time of the inquiry, nine of the thirteen council positions were held by Liberal party members. This included the position of Mayor and Deputy Mayor.

From the establishment of the inquiry, the committee had approximately three months to conduct its investigation due to New South Wales' general election which occurred on Saturday 25 March 2023. The government was prorogued on Monday 27 February however committees were able to transact business until the expiry of the Parliament on Friday 3 March 2023.

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[27] R. Williams, New South Wales, *The Hills Shire Council Liberal Party Councillors*, Legislative Assembly, 23 June 2022, pp. 9118 – 9119.

[28] The establishment of this inquiry followed the initiation of an inquiry into Canterbury-Bankstown Council by a Government majority committee with the target being the Labor Mayor who had been preselected for the Legislative Council.

[29] New South Wales Legislative Council, *Committees—Rules, Resolutions and Membership: First Session of the Fifty-Eighth Parliament*, p 11. Accessed at: <https://www.parliament.nsw.gov.au/lc/rules/Documents/Committees%20-%20Rules,%20Resolutions%20and%20Membership%20-%20as%20at%2019%20May%202022%20(new%20doc).pdf>.

The inquiry, the witnesses, and the Act

On 30 January 2023 the committee resolved to invite 14 witnesses to appear at a hearing on 15 or 16 February 2023.[30] Approximately one week later the committee secretariat had had very limited communication or no communication with four key witnesses and the Chair instructed the secretariat to re-issue invitations to attend the hearing.[31] With still little to no contact from the four witnesses the committee resolved to issue summons to those individuals[32] under s4 of the *Parliamentary Evidence Act*.

Over the course of 10 and 13 February 2023, multiple senior officers of the Department of the Legislative Council attempted to serve the summons on the four witnesses.[33] During this time it was established that one of the witnesses was out of jurisdiction in Victoria. Despite the committee's position that their evidence was key to corroborating the evidence of other witnesses, without their voluntary participation they could not be pursued further.[34]

The other three witnesses could not be found at their homes, places of work and were not responding to the efforts of the secretariat to contact or locate them to effect service of the summons. This was highly unusual and suggested to committee members that attempts were being made to evade service, and that the 'witnesses were deliberately not co-operating with the inquiry'.[35]

With the efforts of departmental staff being unsuccessful in serving the summons, on 14 February 2023, the committee resolved to engage private process servers to effect service of summons on the remaining three key witnesses that were thought to be in

[30] Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), pp. 31-32, 34.

[31] Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p 36.

[32] Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p 36.

[33] Portfolio Committee No. 7, pp. 15-18.

[34] Portfolio Committee No. 7, p 17.

[35] Portfolio Committee No. 7, p 23.

New South Wales.[36] This decision was made in an ongoing attempt to ensure compliance with s4(1) of the *Parliamentary Evidence Act* which requires personal service of a summons. Procedurally, the engagement of process servers was a significant step, one that had never previously been undertaken by a Legislative Council committee. In justifying the use of process servers, the committee report noted that:

> *… the use of professional process servers was entirely appropriate in this context … Private process servers routinely deal with the service of legal documents. They can provide cheques for conduct money as needed, and offer an efficient, professional and cost effective service. Process servers – being commercial agents – are also licensed and regulated by the Office of Fair Trading. They can provide comprehensive reports on attempts made to serve documents, and an affidavit of service as required.*[37]

From 16 to 26 February 2023, between six and eight attempts were made by the process servers to serve the summonses on the three 'missing' witnesses with reports provided to the committee each day.[38] During this period, the witnesses successfully evaded the attempts of the process servers. The evasive actions were on the face of it quite entertaining, and included:

- an unauthorised absence from a scheduled meeting of the Hills Shire Council where that individual holds the position of Councillor;[39]
- a process server attending a property, hearing voices inside and after knocking for a number of minutes finding that the voices ceased and no person would answer the door;[40]

[36] Portfolio Committee No. 7, p 39.

[37] Portfolio Committee No. 7, pp. 22-23.

[38] Portfolio Committee No. 7, pp. 15-18.

[39] Correspondence from Mr David Reynolds, Acting General Manager, The Hills Shire Council, to the secretariat, received 22 February 2023.

[40] Correspondence from Tim Tiernery & Associates Pty Limited, Private process servers report, received 20 February 2023.

- accusations that a witness was hiding in a red gum forest to evade process servers;[41] and,
- a witness informed the committee that one of the three 'missing' witnesses had been seen driving around their local area wearing a black full face ski mask.[42]

Concurrent to the attempted serving of summons by parliamentary staff and private process servers, the Committee Chair, Sue Higginson MLC, authorised several media releases informing the public about the inquiry and the challenges that the committee had encountered in attempting to locate and serve summons on the identified witnesses. This included naming the witnesses and statements encouraging them to come forward to speak to the committee voluntarily.[43] The media releases led to significant media interest and the generation of numerous print and televised news stories by the *ABC, 9 News, 7 News*, the *Sydney Morning Herald*, news.com.au and the *Daily Telegraph*. The intensity of the coverage increased as the expiry of the Parliament approached and as the evasion techniques utilised by the key witnesses became public knowledge.

[41] Evidence, Shirlee Burge, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region hearing,* 2 March 2023, p 11.

[42] Evidence, Shirlee Burge, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region hearing,* 2 March 2023, p 12.

[43] Media Release, Portfolio Committee No. 7 – Planning and Environment, 'Upcoming hearings in inquiry into the Hills Shire Council and property developers in the region', 11 February 2023, Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/18183/Media%20release%20-%20Upcoming%20hearings.pdf>; Media Release, Portfolio Committee No. 7 – Planning and Environment, 'Key witnesses failing to co-operate with parliamentary inquiry into the Hills Shire Council and property developers in the region' 14 February 2023. Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/18191/Media%20release%20-%20PC7%20-%20Continued%20efforts%20to%20summon%20witnesses.pdf>; Media Release, Portfolio Committee No. 7 – Planning and Environment, 'Hearing tomorrow in inquiry into the Hills Shire Council and property developers in the region', 22 February 2023. Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/18226/Media%20release%20-%20PC7%20-%20Hearing%20tomorrow.pdf>; Media Release, Portfolio Committee No. 7 – Planning and Environment, 'Final hearing for inquiry into the Hills Shire Council and property developers in the region', 1 March 2023, Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/18250/Media%20release%20-%20PC7%20-%20Final%20hearing.pdf>.

Correspondence received by the committee reveals that despite the Legislative Council having adopted the Procedural Fairness Resolution, a number of witnesses were concerned that the actions of the committee suggested that the inquiry was 'being conducted to further political ends'[44] and that the committee did not have the authority to conduct an inquiry once the Parliament had been prorogued.[45] Further, a number of witnesses questioned whether the committee would afford them procedural fairness if they appeared at a hearing.[46] Had these witnesses appeared, the provisions of the Procedural Fairness Resolution would have been available to them to ensure their treatment by the committee was fair. Specifically, they could have:

- requested that their evidence be heard in camera;
- requested that they attend and consult with a legal adviser during a hearing;
- objected to questions;
- taken questions on notice; and,
- requested the opportunity to respond to adverse comments made about them.[47]

Nonetheless, the committee's investigations were clearly hampered by the actions of the witnesses as well as the time constraints imposed by the forthcoming election. The seriousness of the witnesses' actions led to the committee finding that:

- witnesses for whom summons were issued to assist the inquiry engaged in serious and deliberate attempts to evade service; … and;

[44] Correspondence from Mr Jean-Claude Perrottet to the committee, received 28 February 2023.

[45] Correspondence between the committee and Mr Dylan Whitelaw, received 23 - 28 February 2023.

[46] See, for example: Correspondence between the committee and Mr Jeremy Greenwood, received 23 - 28 February 2023, Correspondence between the committee and Mr Dylan Whitelaw, received 23 - 28 February 2023, Correspondence between the committee and Mr Robert Assaf, received 23 - 28 February 2023; Correspondence from Mr Jean-Claude Perrottet to the committee, received 28 February 2023.

[47] New South Wales Legislative Council, *House – Rules, Resolutions, Officeholders and Ministerial representation: First Session of the Fifty-Eighth Parliament*, pp. 15 – 17. Accessed at: <https://www.parliament.nsw.gov.au/lc/rules/Documents/House-Rules,%20Resolutions%20and%20Officeholders%20and%20ministerial%20representation.pdf>.

- witnesses for whom summons were issued to assist the inquiry engaged in deliberate attempts to avoid giving evidence to the inquiry.[48]

Further, the committee noted that:

> *… three of the witnesses … all took steps to deliberately avoid attempts by both parliamentary staff and professional process servers to serve a summons. These witnesses showed a blatant disregard for parliamentary processes … [A] New South Wales parliamentary committee has never been faced with such serious, deliberate and co-ordinated attempts by witnesses to evade service of a summons.*[49]

To address this unprecedented issue, the committee recommended that, at the beginning of the 58th Parliament, the New South Wales Legislative Council:

- refer an inquiry into the Parliamentary Evidence Act 1901 to the Privileges Committee, with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summonsing of witnesses; and
- send a message to the New South Wales Legislative Assembly requesting that that House refer the same inquiry to its Standing Committee on Parliamentary Privilege and Ethics.[50]

The Committee also recommended that:

> *Legislative Council committees consider the use of professional process servers to serve a summons on a witness in extraordinary circumstances where the witness has demonstrated that they are not co-operating with the committee, and that this matter be considered by any future inquiry by*

[48] Portfolio Committee No. 7, p 22.

[49] Portfolio Committee No. 7, pp. 21, 23.

[50] Portfolio Committee No. 7, p x.

> *the Privileges Committee into the operation of the Parliamentary Evidence Act 1901.*[51]

Portfolio Committee No 7's report was tabled out of session on 3 March 2023, the final day of allowable committee activity in the 57th Parliament. However, on 20 September 2023 the House referred an 'Inquiry into the provisions of the Parliamentary Evidence Act 1901' to the Legislative Council Privileges Committee.[52] The terms of reference specifically refer to Portfolio Committee No 7's inquiry into the Hills Shire Council and the recommendation to inquire into

> *the Parliamentary Evidence Act 1901 … with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summonsing of witnesses.*[53]

As at October 2023 a reporting date has not been set.

EXAMPLES OF OTHER JURISDICTIONAL APPROACHES TO COMPULSION AND CONTEMPTS

The complexities of dealing with reluctant or recalcitrant witnesses is not unique to New South Wales however various jurisdictions have taken different approaches to addressing these behaviours, otherwise known as contempts. For example, Claressa Surtees, Clerk of the Australian House of Representatives notes 'allow the Houses provides a coherent framework for identifying, considering, and responding to contempts, and potential contempts.'[54] While the Parliamentary *Privileges Act 1987* (Cth) bestows the power to detain, imprison or impose a fine for a contempt, almost without exception, these powers are not exercised. As further noted by Surtees:

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[51] Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p x.

[52] Minutes, NSW Legislative Council, 20 September 2023, pp 508-509.

[53] Privileges Committee, NSW Legislative Council, *Inquiry into the provisions of the Parliamentary Evidence Act 1901 – Terms of Reference* (2023). Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/3006/Terms%20of%20Reference%20-%20Inquiry%20into%20Parliamentary%20Evidence%20Act%201901.pdf>.

[54] Claressa Surtees, '*Submission (SCC0032) to the House of Commons, Committees of Privileges: Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records inquiry,*' Accessed at: <https://committees.parliament.uk/writtenevidence/13575/default/>.

> *One reason for this is that most witnesses do not need to be compelled to provide evidence, and usually welcome the opportunity to engage with parliamentary committee inquiries. Another reason may be that, throughout various evidence gathering processes, witnesses are regularly reminded of their rights and responsibilities, with accompanying explanations of the powers of the House to deal with possible contempts of Parliament. Furthermore, while committees are aware of their considerable powers, they generally exercise caution and discretion in exercising these powers. It is considered that the ability of the House to exercise its rights should be carefully weighed against the need to engage constructively with individuals and organisations.*[55]

In the United Kingdom Parliament, the enforceability of committee powers and the appropriate solution to deal with this issue has been the subject of debate for the better part of the last 23 years. In 1999 and then again in 2013 the Joint Committee on Parliamentary Privilege conducted inquiries into this specific issue. While the 1999 committee recommended legislation, the 2013 committee preferred to reassert powers through standing orders and resolutions.[56] These inquiries were followed by the 2016 House of Commons Committee of Privileges inquiry that was asked to specifically consider the issue of 'the exercise and enforcement of the powers of the House in relation to select committees and contempts'.[57] While the inquiry was interrupted by two general elections, the prioritisation of other matters and the COVID-19 pandemic, a report was eventually published in May 2021 which noted that:

> *Parliament has historic powers to punish Members and non-Members for contempt. A 'contempt of Parliament is a relatively rare occurrence, but in recent years it has become a more prominent issue, especially in the context*

[55] Claressa Surtees, 'Submission (SCC0032) to the House of Commons'.

[56] Committee of Privileges, House of Commons: United Kingdom Parliament, *Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records* (2021), p 6.

[57] Committee of Privileges, House of Commons, p 3.

> *of select committees, which have, for instance, sometimes been unable to compel the attendance of witnesses or secure provision of papers.*[58]

The Committee ultimately concluded:

> *… we consider the best option is for new legislation to provide a statutory basis for existing select committee powers to summon witnesses and compel attendance and provision of information. New legislation would provide much needed clarity, effective deterrents for noncompliance and would bring our Parliament into line with many comparable legislatures.*[59]

Following the publication of the report the Committee conducted public consultation, the results of which were published in 2022. While some modifications were made to the original proposals, the Committee stated that by pursuing the aforementioned course of action they were:

> *… balancing the risks of action … over the risk of inaction which could leave Parliament toothless and unable fully to discharge its responsibilities.* [60]

While different in nature, the examples of the Australian and United Kingdom Parliaments acknowledge that strong committee powers are required to ensure witness compliance and importantly provide clarity to witnesses regarding their rights, responsibilities, and protections.

CONCLUSION

There have been many discussions about the numerous deficiencies of New South Wales *Parliamentary Evidence Act*. However, the experience of Portfolio Committee No. 7 has brought into stark relief the limitations of an Act that is now 123 years old, particularly in relation to the requirement for personal service of a summons and its jurisdictional constraints. If the committee's investigations had not been limited by the

[58] Committee of Privileges, House of Commons, p 3.

[59] Committee of Privileges, House of Commons, p 3.

[60] Committee of Privileges, House of Commons, p 31.

impending New South Wales state election, the committee would have had to decide if it wanted to continue to pursue the recalcitrant witnesses or not. If they chose the former and the witnesses were able to remain successfully 'hidden' they would have no recourse under the *Parliamentary Evidence Act* and would have had to rely on other means to try to persuade the witnesses to appear. If the committee chose the latter and did not continue to pursue the witnesses, this would perhaps have led to questions about the effectiveness of the committee system in New South Wales.

The committee was very clear in its recommendations – the *Parliamentary Evidence Act* needs to be reviewed to identify appropriate amendments to ensure that it is modernised and fit for purpose. The inquiries and practices of other jurisdictions also demonstrate that whether legislation, Standing Orders or resolutions are utilised to address the issue of compulsion, they must be coherent, relevant and ensure that the rights of committees are upheld and the ability to constructively engage with individuals and organisations is retained. While the evasive witness behaviour detailed above could perhaps be considered an anomaly of the 57th Parliament it would be remiss of the 58th Parliament to not heed the recommendations of Portfolio Committee No 7. A modernised *Parliamentary Evidence Act* is required to ensure that the work of committees is supported now and into the future and that the power to compel is balanced appropriately with both procedural and legal safeguards for witnesses. It will, therefore, be very interesting to see what amendments the newly established Privileges Committee inquiry into the provisions of the *Parliamentary Evidence Act* ultimately recommends.

‘It’s a bit unfair on the bin chickens, don’t you think?’: Unparliamentary language as self-regulated freedom of speech

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Abstract: This paper discusses how parliament regulates its own speech through rulings and practice regarding unparliamentary language. Drawing on a review of the instances of unparliamentary language raised in the House of Representatives in 2022-23, and a range of examples from the Parliament of Australia, it highlights the importance of context in understanding the boundaries of parliamentary language. This in turn uncovers the tensions inherent in the parliament’s roles as the site of political debate and as the arbiter of the bounds of that debate.

INTRODUCTION

This paper discusses how parliament regulates its own speech through rulings and practice regarding unparliamentary language. Standing Orders for the House of Representatives and Senate of the Australian Parliament prohibit ‘disrespectful’ references[2], or the use of ‘offensive’ language in referring[3], to other members or senators, or to the monarch, Governor-General or members of the judiciary. Both houses also include use of ‘objectionable words’, and the refusal to withdraw them, as

[1] We thank our colleagues in the Department of the House of Representatives Procedure Office, especially Natalie Cooke, for their assistance on this paper.

[2] House of Representatives Standing Orders (HOR SO) 89 & 90.

[3] Senate Standing Order (SSO) 193.

examples of disorderly conduct[4]. However, despite the apparent simplicity of these rules, there are layers of complexity.

This paper begins by outlining why it is important that parliamentary debates are conducted in an orderly manner, and why it is equally important that the parliament itself sets the bounds of what that means. Those boundaries are set in a range of ways, including through rulings from the chair and the official transcripts of proceedings. Vitally, neither debates nor rulings occur in a vacuum, and in different contexts, different standards may be set.

The issue is further complicated in committee hearings, where witnesses may be granted considerable latitude in not just their language, but in their reflections on individual members or senators or decisions of the parliament.

This paper draws on a review of the instances of unparliamentary language raised in the House of Representatives in 2022-23. In addition, it examines a range of examples from the Parliament of Australia, in particular the House of Representatives, to demonstrate the importance of context in understanding the boundaries of parliamentary language, and will highlight the tensions inherent in the parliament's roles as the site of political debate and as the arbiter of the bounds of that debate.

UNPARLIAMENTARY LANGUAGE: WHAT IT IS, WHY IT IS IMPORTANT & WHY PARLIAMENT IS THE ONLY ARBITER OF WHAT IT IS

The concept of unparliamentary language originates from the early history of Westminster, where restrictions on the expression of free speech were self-imposed over time after a significant struggle to attain freedom of speech. Elizabethan parliaments in particular were significantly curtailed by the Queen's restrictions on freedom of speech.[5] Eventually, this lead to the enactment of the Bill of Rights of 1689, Article 9 decrying 'That the freedom of speech and debates or proceedings in

[4] HOR SO 91 (b), SSO 203 (c).

[5] Rosemary Sgroi, 'Freedom of speech in Elizabethan Parliaments: The History of Parliament', accessed at: <http://www.historyofparliamentonline.org/periods/tudors/freedom-speech-elizabethan-parliaments>.

Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[6] This pronounced the assertion of the rights and privileges of parliament to determine in what manner its business was conducted.

Commentary by Paul Seaward suggests that two factors informed the evolution of the principle of unparliamentary language. He suggests that, firstly, a culture evolved in Westminster from the sixteenth century which promoted the model of a quiet and serious parliamentarian who approached their role with the appropriate gravity demanded of the parliament.[7] Secondly, Seaward suggests that the contemporary conventions regarding gentlemanly violence likely informed the development of the principle. Instances where a member accuse another of lying were likely interpreted as a prompt for a challenge and subsequent duel, indicating the seriousness of such a charge.[8] Given the propensity of challenges and duels to eventuate in physical violence and death, unflattering reflections on other members or lack of civility in the chamber held a significant risk to the business and order of the parliament.

Interestingly, Seaward notes that the procedural evolution of unparliamentary language in the House of Commons in particular has tended to fixate on particular words as inherently unparliamentary, rather than consideration of such language by context. While John Hatsell, an eighteenth-century clerk, asserted the importance of context in determining whether language used is unparliamentary, Seaward argues that subsequent Speakers 'routinely condemned individual expressions as unparliamentary, conveying the impression that it was the word, rather than the word in context, that was damaging'.[9] As demonstrated in Australian examples below, such interpretation has survived to an extent.

[6] 1 Will. & Mary, sess. 2, c.2.

[7] Paul Seaward, 'Lies, Personalities and Unparliamentary Expressions, The History of Parliament: British Political, Social & Local History'. Accessed at: <https://historyofparliamentblog.wordpress.com/2021/04/29/lies-personalities-and-unparliamentary-expressions/>.

[8] Seaward, 'Lies, Personalities and Unparliamentary Expressions'.

[9] Seaward, 'Lies, Personalities and Unparliamentary Expressions'.

The Australian context: The House of Representatives and the Senate

The Parliament derives its power to determine its powers, privileges and immunities by virtue of section 49 of the Constitution. Section 50 further determines that both Houses are vested with the power to the resolve the 'order and conduct of its business and proceedings either separately or jointly with the other House'.

In the Australian context, the use of unparliamentary language is governed, in both Houses of the parliament, by Standing Orders relating to Disorder. The House of Representatives Standing Orders (SOs) outline the following instances of Disorder:

> *A Member must not refer disrespectfully to the Queen, the Governor-General, or a State Governor, in debate or for the purpose of influencing the House in its deliberations.*
>
> *A Member must not use offensive words against:*
>
> *either House of the Parliament or a Member of the Parliament; or*
>
> *a member of the Judiciary.*
>
> *All imputations of improper motives to a Member and all personal reflections on other Members shall be considered highly disorderly.*[10]

Standing Order 91 further highlights that 'a Member's conduct shall be considered disorderly if the Member has ... used objectionable words, which he or she has refused to withdraw'. Other than the specific instances highlighted in SOs 88-90, the SOs do not explain how 'objectionable words' should be defined. House of Representatives Practice (Reps Practice), however, expands on this, noting that the decision rests with the Chair:

[10] HOR SO 88-90.

> *The determination as to whether words used in the House are offensive or disorderly rests with the Chair, and the Chair's judgment depends on the nature of the word and the context in which it is used.*[11]

This is in line with SO 60: 'The Speaker, or the occupier of the Chair of the House at the time, shall keep order in the House'. Similarly, the Deputy Speaker, or Chair in the Federation Chamber, is responsible for keeping order in the Federation Chamber.

Where language or conduct that is out of order is identified, it can be raised either by a Member as a point of order for the Speaker or Chair's determination, or by the Speaker themselves. The Speaker or Chair is empowered by SO 92 to intervene in situations where a Member's conduct is considered to be offensive or disorderly, in addition to enabling the Speaker to determine whether a Member's conduct was offensive or disorderly if drawn to their attention by another Member. If the Speaker determines that the language or conduct breaches the SOs, the most common response is to request that the offending Member to withdraw the unparliamentary language or conduct, which in most cases is generally complied with. A range of other disciplinary measures are available to the Speaker via SO 94, such as a direction to leave the Chamber for a one-hour period, and naming and moving to suspend the Member.

Reps Practice also notes that 'A Member is not allowed to use unparliamentary words by the device of putting them in somebody else's mouth, or in the course of a quotation'.[12] As we note later in this paper, this determination is not always strictly followed.

The Senate Standing Orders (SSOs) contain similar guidance to the House:

> *A senator shall not reflect on any vote of the Senate, except for the purpose of moving that the vote be rescinded.*
>
> *A senator shall not refer to the King, the Governor-General or the Governor of a state disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations.*

[11] David Elder, *House of Representatives Practice* (HRP), 7th Edition. Canberra: Department of the House of Representatives, 2018, p. 514.

[12] Elder, HRP, p. 514.

> *A senator shall not use offensive words against either House of Parliament or of a House of a state or territory parliament, or any member of such House, or against a judicial officer, and all imputations of improper motives and all personal reflections on those Houses, members or officers shall be considered highly disorderly.*[13]

While many of the same disciplinary options are available to the President of the Senate in responding to unparliamentary language or conduct, censure motions are used with more frequency to respond to these issues than in the House.[14] However, a censure motion is not a sanction available to either the President or the Speaker; it can only be initiated by a Member or Senator, placing the responsibility of bringing a censure motion on the relevant chamber as a whole rather than the Presiding Officer.

The role of the Presiding Officer

As highlighted by the relevant Standing Orders, the Presiding Officer (either the Speaker of the House or the President of the Senate) is the ultimate arbiter for determining what constitutes disorder and, consequently, unparliamentary language. As described by former Speaker the Hon Peter Slipper, the Speaker is the 'ultimate authority' of the House, and with it comes the responsibility of maintaining order.[15] In the House, the Speaker can intervene where a Member's conduct is determined to be offensive or disorderly by virtue of Standing Order 92. The current Speaker's submission to the House of Representatives Standing Committee on Procedure inquiry into recommendations 10 and 27 of Set the Standard: Report on the independent review into Commonwealth Parliamentary Workplaces (henceforth, *Raising the Standard*), highlights the competing considerations when determining rulings on conduct:

[13] SSO 193.

[14] See, for example, the Senate's censure of former Senator Fraser Anning on 3 April 2023. Note, however, that the inflammatory language Senator Anning used was external to the Chamber, which prevented the President's intervention available under SSOs: *Journals of the Senate,* No. 142, 3 April 2023, p. 4834.

[15] Cited in *Raising the Standard*, p. 12 [3.18].

The Speaker has an important duty to apply the Standing Orders in the Chamber. It is also the Speaker's duty to uphold the dignity of the House and ensure that Members treat each other with respect and courtesy, while engaging in healthy, democratic debate.[16]

In her submission to the inquiry, the Clerk of the House of Representatives noted that this lack of specificity allows for the Speaker to take a principles-based approach:

> *The Speaker may be guided by relevant precedents and rulings by former Speakers, such as those cited in House of Representatives Practice. While it could be argued that the current absence of specific types of 'offensive' or 'objectionable' words in the standing orders is a concern, it does mean that the Speaker is not restricted if faced with unanticipated circumstances and can take context into account.*[17]

The Speaker's own submission highlighted that the broad outlines contained in the SOs enable the Speaker to reflect evolving community standards:

Speakers' rulings over time have changed. In the same way that standards of dress have evolved since the first sitting of Australia's Parliament, what constitutes acceptable language and behaviour has also evolved. For example, some inherently sexist language or behaviour may once have been somewhat tolerated but is no longer considered acceptable in contemporary Australia or in today's Parliament. Similar comparisons can be made regarding actions that discriminate or are exclusionary based on race, disability, or sexual orientation.[18]

The flexibility in practice enables the Speaker to adapt to both the context in the specific instance and to broader changes in society. As the SOs in relation to unparliamentary language and conduct have generally been interpreted to be applicable to a broad range of behaviour and language, they have been infrequently

[16] Milton Dick MP, Speaker of the House, Procedure Committee Inquiry into Recommendations 10 and 27 of Set the Standard, *Submission 7*, p. 1.

[17] Claressa Surtees, Clerk of the House, Procedure Committee Inquiry into Recommendations 10 and 27 of Set the Standard, *Submission 2*, p. 2.

[18] Milton Dick MP, Speaker of the House, Procedure Committee Inquiry into Recommendations 10 and 27 of Set the Standard, *Submission 7*, p. 1.

amended.[19] However, rulings on disorderly conduct necessarily respond to poor behaviour after it has already occurred whereas until recently there have been limited established rules to determine what expectations should be placed on parliamentarians' conduct and behaviour. Further, the limited appreciation by the broader community regarding the contextual importance can cause confusion, particularly in situations where words such as 'liar' are found to be problematic under SOs but discriminatory or inflammatory language are considered within the rules.

Notwithstanding the Presiding Officer's capacity to flexibly respond to the situation at hand when making rulings, such a mechanism can result in inconsistent rulings. As illustrated below, offensive language that may be considered a breach of SOs in the Chamber may not be ruled out of order in a different context or under a different Chair or Speaker. An example is the acronym 'WTF', which was deemed to be an unparliamentary term during debate on a bill on 14 February 2023 and withdrawn by the offending Member;[20] however, five days before, the same acronym had been used by a different Member, and attention was not drawn to it.[21]

Why is it important?

The importance of the Parliament's ability to determine the manner in which it conducts its business is demonstrated in a number of ways. Firstly, such powers represent an exercise of parliamentary privilege at its most fundamental. As noted above, sections 49 and 50 of the Constitution empower the Parliament to determine its powers, privileges and immunities, and how these features are practiced in governing its own administration. Accordingly, only the Parliament may determine what forms of language and behaviour fall within the confines of acceptable behaviour.

[19] The last broad-scale review of the House of Representatives Standing Orders was in November 2003, which consolidated a number of Standing Orders. The House of Representatives Standing Committee on Procedure is currently undertaking an inquiry into the Standing Orders. In the Senate, a full review of the Standing Orders has not taken place since 1987, but inquiries on individual matters or SOs have been successful in recommending changes, most recently in *Report 2 of 2023* of the Senate Standing Committee on Procedure, which responded to Recommendation 10 of *Set the Standard* among other matters.

[20] Julian Hill MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2023, p. 759.

[21] Jerome Laxale MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 February 2023, p. 483.

Such a right cannot be understated, particularly in the context of Westminster parliamentary history. In the UK , the parliamentary right to freedom of speech was long contested, demonstrated by cases such as Sir Peter Wentworth MP's repeated imprisonment and eventual death in the Tower of London during the sixteenth century for breaches of the restrictions on freedom of expression imposed on the Commons by Elizabeth I.[22] While the current Australian parliamentary landscape bears little resemblance to its contextual predecessors in this respect, the principle established at that time remains fundamentally relevant: that parliaments continue to assert and jealously guard their sovereignty, including freedom from tyranny of the Executive and Judicial branches of government.

Further, the need to control for unparliamentary language and disorder highlights a tension between parliamentarians' freedom of speech and capacity to undergo their duties unobstructed, and the need to maintain order in an often fast-moving and chaotic environment. This balance of rights is referred to in *Odgers' Australian Senate Practice* (Odgers), which stated that the prohibition on offensive words in the Senate is to ensure that 'debate is conducted in the privileged forum of Parliament without personally offensive language'.[23] The excerpt in Odgers hints at the extremity of freedom that parliamentary privilege provides parliamentarians at large; with considerable protections enabling free speech, it is imperative that these processes are not abused.[24]

Finally, there are broader considerations of the need to model appropriate workplace behaviour and behave with decorum. Concerns regarding acceptable behaviour and language have long proliferated, particularly given the regular televisual presence of contentious parliamentary debates. The importance of 'setting an example' has been recognised by Presiding Officers, including a statement by the current Speaker noting to Members recently that 'Our general demeanour and the courtesy we show one

[22] Sgroi, 'Freedom of speech in Elizabethan Parliaments'.

[23] Rosemary Laing (ed.), *Odgers' Australian Senate Practice*, 14th edition. Canberra: Department of the Senate, 2016, p. 268.

[24] One mechanism adopted for the purposes of encouraging moderated use of language in the Senate lies in the Resolution 8 of the Privilege Resolutions, which urges senators to responsibly exercise their freedom of speech.

another in the chamber matters'.[25] More expansively, the former Senate President the Hon Scott Ryan stated in August 2018:

> *… I ask senators to consider the following. This chamber is the prime deliberative chamber of the parliament. It is far better that positive attention is attracted by our words and contributions to debate. On several occasions in recent times, this has not been the case. The standing orders and rules of this place are limits, not guides. Just because something can be said or done does not mean it should be. Common decency cannot be codified. It depends on all of us considering the impact of our behaviour on others. While this workplace isn't like a normal one, it is still a place where we all must work together, even across issues of profound disagreement. We also work with officials and staff, and we should consider the impact of our behaviour on them.*
>
> *This is rightly a place of vigorous debate, but personal abuse has no place in this chamber, particularly if it targets personal attributes, such as race or gender—nor does the use of abusive epithets or labels. The use of such language does nothing to facilitate the operation of a chamber and free debate within it, and we are all capable of vigorously arguing our case without resort to it. I intend to take a strict line on the use of such language, to uphold the dignity of the chamber and to ensure it is a place where all senators representing the people of their states and territories are able to freely contribute to debate and deliberations.*[26]

This point was highlighted by *Set the Standard*, where it was argued that the current arrangements governing the conduct of Parliament 'do not adequately promote a safe and respectful environment'.[27] Recommendation 10 of *Set the Standard* recommended

[25] Milton Dick MP, Commonwealth, *Parliamentary Debates*, House of Representatives Thursday 22 June 2023, p. 64.

[26] Cited in Senate Standing Committee on Procedure, *Third Report of 2018: Disorder outside formal proceedings*, September 2018, p. 1.

[27] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*, November 2021, p. 173.

the review of the Standing Orders of both Houses with a view to 'eliminating language, behaviour and practices that are sexist or otherwise exclusionary and discriminatory [and] improving safety and respect in the parliamentary chambers'.[28] Both the House and the Senate Procedure Committees have responded to Recommendation 10, with the House Committee making a range of recommendations to amend the House SOs.

CONTEXT IS EVERYTHING: EXAMPLES OF UNPARLIAMENTARY LANGUAGE

For this paper, we focus on both quantitative analysis of unparliamentary language in addition to several case studies from the Parliament of Australia (the House of Representatives). This highlights how much context matters in the recording of unparliamentary language.

Study of 2022-23 instances of unparliamentary language in the House of Representatives

For the purposes of this paper, we examined all recorded instances where a Speaker has determined that a Member of the House of Representatives used unparliamentary language or conduct between 2 August 2022 (the first day of the 47th Parliament) to 22 June 2023.

There are limitations with this study, particularly in that it does not capture every instance of unparliamentary language but only where the Speaker has determined that the relevant SO has been breached and where Hansard has been able to capture the words expressed, which may not be inclusive of all unparliamentary language uttered. In addition, the sourced data is from the House of Representatives' Chamber and the Federation Chamber, and does not include either the Senate or the Hansard transcripts of public hearings of parliamentary committees.

Between 2 August 2022 and 22 June 2023, there were 68 instances of unparliamentary language which the Speaker made a ruling on, in almost all instances requesting that

[28] Cited in House of Representatives Standing Committee on Procedure, *Raising the Standard: Inquiry into Recommendations 10 and 27 of* Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces, July 2023, p. 1 [para. 1.3].

the Member withdraw the offending language. There was only one instance where a Member refused to withdraw, and in two other cases, on appeal from a Member or Members, the Speaker undertook to consider and review specific instances. Of these, 15 instances of unparliamentary language were unrecorded by Hansard, which limits their evidentiary value.

Unparliamentary language is most common during Question Time, with 25 recorded instances during that time of the day during the reviewed period. The next most common times were during time reserved for Matters of Public Importance (12 instances) and during Bills debate (eight instances). In relation to the former two, this can be explained by the highly adversarial nature of Question Time, which can then flow on to Matters of Public Importance motions (which follow Question Time on sitting days except Mondays).

The content of unparliamentary language was largely in relation to personal reflections – that is, insults based on a person's character or the like. Such instances comprised 35.29 per cent of recorded instances. The second- and third-most common forms of unparliamentary language relate to allegations of corruption and imputations of lying in relation to another Member. This is reflective of the historical origins of the concept, as discussed earlier in the paper.[29] However, while many Members referred to broader investigations (including Royal Commissions) which had made adverse findings, it is still considered disorderly to ascribe improper motives to another Member even where external processes may have done so.

Finally, gender is a significant parameter in instances of unparliamentary language; the majority of recorded instances were by male Members (sixty per cent as opposed to ten per cent by women; the remainder were unidentified speakers). This finding does not necessarily indicate that men are more likely to breach the rules of the House; higher rates of male Members using unparliamentary language may be reflective of their having more speaking opportunities than women, such as in positions of higher duties (e.g. as Ministers or as parliamentary Office Holders). This is supported when examining the individual Members who had the highest findings of unparliamentary

[29] Hansard did not capture the content spoken in 23.53 per cent of instances examined.

language against them, which primarily were those in senior positions and also were male, such as the Treasurer and the Leader of the Opposition.

Recent individual examples

A closer examination of instances of unparliamentary language highlight the importance of context in the Chair's determination of whether the SOs have been breached or otherwise. The following examples are included in exactly the form as recorded in Hansard (or other formal sources), for obvious reasons. Readers should be aware that some of the language below may be upsetting.

COMMITTEE HEARING AND REPORT

In late 2021, the House of Representatives Select Committee on Social Media and Online Safety heard from a witness in a public hearing regarding their experience of receiving online abuse. Hansard transcribed the witness verbatim:

> *In December 2013, around this time, actually, I woke up to my photo being misused on Reddit. Reddit is a horrible cesspit of the internet. I'm going to swear here because I'm going to quote the forum that it was used on. My photo was used on the 'what the fuck' forum. They were asking what the fuck had happened to my face. There were about 500 comments when I woke up, and they were all hideous.*[30]

The Committee Chair chose not to request a withdrawal. Given the context, the forum's title would have been nonsensical if withdrawn, but arguably the flavour of both the forum name and the reaction of users could have been conveyed even with a redacted transcript.

Subsequently, this extract was included in the Committee's report, tabled in the House in March 2022,[31] suggesting that Committee members recognised that the power of the witness's experience and account of it carried sufficient weight to include it in full.

[30] Carly Findlay*, Committee Hansard*, Social Media and Online Safety Select Committee, 21 December 2021, p. 1.

[31] House of Representatives Select Committee on Social Media and Online Safety, Report, p. 43.

CHAMBER SPEECH – INDIRECT QUOTE

As noted earlier, Reps Practice highlights that 'A Member is not allowed to use unparliamentary words by the device of putting them in somebody else's mouth, or in the course of a quotation'. Yet we can find instances where this prohibition is not followed – not just in committee hearings, but in the House itself.

In debate on the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2001, then-Member for Boothby Nicolle Flint made the following comments, recorded in Hansard with censoring asterisks:

> *I'm going to read some of this into Hansard because it needs to be recorded, because I will not by lectured by those opposite, as I've said before, when I know that they have even more serious problems than the ones that have already been revealed by the brave women who have come forward:*
>
> *He is a man who punches the wall next to his female staffer's head calling her a "f***ing c**t" when she passes on news he doesn't want to hear.*
>
> *He is a man who calls his female colleague a "pig dog" when she disagrees with him and says in front of her staff "that's why no one wants to f**k you".*

This is female Labor staff members reporting the behaviour of current and former Labor MPs. The article continues:

> *He is a man who says he'd "never f**k a woman without a thigh gap" and asks if I'll show him mine while we sit waiting for a meeting I'm about to run to start in a room full of young men.*[32]

A few months later, the same member made her valedictory speech, and again highlighted the abuse she had experienced. On this occasion, Hansard's record contains all words as spoken in full:

[32] Nicolle Flint MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 2021, pp 9248-9249.

> *I want to be very clear about the sort of behaviour that I'm talking about. Men on the Left, some of whom are public figures of influence, have done the following: stalked me; suggested I should be strangled; criticised the clothes I wear and the way I look; repeatedly called me a whiny little bitch; repeatedly called me weak, a slut, a dick-hole—and I apologise for the language—and much, much worse over email, online, on YouTube, on Facebook, and on Twitter. They've commented that I should be raped, grudge-fucked, that I am doing sexual favours for all my male colleagues, that I should be killed, that I should kill myself, and many, many more things that I will not repeat here. These men have also consistently reminded me that I deserve everything that has happened to me.*[33]

Immediately before this, Flint had said:

> *It's tempting to describe the Leader of the Opposition with a single word, a four-letter word. It begins with L and ends with R. But that would be unparliamentary, so I won't.*[34]

It is notable that, even in a speech containing the above language, the Member was unwilling to use the 'unparliamentary' term of describing another Member as a 'liar', highlighting that reflecting on a Member remains the most prohibited form of speech in debate. It is also noteworthy that despite the Member's allusion to the use of an unparliamentary term, an act which could be ruled out of order, her comments were permitted without interjection.

CHAMBER DEBATE – DIRECT QUOTATION

When making a statement on the International Day for the Elimination of Violence against Women, Member for North Sydney Kylea Tink spoke of her experience of abuse since becoming an MP:

> *I've now been subject to gender based bullying and harassment online, as I suspect many of my colleagues have. I believe we'd all be subjected to a*

[33] Nicolle Flint MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 2022, pp 841-842.

[34] Nicolle Flint MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 2022, p. 841.

> *similar daily barrage of abuse from cowards hiding behind their keyboards. But even knowing this as I took on this role, some of the messages that I've received during this time have been truly breathtaking, with one of the more recent—and I'll apologise in advance for offence— saying, 'You ****ing ugly big nosed slut. And you're a fat ****. Climate change is bullshit.'*[35]

Tink was not asked to withdraw or modify her language, and notably was *directly* quoting a message she'd received (as opposed to the general sense of messages relayed by Flint), and yet 'fuck' (as part of 'fucking') is here indicated with asterisks, as is another word, yet 'slut' and 'bullshit' are both transcribed.

A more recent example further highlights the inconsistencies in how debates are managed and transcribed. Speaking on workplace bullying, sexual harassment and sexual assault, Senator Pauline Hanson quoted from text messages allegedly sent by former Speaker Slipper to a staff member:

> *This was the first time a staffer had had the courage to publicly fight, instead of the long history of staff who have been mistreated and then encouraged to quietly go away. The Jenkins and Foster reviews have confirmed this very fact in black and white. Let me read you some of the text messages Peter Slipper sent to his staff member.*
>
> *On 10 October 2011 he sent:*
>
> *Funny how we say that a person is a cunt when many guys like cunts!;)*
>
> *In a follow-up message that same day, the Speaker wrote:*
>
> *They look like a mussel removed from its shell. Look at a bottle of mussel meat! Salty Cunts in brine!*
>
> *[...]*

[35] Kylea Tink MP, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2022, p. 3834.

> *The ACTING DEPUTY PRESIDENT (Senator Pratt): Point of order, Senator Hanson. Please pause the clock. Quoting from other sources does not make it any less disorderly in terms of reflecting on members of the other place. I would like to call your attention to the standing orders and for you to consider that in the remainder of your remarks.*[36]
>
> *[...]*
>
> *The ACTING DEPUTY PRESIDENT: Senator Hanson, I call your attention to the standing orders in terms of reflecting on members of the other place.*
>
> *Senator HANSON: They're not a member of the other place at this time, so therefore I have every right to disclose what was in text messages and before the courts.*
>
> *The ACTING DEPUTY PRESIDENT: I'm sure that, under the standing orders, people will draw their own attention to the remarks that you have made. I'll let you continue.*[37]

Again, it is evident that reflecting on another member (in this case, a former member of the other House) merits more cause for warning than does quoting sexually explicit material. The matter is further muddied by, in this instance, Hansard including the full word which, in Tink's speech above, had been censored.

SENATE CHAMBER DEBATE – IMPUTATION OF RACISM

Finally, a scenario that took place in the Australian Senate in September 2023 drew out some of the difficulties in interpreting prohibitions on unparliamentary language. On 7 September 2023, Senator Lidia Thorpe put the view during debate that a statement made by Senator Alex Antic were racist:

> *Senator ANTIC: History tells us that civilisations and empires are transitory. There are increasing signs now that Western culture has reached a tipping point. Left-wing activism supposedly based on equity, diversity and inclusion*

[36] Senator Pauline Hanson, Commonwealth, *Parliamentary Debates*, Senate, 8 August 2023, p. 79.

[37] Senator Pauline Hanson, Commonwealth, *Parliamentary Debates*, Senate, 8 August 2023, p. 80.

> *uses its allies in the media, the corporate sector and politics to prohibit any views it disapproves of. Too many of our modern leaders are not across this threat. They seem to think that defending our values is beneath them and that we have time on our side. We do not. Suicide and depression rates in our young people continue to skyrocket. We've failed to instil in them a sense of meaning and purpose, replacing it with empty modern ideologies like climate alarmism. On leaving school, young adults have little knowledge of history, the result of a curriculum denuded of Western history, replaced by critical race theory and a sense of victimhood. Sadly, too many have cowered before these ideologies, afraid of being called the various isms and phobias, and they're wreaking havoc across the West. If a principled defence of liberty was ever needed in this country, it was over the past 2½ years, yet we were told that those concerned with freedom were dangerous extremists. We need more brave men and women to stand up for future generations of Australians and hand them a culture that is greater than the one left to us. The relative prosperity and peace we've enjoyed have allowed us to become complacent, thinking that such a decline couldn't happen here, but the time has come for our leaders to stand up for what is right. Without urgent, strong leadership the West is doomed.*
>
> *Senator Thorpe: Why do you have to be so racist?*

Upon being determined by the Acting President that she was in breach of the SSOs, she highlighted what she viewed as a contradiction: that while racist or otherwise offensive or inflammatory language or ideas could be invoked by a Senator, another Senator calling them to account on their behaviour could be considered unparliamentary language.[38] Senator Mehreen Faruqi expressed support for Senator Thorpe's position, noting that she had been subject to racism within the Senate Chamber which had been poorly managed under SSOs. She particularly noted that determinations by Presiding Officers had not necessarily been considered in the context of the broader harm caused by such language.

[38] Commonwealth, *Parliamentary Debates*, Senate, 7 September 2022, pp 871-2.

While ultimately the matter moved on within the Chamber, two observations regarding this event can be made. Firstly, the original point of order did not address unparliamentary language but instead on a Senator's right to be heard in silence when they had the call, and it was only upon a colleague's raising the point of order regarding the allegation of racism that the discussion was prompted. This reflects the importance of context in understanding unparliamentary language, particularly in how Presiding Officers determine which instances to make rulings upon.

Secondly, such interactions – if not appropriately managed – can have a significantly broader impact, both in and outside the Chamber. Shortly after this interaction, Senator Hanson issued a tweet to Senator Faruqi, telling her to 'piss off back to Pakistan'.[39] After significant public and political commentary, Senator Faruqi moved a censure motion against Senator Hanson in relation to her comments where she raised the importance of respectful debate in the context of safety in the workplace.[40] In speaking in support of the motion, Senator the Hon Penny Wong made the following comment in relation to the importance of maintaining appropriate and respectful language:

> *Each of us in this place needs to take responsibility for our words and the impact of our words. Sometimes we say the wrong thing. Sometimes we do say the wrong thing, but we do have an individual and collective responsibility to act in a way that Australians would expect of us and that we would expect of our fellow Australians.*
>
> *[…]*
>
> *For our democracy to function well we must treat each other as equals. It is true that freedom of speech is a feature of democracy, but speech which is directed at people's heritage, race or religion is an attack on democracy, because fundamentally what it is saying is, 'You are not equal.' We must treat each other as equals, no matter the differences in our views. When we*

[39] Australian Associated Press, 'Pauline Hanson denies 'Pakistan' tweet aimed at Mehreen Faruqi was racist'., *The Guardian*, 1 June 2023. Accessed at: <https://www.theguardian.com/australia-news/2023/jun/01/pauline-hanson-denies-pakistan-tweet-aimed-at-mehreen-faruqi-was-racist>.

[40] Commonwealth, *Parliamentary Debates*, Senate, 27 September 2022, p 1235.

> *fail to take such an approach, it is not only diminishing of the other; it is diminishing of us all.*[41]

CONCLUSION

As is evident from this paper, unparliamentary language is a complex issue for parliaments to manage. Parliaments need to balance competing priorities in regulating the terms and nature of their debates: raising standards of behaviour and creating a workplace which is more inclusive and reflective of the community; maintaining parliamentarians' appropriate use of privilege to discuss matters of importance; allowing debate without encouraging personal clashes. Parliaments, and particularly the Presiding Officers who manage debates, have an unenviable task in making determinations, often in the moment itself. Yet it is vital that parliaments themselves continue to be the only source of determining what language is and is not appropriate, and equally vital that these standards continue to evolve as society does.

[41] Senator the Hon Penny Wong, Commonwealth, *Parliamentary Debates*, Senate, 27 September 2023, p 1238.

What should Oppositions do?[1]

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Abstract: This article explores the range of policy, political, parliamentary and tactical choices political parties face when they move from government to opposition in Australia. That there have been so many such changes at both national and state and territory levels following recent elections makes this an especially pertinent topic. Further, that the Coalition (Liberal and National parties) are in opposition nationally and across every other jurisdiction except Tasmania, adds to this interest given the strains this imposes on these parties given their structures and history. Attention is given to centrality of parliament in Westminster type democracies like Australia's in affecting the roles and expectations of oppositions. Also explored are how recent developments in modern political campaigning, the availability of resources, the changing nature of political parties and the growing demands on oppositions to develop more detailed policies, affects opposition choices in what roles they might perform and what tactics they might pursue to regain office.

INTRODUCTION

In Australia in recent years, there has been a movement of parties once in office to the opposition parliamentary benches. Several parties already in opposition had their place confirmed given their poor recent election results. The federal Coalition parties after

[1] The author acknowledges the late Dr Graeme Starr's contribution to the early draft of this article.

nearly nine years in government lost heavily at the May 2022 election and are now in opposition. So too are the South Australian Liberals. In Victoria and Western Australia non-Labor parties remain on the opposition benches as they are in Queensland, the Northern Territory and the Australian Capital Territory. The New South Wales Coalition after twelve years in office joined the opposition ranks following the March 2023 elections. Only in Tasmania has a Liberal Government survived a recent election (2021).

This article examines the choices facing oppositions in terms of their roles and strategies to return to power with some attention to the non-Labor parties given their current predominance in this role and the particular challenges this poses for these parties. As Marija Traflaga commented, the general electoral success of non-Labor parties, especially federally, and their particular structure with the parliamentary leader and parliamentary members dominating, combined with their weaker links to supportive external community groups, creates very different dynamics for these parties when in opposition.[2]

A focus on oppositions highlights the centrality of parliament in Westminster democracies. Parliament determines not just who governs by virtue of their numbers on the floor, but also who forms the 'alternative government' by where they sit in parliament. How parties and leaders perform in parliament greatly affects their futures, though in different ways for governments and oppositions. For governments, their parliamentary tasks are more straightforward – maintain their majority, control the agenda, pass the budget and legislation, and deflect opposition attacks. Governments usually have the numbers to guarantee the outcomes, though elected and powerful upper houses in Australia, unlike other Westminster democracies[3], make it more

[2] Marija, Traflaga, 'Prepared for Opposition?', in Tom Frame, (ed), *The Desire for Change, 2004-2007 The Howard Government Volume IV*. Sydney: UNSW Press, 2021, pp. 239-48.

[3] The United Kingdom and Canada have non-elected upper houses and New Zealand none – see Nicholas Aroney, Scott Prasser and John Nethercote, (eds), *Restraining Elective Dictatorship: The Upper House Solution?*. Nedlands: University of Western Australia Press, 2008.

difficult. Generally, governments' fortunes are more critically judged by a wider audience outside of parliament in how they are managing the economy, delivering election promises, and responding to the latest 'crisis'. For oppositions, parliamentary performance is more critical. They have few other avenues to hold governments to account or to promote their leader and policies. It is also more challenging as oppositions, lacking the numbers, must master parliamentary processes to exploit every opportunity, no matter how small, to expose a government's flaws. Considerable political acumen is also required to pick the right issues with the most appropriate tenor.

OPPOSITIONS AND WESTMINSTER

The notion of an official opposition as part of the legislative process evolved with the development of the Westminster system and the essence of the notion was widely acknowledged by the eighteenth century. It was later recognised and defined in Britain by parliamentarians like John Hobhouse and Randolph Churchill and by commentators like Walter Bagehot who advanced the idea of having an ongoing formal opposition 'which made criticism as much a part of the polity as administration itself'.[4]

The idea of a government facing a formal and official opposition reflected the adversarial and competitive nature of the Westminster system. It meant that politics was a contest between one party in power against the other, the opposition, seeking to gain office by attacking and criticising the government in what has been seen as a continuous election campaign.[5] It has also been suggested that the idea of a system that recognised the legitimacy of a matching government and opposition was a natural consequence of the architecture of the House of Commons. The idea of a 'shadow cabinet' also fits this suggestion.

[4] Walter Bagehot, *The English Constitution*. London: Collins/Fontana, 1963, p. 72.

[5] Joel Bateman, *In the Shadows: The Shadow Cabinet in Australia*. Canberra: Commonwealth Parliamentary Library, Commonwealth Parliament, 2009.

In Australia, our parliaments developed (reflecting the shape of the House of Commons) with the legitimacy of the opposition essentially accepted in practice. Although the opposition is rarely recognised or implied in State or Commonwealth constitutions, it is acknowledged in parliamentary procedures in all sorts of ways – questions time, debates on legislation, right-of-reply on the budget – and in electoral and other laws. We might not always agree on the proper policy role or roles of the opposition, but we know it is there somewhere and we respect its right to oppose the government as vigorously as it wishes, and to strive to replace the government as soon as it possibly and legally can.

Defeated parties thrown into opposition after a lengthy period in government are confronted with the question: 'What the heck are we supposed to do now that we are in opposition?' It is a particularly vexing question for these parties as they have, after all, lost members, personal staff, status, and connections in the community. No-one calls them anymore. The first term in opposition is usually the hardest. The party thrown into opposition is usually led by a new leader,[6] has depleted ranks, and is attempting to work out what went wrong as well as what to do next. It is the harder for non-Labor parties as Traflaga has pointed out earlier. So, most oppositions initially face a bleak future, unless the new government is totally inept and obliges them an easy route back to office in one term, as we especially saw with the one term Queensland Newman Government (2012-15).

[6] Most prime ministers (and premiers) in recent times whose governments lose, usually resign, if they have not already lost their seats (eg Prime Minister John Howard, 2007; Queensland Premier Newman, 2015). Exceptions include Prime Minister William McMahon (1971-2) whose government lost but who retained his seat but not his leadership of the Liberal Party. The other was Gough Whitlam, Labor Prime Minister (1972-75) who after losing the 1975 election stayed as Labor Party leader and contested the 1977 election which he also lost. He then resigned as leader and in 1978 retired from parliament.

OPPOSITIONS ROLES AND OPTIONS – THE IMPORTANCE OF POLICY

All oppositions in Westminster-model parliaments have a range of roles they are expected to serve, but any opposition of any worth at all has only one fundamental goal – to quit its day-job and to take on something more challenging like becoming the government. A successful opposition is one that achieves this goal as fast as possible. The achievement of this objective requires a range of skills, qualities and attributes, but it calls for nothing that is more important than the possession of appropriate and acceptable policies. An opposition must face the reality that, with little warning, it might cease to be the opposition and suddenly become the government, whether ready or not. Without meaningful policies, it is not ready.

Policy is about problem solving and many other things, but the concept of policy in the context of opposition politics can be conveniently understood at two levels:

- Opposition policy as parliamentary tactics
- Opposition policy as electoral strategy

Before exploring these further, it is useful to identify the range of roles oppositions can serve.

OPPOSITION ROLES AND POLICY IMPACTS

Oppositions tend to select their policy responsibilities from a menu of roles that is now quite widely understood. Five major roles are usually identified, all inter-related and each requiring attention to policy-making:

- Opposition as criticism of government policies, legislation and actions, and holding government to account;
- Opposition as opposing government policies and legislation;
- Opposition as cooperation to augment and improve government legislation and helping to solve policy problems;
- Opposition as government-in-waiting – to be available and ready as an alternative government; and
- Opposition as offering a difference.

All five roles have policy implications. The first three are essentially tactical and relevant primarily at the parliamentary level. The fourth suggested role is largely strategic and more relevant at the electoral level. The fifth suggested role is vital, both tactically and strategically and discussed in more detail at the end of this article.

OPPOSITION POLICY AS PARLIAMENTARY TACTICS

The tactical aspects of opposition policy require reactive decisions in response to the government's agenda and legislative program. The essential question is how the opposition will respond to the government's initiatives from the menu of options outlined above. Will it seek to hold a government to account? Will it flatly oppose? Will it offer positive proposals or amendments?

Criticising the government and holding it to account

The opposition plays an important role in the policy process simply by being available to criticise the government, holding it to account, scrutinising its proposals and assessing its actions. As Bagehot observed, the opposition is there to ensure that 'the nation has the opportunity to hear two sides – all the sides, perhaps' of any argument that arises in the policy process.[7] A government, it is argued, will perform better when it knows that there is an effective opposition watching its every move.

Oppositions complain, usually with good reason, that they are often unable to fulfil the role of critic as effectively as they might because government parties dominate parliamentary processes and seek to camouflage their mistakes, to protect their ministers, and to deflect criticism on key government projects. This control by executive dominance is well documented in Australia.[8]

[7] Bagehot, *The English Constitution*, p. 72.

[8] Jim Chalmers and Glyn Davis, *Power: Relations between the Parliament and the Executive*. Research Paper No 14, Canberra: Commonwealth Parliamentary Library, 2001.

Nevertheless, despite these limitations, criticising government is relatively easy for the opposition at one level. Governments and the large bureaucracies, budgets and complex programs they now administer inevitably result in some mistakes at some time. Through insider 'leaks', media investigations, information garnered through normal parliamentary processes of question time and committees, reports from auditors-general and other review bodies, and interest groups' reactions to government policy initiatives, there are always revelations of enough 'mistakes' to stir even the most inept opposition or shadow minister. Criticising government is also cheap in terms of resources, involving minimal effort on the part of the opposition. In practice, an opposition's forensic efforts have rarely been responsible for exposing government vulnerabilities.

There have been some exceptions. The Coalition Opposition's pursuit of the Whitlam Government (1972-75) over the 'Loans Affair' was seen to have been exemplary in its analysis of both the intrinsic financial implications and the constitutional implications of the issue.[9] So too, was the Labor Opposition's dogged and persistent exploitation of the issues relating to the Howard Government and the Australian Wheat Board and its dealing with Iraq prior to the 2007 election.[10] More frequently, oppositions rely on other sources to identify their targets and often get their cue from the media, reports from external review or integrity agencies and sometimes even from the government itself about what to attack. Abbott's success when leader of the Coalition Opposition (2009-13), was more through a consistent battering of the Gillard Labor Government on a small number of issues and exploiting Labor's leadership changes and internal

[9] Alan Reid, *The Whitlam Venture*. Melbourne: Hill of Content, 1976, pp. 240-78.

[10] Stephen Bartos, 'Sweeping the wheat under the carpet – how much have we learnt from the AWB oil for food kickback scandal? in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential.* Ballarat: Connor Court Publishing, 2014, pp. 233-47.

divisions while enforcing rigid discipline on his own ranks than by forensic policy analysis.[11]

Opposing the government's policies and legislation

The classic statement of the role of positions is that 'the purpose of the opposition is to oppose.' This is what people expect an opposition to do. There are all sorts of means within parliament that the opposition can use to perform this basic function, ranging from questions to ministers, debates on legislation and budgets, participation in committees and through the use of the upper house to block or delay government proposals or even to hound a government from office. Activities to harass the government outside parliament include seeking to change public opinion against proposed government actions through media commentary, highlighting government 'scandals' and ongoing public debate with government members.

Most importantly, there is an expectation today that simple opposition must be matched by policies to fix the problems being highlighted. Criticism of government performance or even defeat and rejection of government policies might often not be enough by itself to win electoral support for an opposition. Oppositions that just oppose without offering an alternative policy framework are often unfairly dismissed as being negative, 'whingeing and whining' and lacking capacity to tackle current public policy problems.

There will often be situations, however, where an opposition might be convinced that the policy approach of the government is wrong, but the opposition has not the resources to develop an alternative. The Coalition Opposition was in this situation during the Rudd Government in relation to the Henry Tax Review. This was a large and complex report compiled after considerable consultation and research and not released

[11] Jennifer Rayner and John Wanna, 'An overview of the 2013 Federal election campaign: Ruinous politics, cynical adversarialism and contending agendas', in Carol Johnson and John Wanna (eds), *Abbott's Gambit: The 2013 Australian Federal Election*. Canberra: ANU Press, 2015, pp. 17-34.

to the public (and the opposition) until after some delay. In such circumstances, the opposition might be serving a useful purpose if it can send the government off to try again to get a better solution to a problem. Similarly, there will often be situations where a government motivated by ideological considerations might adopt a policy involving radical, complex and expensive changes, while the opposition policy simply calls for the maintenance of the status-quo and does not require the exposition of any other option. Under such circumstances, simple rejection of government policy is more useful than the development of any equally unsatisfactory alternative policy.

Improving government policy and legislation

This is the positive side of opposition, when, as Menzies suggested, the opposition will be seen to be 'constructive.'[12] Oppositions do not always oppose and on occasion they give government measures their full support, perhaps simply proposing improvements. The two sides will often agree on the nature of a crisis or a problem of some urgency and on the measures necessary to deal with it. This sort of co-operation is common in the event of wars and natural disasters and it is not all that uncommon when government is dealing with less critical and politically salient problems. The opposition under Peacock and Howard, for example, supported many of the Hawke-Keating Government's proposals for financial deregulation and privatisation (although it should be noted that these were areas where the opposition, when previously in government, had itself taken relevant agenda initiatives).[13] During the recent pandemic the Labor Opposition supported many of the basic thrusts of the Morrison Government's responses – like the *JobKeeper* program and the increased level of social welfare payments and the formation of the National Cabinet which had the support and attendance of five Labor premiers and chief ministers.

[12] Robert Menzies, *Measure of the Years*. Melbourne: Cassell, 1972, p. 20.

[13] Paul Kelly, *The End of Certainty*. Sydney: Allen and Unwin, 1992, p. 237.

Evidence of the level of bipartisan agreement might not be clearly reflected in the debates and votes in the parliament (although a study of the number of votes that are settled on the voices with no significant debate would be interesting), but a quick examination of the work of parliamentary committees is a helpful indicator of the incidence of constructive policy consensus. Even when there is not outright agreement on the totality of a bill, moreover, opposition amendments are often accepted by the government as well-intentioned efforts to improve the legislation in the national interest. The Howard Government, for instance, accepted in 1997, many of the amendments from Labor to its first tranche of reforms to industrial relations to have its legislation (*Workplace Relations and Other Legislation Amendment Bill 1997*) passed by the Senate.[14]

Bipartisanship is a tricky business, of course, and oppositions are wise to be cautious when governments call for support in this spirit. Consensus is not always desirable, and politically it usually amounts to the opposition conceding the policy ground to the government. Good government is partly a product of good opposition, and too much bipartisanship makes the opposition irrelevant. Abbott's rejection of Prime Minister Rudd's call for a bipartisan agreement on a target for homelessness and the emissions trading scheme reflected this concern. The current federal Coalition Opposition, especially its Liberal Party component, initially had the same dilemma in relation to recent constitutional referendum issue or on climate change issues. While the National Party very early on declared their opposition to the proposed referendum, the Liberal Party took six months of careful incremental manoeuvring to join them to make it official opposition policy.

At the same time, oppositions must be careful not to be seen as too negative. It may strengthen partisan support, but the general voter is often unimpressed, preferring to see evidence of co-operation or at least recognition that not all the government's

[14] Gwynneth Singleton, 'Industrial Relations: Pragmatic Change', in Scott Prasser and Graeme Starr (eds), *Policy and Change: The Howard Mandate*. Sydney: Hale and Iremonger, 1997, pp. 192-207.

policies are regarded by the opposition as wrong. Discretion and considerable judgement on the part of the opposition would seem to be the key when governments call for bipartisanship. Governments have little to lose, but oppositions have little to gain from the political mischief of bipartisanship.

Policy at the tactical level

At the parliamentary level, opposition policy is essentially reactive and negative. The reality of opposition is that its role is to react in response to someone else's agenda. Because of the adversarial nature of Westminster-model parliamentary politics, the response of the opposition will often be to oppose the government's initiatives and even when the opposition proposes a good alternative or when its criticisms are well-warranted, it will be relatively simple for the government to brand it as negative.

When it is properly motivated and when it faces a government that is unusually vulnerable and inept, an opposition might sometimes be able to seize the initiative and force the agenda on some specific area of policy, as the Abbott Opposition did on the carbon tax, but this will be exceptional. Schattschneider's dictum – 'who determines what politics is about runs the country'[15] – is especially poignant in the parliamentary system. Even an extraordinarily inept government, however, will nearly always control the agenda. The opposition, no matter how effective, will usually be at a disadvantage, especially in promoting its policies. It must pay its own way, while the government can generate considerable advantages for itself through government-funded advertising of its policies (and, implicitly, its criticisms of those of the opposition). Similarly, the opposition is naturally disadvantaged on questions of timing. The government sets the clock. The opposition has to judge the best time to announce its policy. If it announces early, it might get the benefit of more publicity, but it also opens its policies to the risks of more forensic analysis by a better-resourced government. John Hewson's *Fightback!* program announced before the 1993 election managed to turn the 'unlosable election'

[15] Elmer. E Schattschneider, *The Semisovereign People.* Illinois: *Dryden Press,* 1960, p. 68.

for the Coalition into a complete failure as Keating exposed its complexity and flaws. The Labor Opposition's announcement prior to the 2019 election of its proposed tax treatment of share dividends and investment properties allowed the Morrison Government to attack these relentlessly, as did major interest groups.[16] If an opposition announces its policies late it might protect its better policies against theft, but it also leaves itself open to the charge of being bereft of policy.

Oppositions are now challenged by the expectation that they must have their policies immediately on hand on any issue that the government decides to advance. This means that oppositions are expected to work according to the government's timetable and its policy agenda. Accordingly, the opposition can often be caught off-guard when the government announces a new policy initiative, leaving the opposition with insufficient time to develop a detailed response. Thus, the opposition will often be vulnerable to government accusations of being a 'policy free zone' and to media and interest group charges that its policies are too hastily assembled, ad hoc, contrived, political, impractical, ideological, lacking detail and poorly costed. There is a tendency to expect too much from oppositions given the increasing complexity of policy.[17] After all, oppositions face numerous constraints in developing policies that are rational, 'evidence' based and 'do-able' while at the same time popular and consistent with previous party stances and long held ideological beliefs. The opposition is not making a useful contribution when it is trapped into releasing a 'half-baked' policy simply because it is expected to respond to a government or media agenda.

Further, it is inevitable that an opposition will sometimes yield to the temptation to take the easy road and opt for policies that they know they might never have to implement and thus be more 'populist' or extreme, appealing to narrow segments of

[16] Sarah Cameron and Ian McAllister, 'Policies and performance in the 2019 Australian federal election'. *Australian Journal of Political Science* 55(3) 2020, pp. 241-44.

[17] Scott Prasser, 'Opposition one day, government the next: Can oppositions make policy and be ready for government?'. *Australasian Parliamentary Review* Vol 25(1) 2010, pp. 151-62.

the political market at the expense of the wider public interest. Tony Abbott's generous parental leave scheme announced in the early days of his leadership when the Coalition was still languishing in the polls was said to be vulnerable to criticism on these grounds.[18] This is perhaps what Menzies meant when he stressed that the opposition must be 'judicious' in the development and announcement of policy.[19] The trouble with sudden policy initiatives is that when they do not align with a party's traditional policy stances or its leader's record they are seen for what they are – attempts by oppositions to 'buy' their way into office.

Any modern Australian government that comes to office with a healthy majority will be likely to maintain its position through several terms unless it is blinded by its own perception of its grandeur and importance and is inept in maintaining its political base (witness the Whitlam, Rudd, Greiner and Newman governments). The normally lengthy periods in office reinforce the advantages enjoyed by incumbent governments and have many adverse consequences for their opponents. After a long period in opposition, for example, a party might lack experience when it is returned to government, although this problem can be overcome by effective leadership (witness Hawke and Howard). Further, a lengthy period in opposition might reduce a party's ability to attract quality parliamentary candidates.

The opposition is also disadvantaged in terms of the staff places available to it and in its capacity to both attract and recruit high calibre policy and political savvy staff for its limited range of positions. Given the imbalance in staff resources between a government (even without including its public service support) and its opposition, just what can the opposition be expected to produce in terms of well-researched policies and detailed statements such as the reply to the budget. This problem of staff resources is no longer as serious as it was in earlier times when opposition front-bench members

[18] Rob Manwaring *et al*, 'Unstable bipartisanship or off the agenda? Social issues during the 2013 election campaign', in John and Wanna, *Abbott's Gambit*, pp. 365-66.

[19] Menzies, *Measure of the Years*, p. 20.

had virtually no staff and often had to share an office with a colleague.[20] In those days, of course, even ministers similarly had very little in the way of staff resources, but Parkinson's Law in relation to office space (ie staff expands to fill the available desks and office space) has served them all very well in the new Parliament House. While the problem has eased, however, the disadvantage of the opposition in terms of staffing remains, as indicated by this simple table.

Table 1 Federal ministerial and opposition staff, 2009-2021

	2009	2010	2011	2021
Government	328	366	420	463
Opposition	72	77	88	102

Leaving aside the issue of the capacity of oppositions to develop detailed policy, there is the question of whether they should even attempt to do so. Some suggest that oppositions should seek to focus on broad principles of policy and overall directions rather than the detail of policies about which they are patently ill-equipped to develop. Prime Minister Harold Macmillan, for example, quipped about his opposite number, Hugh Gaitskell, who developed detailed policies covering every policy area:

> *The trouble with Mr Gaitskell is that he is going through all the motions of being a government when he isn't a government. It is bad enough having to behave like a government when one is in power. The whole point of being in Opposition is that one can have fun and lend colour to what one says and does.*[21]

[20] Maria Maley, 'Too many or too few? The increase in federal ministerial advisers, 1972–1999'. *Australian Journal of Public Administration* Vol 59(4) 2000, 48-53; Liz Dowd and Scott Prasser, 'The Resources of the Federal Opposition', in Scott Prasser and David Clune (eds), *The Art of Opposition,* Redland Bay: Connor Court Publishing, forthcoming 2024.

[21] Quoted in David Butler and Richard Rose, *The British General Election of 1959*. London: Macmillan, 1960, p. 32.

Menzies (and the media) made the same criticism during the 1954 election chiding his Labor opponent, Dr H.V. Evatt for having a policy for everything that was also too costly in the extreme.[22]

OPPOSITION POLICY AS ELECTORAL STRATEGY

While the first three of our five suggested policy roles of opposition are essentially tactical functions of the opposition party (or coalition of parties) at the parliamentary level, the fourth suggested role – offering an alternative to the government and being ready to replace it – is the strategic aspect of opposition policy. In best practice, this role involves the combined efforts of both the parliamentary and the organisational arms of the opposition party. The parliamentary policy-makers in opposition, inevitably lacking the resources available to the government, should be able to rely on their party organisations for necessary longer-term policy directions and research. With the declining policy role of party organisations, however, there is a tendency to be satisfied with standards considerably lower than 'best practice.'

Posing an alternative – the 'government-in-waiting' role

An opposition in Westminster systems is the 'government in waiting' and because of this it has to be more than just a critic. While there are numerous other categories of critics of government – such as the various statutory review agencies, interest groups, academics, think tanks, the media and citizens both as individuals and through public opinion – none of these is in the business of seeking office. Only His Majesty's Loyal Opposition is seen as the 'government in waiting' and thus it has policy obligations imposed upon it.

Policy-readiness is important for the opposition in our system because oppositions must be prepared to take over the reins of office immediately after an election or some

[22] See Allan W Martin, *Robert Menzies: A Life, Volume 2 1944-1978*. Carlton: Melbourne University Press, 1999, pp. 259-60.

other decisive political event. There is no transition to office period for oppositions in Westminster systems unlike in the United States where newly elected presidents have several months before their inauguration and formally taking over the reins of power. Under the Westminster model, a party might be in opposition one day and in government the next. It is a question of 'government, ready or not.' The very speed of this transition and its occasional unexpectedness, imposes real demands on oppositions concerning their policy 'readiness.' This problem is exacerbated when, as is the case federally, when there is no fixed term for the parliament and the election timetable rests with the government.

Policy at this strategic level must be partly reactive to some programs of the incumbent government, of course, but ideally it must be proactive and longer-term in its perspective. It is policy that has a grander purpose than simply making a point in the on-going political contest or creating a headline in the morning paper or the six o'clock television news. It is policy that will be used in the context of the electoral contest. It aims at achieving some measure of control over the policy agenda and establishing ownership of strategic issues. The objective of policy development at this level was expressed by Abbott when in opposition in these terms:

> *Our task is to use the coming year to establish political ownership over moves towards lower taxes, fairer welfare, better services and stronger borders by showing that they are backed by well-developed policies that could be swiftly and competently implemented.*[23]

Policy at the strategic level

Many puzzling problems confront parties in their development of strategic opposition policy. There has been a tendency, for example, for ex-ministers from defeated governments to retire from parliament, leaving the shadow ministry dominated by

[23] Tony Abbott, 'The Coalition must develop the policies to govern', *The Australian*, 15 December 2010.

people inadequately 'connected' to the realities of how actual policies emerge and develop incrementally within government and society. In opposition, moreover, a party's links with the policy networks are often very loose and informal, its interactions with stakeholders are usually sporadic and the real nuances of the working of particular policies are likely to be poorly understood.

Similarly, new oppositions face peculiar problems in that they are likely to have found their policy cupboard bare, with many of their policies having been taken over by the new government and others having been disowned and dumped as embarrassing reminders of electoral defeat. This might provide a clean policy slate, but it also leaves the opposition in a policy vacuum and directionless. The federal Coalition Opposition after 2007 faced this very problem in relation the *Workchoices*, the industrial relations policy inherited from the last Howard Government (2004-7).[24] Abbott during the 2010 election campaign had to announce that Howard's *Workchoices* was 'dead, buried, cremated'[25] so Labor could not reignite the electorate's concern about this issue as they had done in the 2007 campaign. The current Coalition Opposition is facing the same challenges on several issues like its discredited Robodebt program which the Albanese Government kept alive by appointing in 2022 a royal commission into this matter and which reported in July 2023. It was highly condemnatory of the previous Coalition Government and especially of Scott Morrison both as Minister for Social Services and later as Prime Minister.[26]

[24] The 2004 election gave the Howard Government unexpected control of the Senate which it sought to exploit by introducing amendments to *Workchoices* that had been rejected by a hostile Senate previously. Many saw these changes as too ideological and the cause of Howard's defeat in 2007.

[25] 'Abbott sends mixed WorkChoices messages', ABC News Online, 19 July 2010. Accessed at: <https://www.abc.net.au/news/2010-07-19/abbott-sends-mixed-workchoices-messages/911064>.

[26] Catherine Holmes, (Chair), Royal Commission into the Robodebt Scheme*, Report*. Canberra: Commonwealth Government, 2023.

HOW OPPOSITIONS MIGHT DEVELOP POLICY

There are three issues an opposition, newly out of office, needs to consider in how it might develop policy include the importance of utilising the party resources, the nature of modern election campaigning and the question of platform, policy and manifesto.

Utilising party resources

Politicians consult their party organisations on policy questions for a variety of reasons, but today three reasons seem to dominate:

- to keep the organisation busy (and quiet) until election day when their workers might be needed;
- to give the impression of participation and consultation for public relations purposes; or,
- to provide an excuse for doing nothing (eg 'we are delaying a decision on this issue until it is discussed by the party conference').

Sometimes, of course, they actually consult their party because they are working on new policies and are seeking real and meaningful input. Wise party leaders, whether in government or in opposition, work to build up the policy potential of their party and maintain close policy links with their party as their principal political base and their best assurance of longevity in office.

In opposition, party leadership, severed from the support of the public bureaucracy and other sources of advice, necessarily turns to party supporters. There is a natural inclination for a parliamentary party to return to its roots, to sip again at the ideological well as a means of redefining its political and policy stands, to restore depleted partisan support, and to distinguish itself from the government. Purity in policy is what partisans preach. There is danger that subsequent policies may please the party faithful but become too doctrinaire and impractical and thus alienate the more moderate and larger parts of the electorate. This was seen why Labor languished on the opposition

benches so long – its pursued ideological policy purity at least until Whitlam emerged.[27] This problem can be overcome by effective leadership in a party that is trained and experienced in research and policy-making.

In government, on the other hand, parliamentary parties tend to move away from their ideological base as they confront the realities of office, and the policies as advanced through the party organisations are often shelved, or worse, rejected outright and just ignored. The wiser leaders are wary of this tendency. The parliamentary party must necessarily focus on winning day-to-day victories, dealing with occasional but inevitable crises, and simply being ready to govern 'now' – or at least immediately after the next election. The rest of the party, however, exists because it has long-term philosophical objectives and should be expected to look far beyond the next election. Again, Menzies was the exemplar when he told his leading strategist John Carrick, then General Secretary of his party in New South Wales: 'It is my job to be distracted. Your job is to focus on the long-term'.[28]

Modern election campaigning

Most of the problems inherent in opposition strategic policy making are exacerbated by the nature of modern election campaigning. Public funding of parties and the abundance of ministerial and parliamentary staff on the public payroll (see Table 1 above), along with increased mailing and other entitlements, have transformed parties and elections. The political campaign as it was once understood has given way to media or advertising campaigning with the parties tending to wither in the direction of irrelevance except as conduits through which public funds are transferred from the party officials to the various media, opinion research and advertising agencies parties now employ – the real beneficiaries of public funding. This is a problem for our system but one that could be overcome, by redirecting some of the public funding windfall

[27] Donald W. Rawson, *Labor in Vain?*. Melbourne: Longmans, 1966; Ross McMullin, *The Light on the Hill: The Australian Labor Party 1891-1991*. Melbourne: Oxford University Press, 1991, pp. 35-7.

[28] Graeme Starr, *Carrick: Principles, Politics and Policy*. Ballarat: Connor Court Publishing, 2012, p. 150.

towards restoring and facilitating some of the old policy research and strategic functions of the parties – but this is unlikely to happen.

Platform, Policy and Manifesto

Politics worked well in Australia when parties made a clear distinction between their platform and their fighting policy. The platform was the statement of beliefs, directions and objectives, developed by the party as a whole through its internal mechanisms. It had a degree of permanence. One version of the Liberal Federal Platform, for example, remained current with only marginal changes throughout the sixteen years of the Menzies Government. It contained the broad principles on which the party's specific policy decisions were expected to be based and with which they were expected to be consistent. The fighting policy was essentially the policy speech delivered by the party leader for the imminent election. The 'policy speech' was a concise and specific statement of a party's commitments, understandable to voters without forensic media analysis or interpretation, and useful when holding a government to account.

This has changed over recent decades. Platforms as statements of principle now play very little part at all in the political contest. Oppositions and governments alike are now expected to present the electors with something like a manifesto and highly detailed policy documents complete with the research base of each significant decision and with costings that can be measured with some degree of objectivity and accuracy. This has been driven in part by media expectations, but it is also explained by the fact that parties in Westminster democracies have been much more programmatic than goal-directed. As Finer explains, 'parties ... spend a good deal of time in preparing a program of action which they expect to carry out if returned with a majority'.[29] This 'program of action' also becomes tied up with an incoming government's 'mandate' of election

[29] Samuel E. Finer, *Comparative Government*. Harmondsworth: Penguin, 1970, p. 159.

promises and thus justification for certain policy actions once in power.[30] Detailed and programmatic policy manifestos and promises are also favoured by some as a means to keep a party on track, in ideological terms, once it has gained office. This, of course, applies especially in the case of 'reformist' or 'visionary' parties whose members become concerned that the party once in office might be resisted by other institutions (such as the permanent public bureaucracy) or seduced from the party line by the day-to-day crises and pressures from key interests. It reached its zenith in Australia with the Whitlam led Labor Party which came to power with a detailed list of promises that became known as 'The Program'. It was to prove an attraction to gain voter support, but it became a distraction to good government once Labor was in office as unexpected events overtook some of its detailed policies or others proved too difficult to implement – at least in the short term.

Whatever the reason, the 'policy speech' approach appears to be a thing of the past, and the trend in Australia has been for both sides of politics to develop ever more detailed policy documents before and during an election campaign. Oppositions that produce policies without sufficient detail tend to be ridiculed by the government and the media. The production of an over-abundance of detail, on the other hand, opens an opposition to scaremongering and ridicule for any mis-statements or inaccuracies in the wording of the policy. An abundance of detail also opens more opportunities for misrepresentation as highlighted earlier concerning Hewson's *Fightback!* policy in the run-up to the 1993 election, which made the opposition an easy target for the Keating Government, from which the Coalition learnt for their more successful landslide 1996 election.[31] Similarly, some argued that Labor leader Bill Shorten brought a too detailed program to the 2019 election allowing the Morrison Government to attack it especially

[30] See Samuel Beer, *Patterns of Government*. 3rd ed, New York: Random House, 1973; Hugh V. Emy, *The Politics of Australian Democracy*, Melbourne: Macmillan, 1978, pp. 227-30.

[31] See Pamela Williams, *The Victory*. Sydney: Allen and Unwin,1997, pp. 147-51 for the debate within the Coalition over whether to release policy details prior to the 1996 election; Graeme Starr, 'The 1996 Election and the Changing Policy environment', in Prasser and Starr, *The Howard Mandate*, pp. 37-40.

on retirement issues.[32] By contrast, Albanese led the Labor to victory in 2022 by being a small policy target in contrast to not only Shorten but Whitlam.[33]

The real value of an unrealistic and highly detailed manifesto, as opposed to the 'policy speech' approach, falls into place when we consider its possible role at the first cabinet meeting after an opposition has been elected to govern. The image of the newly-minted ministers sitting around the table ticking off the relevant sections of the voluminous manifesto does not seem to be as realistic as a scenario involving shredding machines.

CONCLUSIONS – VIVE LA DIFFERENCE?

It appears to be accepted as a truism that: 'oppositions don't win elections, governments lose them.' Nevertheless, oppositions cannot rely simply on government mistakes and mismanagement. They need to be more than critics of governments. There are any number of government critics, but few are ready to govern. Until they win office, oppositions must be able to present themselves credibly as 'governments in waiting' and ready to govern, and to achieve this they need to have real policy alternatives ready to implement. Several factors – such as the more sophisticated electorate, the growing interest group expertise in policy analysis, the development of think tanks, the complexity of modern policies, the demands for improved rationality and 'evidence' in policies – call on opposition parties to improve their policy efforts, but at a time when parties lack the capacity or inclination to respond. Institutionally, given the 'winner takes all' nature of Westminster systems and the increasing dominance of executive government, oppositions find the competitive policy game to be increasingly difficult. Well-intentioned resolutions at party conferences are no longer sufficient. The

[32] Michelle Grattan, 'Labor in Opposition: When the Favourite Loses', in Mark Evans, Michelle Grattan and Brendan McCaffrie (eds), *From Turnbull to Morrison – The Trust Divide: Australian Commonwealth Administration 2016-2019*. Carlton: Melbourne University Press, 2019, pp. 134-35; pp. 137-43.

[33] David Crowe, 'Timid campaign needs big ideas'. *Sydney Morning Herald*, 29 April 2022.

future of any opposition lies in developing alternative policies that have both good content and the right political appeal. Abbott in opposition acknowledged this: 'knowing what you are against is important for oppositions, but it is not a recipe for effective government'[34] as he was to find out. Oppositions must be ready and without good policy they are not ready.

A key to good opposition policy is the word 'alternative', or as Menzies put it more precisely, to be 'different'.[35] The challenge for oppositions is to avoid policy 'me-tooism' – of following too closely to the new government's policy line. If the opposition is not presenting an alternative – not offering something different – it is not doing its job or serving a useful function. The notion of bipartisanship in key areas of policy seems currently to have some superficial appeal, but its benefits are usually illusory. Good opposition is a precondition for good government. A wise opposition leader should check the trophy shelf and count the silverware whenever he hears a call from the government for bipartisan support for any measure. Inept and lazy governments rejoice in the idea of bipartisanship and crave a docile opposition that does not strive to present itself as a credible alternative.

These are the issues and choices that confront any party that goes from government to opposition. It is a period of immense personal and party readjustment. It requires considerable thought across both parliamentary and organisational wings about what being in opposition means and a clear appreciation of the available options to return to office – follow the government leader or strike out on a more decisive policy track. Initially, the skills to do this will be missing in a new opposition. It will take time to learn those skills and political acumen in how to apply them, and for non-doctrinaire parties, like the Coalition, that cannot fall back on a narrow ideology that views issues through a single prism, it makes choice of policies, and their presentation to the public more difficult.

[34] Tony Abbott, 'The choice will be clear cut'. *The Australian*, 1 March 2010.

[35] Menzies, *Measure of the Years*, p. 20.

Legislative Strategies to Tackle Misinformation and Disinformation: Lessons from Global Jurisdictions

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Abstract: The spread of misinformation and disinformation on social media has become a major concern in recent years. This is due in part to the ease with which false information can be shared and amplified online, as well as the fact that social media platforms often lack the resources or expertise to effectively moderate harmful content. Addressing the problem of misinformation and disinformation in parliaments is a complex challenge. This paper will explore the different types of misinformation and disinformation that are being spread in New Zealand; the ways in which misinformation and disinformation are being used to target Parliament; the impact of misinformation and disinformation on public trust in government; the challenges that parliaments face in addressing the problem of misinformation and disinformation; and the potential solutions that are being proposed to address the problem of misinformation and disinformation. It will also identify some legislative strategies that have been proposed as potential solutions to the growing problem of widespread misinformation and disinformation, including those adopted by the European Commission and the United Kingdom.

INTRODUCTION

The rapid growth of social media has facilitated the emergence of a decentralised technology that empowers individuals to initiate a cycle of violence.[1] The widespread dissemination of information via social media platforms has the potential to have negative physical consequences, particularly when it involves misinformation. Fake news, which can take many forms, including conspiracy theories, financial motivations, political agendas, entertainment purposes, and satirical content, is a prime example of how misleading information can spread quickly and have a real-world impact.[2] Conspiracy theories, a subset of fake news, have been linked to the spread of misinformation and deception. This phenomenon has the potential to have negative physical consequences because it can contribute to the radicalisation of both individuals and organisations, ultimately leading to instances of violence.[3]

Misinformation refers to the dissemination of erroneous or faulty information, whether it is done purposefully or unintentionally. In contrast, disinformation refers primarily to the deliberate dissemination of falsehoods with the intention to deceive. Fake news, on the other hand, relates to stirring 'false, inaccurate, or misleading information designed, presented and promoted intentionally or unintentionally cause public harm or for profit.'[4] There is also a connection between hate speech on the internet, and the spread of false information or disinformation, both of which are complex phenomenon.[5] Both misinformation and disinformation can exacerbate the spread of hate speech by reinforcing existing prejudices and stereotypes or propagating erroneous claims about specific groups.[6]

To effectively mitigate the influence of misinformation on parliamentary processes, it is imperative to adopt a comprehensive and diversified strategy. The principal methods

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[1] Peter Warren Singer and Emerson T Brooking, 'LikeWar: The weaponization of social media'.*National Defense Industrial Association*, October 2018, p. 18 2.

[2] Lea Bader and Jochen Bender, 'What is 'fake news' and 'hate speech' and how do they work in practice?'. *Central and Eastern European EDem and EGov Days* 342 2022, pp. 17-36 1.

[3] Karen M. Douglas, Jan-Willem van Prooijen and Robbie M. Sutton, 'Is the label 'conspiracy theory' a cause or a consequence of disbelief in alternative narratives?' *British Journal of Psychology,* 113(3) 2022 p. 576.

[4] Bader and Bender, 'What is 'fake news' and 'hate speech' and how do they work in practice?' , p. 18 1.

[5] Matteo Cinelli and others*, 'Dynamics of online hate and misinformation'* Scientific Reports 11(1) 2021 p. 10.

[6] Cinelli *'Dynamics of online hate and misinformation',* p.10.

employed to discover and eradicate harmful content from online platforms are orientated around content moderation and community standards. However, in promoting inclusion and diversity can also offset misinformation by increasing cultural knowledge and empathy.[7]

The prevalence of misinformation has become increasingly apparent in recent times since it exerts a significant impact on political campaigns on a global scale. This was particularly seen in the 2016 United States (US). presidential elections, where the dissemination and likely influence of 'fake news' or other purposefully false or misleading content that presented itself appeared like news stories.[8] Consequently, there are scholars and observers who hold concerns about the potential consequences that may arise from the extensive proliferation of fake news and different types of misinformation, particularly in relation to the fundamental principles of democracy.[9] Despite the lack of evidence for these deceptive assertions, there is contention surrounding the notion that such material has the capacity to influence the result of a democratic electoral process.[10] Some of the earliest journalistic coverage of false news emphasised its prevalence on social media platforms, particularly Facebook.[11] The analysis of web consumption data indicates a significant correlation between users' tendency to visit Facebook prior to reading fake news stories, hence emphasising the considerable impact exerted by this particular social network.[12]

[7] Peter Bille Larsen and Marjorie Pamintuan, 'The Human Right to Science: From Fragmentation to Comprehensive Implementation?' *South Centre, Geneva,* Research Paper, No. 163, 2022 p. 11.

[8] Andrew Guess, Jonathan Nagler and Joshua Tucker, 'Less than you think: Prevalence and predictors of fake news dissemination on Facebook'. *Science Advances* 5(1) 2019, p. 1

[9] Guess, Nagler and Tucker, *Less than you think: Prevalence and predictors of fake news dissemination on Facebook.* 2019, p.1.

[10] Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election'. *The Journal of Economic Perspectives* 31(2) 2017 p. 212.

[11] Craig Silverman, 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook' 2016. Accessed at: <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

[12] Guess, Nagler and Tucker, *Less than you think: Prevalence and predictors of fake news dissemination on Facebook*, 2019 p. 1.

UNRAVELLING THE CONSEQUENCES: IMPACT OF MISINFORMATION AND DISINFORMATION

The profound consequences of misinformation and disinformation are readily apparent in the terrorist attack that occurred in 2019, targeting two mosques in Christchurch. This heinous act was broadcast in real time on several social media platforms. Following this tragic event, the COVID-19 pandemic experienced a notable increase in the dissemination of inaccurate and misleading information pertaining to the efficacy and safety of vaccines, as well as other preventive measures like mask usage. This phenomenon has been commonly referred to as an 'infodemic.'[13] During the COVID-19 pandemic, there were a lot more attacks on the internet than before.[14] The increased occurrence of scientific illiteracy and the lack of robust evidence-based fact verification have amplified the level of scepticism towards scientific knowledge, making individuals more vulnerable to the influence of false news, misinformation, and conspiracy theories.[15]

There was a notable increase in animosity targeted towards Asian communities, underscoring the difficulty social media platforms encounter in effectively tackling many forms of misinformation. The current increase in cases can be attributed to the initial emergence of the pandemic in Wuhan, China, around the end of December 2019.[16] Recent events surrounding the Corona pandemic provide a good illustration of this phenomenon. Statements ranging from 'the coronavirus is a harmless flu' to 'when vaccinating, a chip is implanted for monitoring,' to name just two examples, are examples of this phenomenon.[17]

[13] Gilbert Wong, 'The battle against infodemic threat', *Mātātaki | The Challenge*, 25 October 2022. Accessed at: <https://www.auckland.ac.nz/en/news/2022/10/25/battle-against-infodemic.html>.

[14] Larsen and Pamintuan, 'The Human Right to Science: From Fragmentation to Comprehensive Implementation?' *South Centre* 2022, p.8.

[15] Larsen and Pamintuan, *'The Human Right to Science',* p.8

[16] Jess Berentson-Shaw and Marianne Elliot, 'Misinformation and Covid-19: a briefing for media', The Workshop, 2020, p.2 . Accessed at: < https://www.theworkshop.org.nz/publications/misinformation-and-covid-19-a-briefing-for-media>.

[17] Bader and Bender, 'What is 'fake news' and 'hate speech' and how do they work in practice?'. *Central and Eastern European EDem and EGov Days*, 342, 2022 p.21

At the beginning of the Covid-19 pandemic, misinformation and disinformation circulated throughout New Zealand through a variety of platforms such as Facebook, Instagram, TikTok and Twitter, including social media, news websites, and messaging applications such as Whatsapp. The dissemination of incorrect information can have major repercussions, including the erosion of public trust in established institutions, the instigation of fear and panic, and the promotion of damaging conspiracy theories. In order to mitigate the dissemination of inaccurate information, New Zealand has adopted many strategies, including the implementation of public awareness initiatives, collaborations between governmental entities and online enterprises, and enhancements to the nation's media literacy as a whole.

The 2022 Wellington protest manifested as a highly divisive occurrence characterised by rallies that expressed opposition towards Covid-19 mandates and the implementation of lockdown measures. The aforementioned demonstrations were held at Parliament House and Molesworth Street, both centrally located in Wellington, under the backdrop of the ongoing COVID-19 pandemic.[18] The protest emerged as a result of the New Zealand Convoy 2022, a large-scale vehicular convoy that traversed from the North to the South Island, culminating in a three-week occupation of the grounds of the Parliament. [19]

The protesters expressed allegiance with a wide range of causes, with a significant number expressing their dissent towards the mask and vaccine mandates implemented in New Zealand in response to the COVID-19 epidemic. Moreover, among the cohort of demonstrators, a distinct faction emerged that espoused far-right ideas, which included, but were not limited to, tenets associated with Trumpism, white nationalism, and Christian fundamentalism.[20] The nature of the demonstration underwent a

[18] Tom Hunt, 'By the numbers: The 23 days of New Zealand's Parliament occupation', *Stuff,* 2023 Accessed at: <https://www.stuff.co.nz/dominion-post/news/wellington/131356257/by-the-numbers-the-23-days-of-new-zealands-parliament-occupation>.

[19] Digby Werthmuller, 'Anti-mandate protesters convoy on both North and South Islands', *1News*. Accessed at: <https://www.1news.co.nz/2022/02/07/anti-mandate-protesters-convoy-on-both-north-and-south-islands/>.

[20] Rachel Sadler, 'In-fighting between Freedom and Rights Coalition, Counterspin continues at convoy protest after event 'hijacked'', *Newshub*, 2022. Accessed at < https://www.newshub.co.nz/home/new-zealand/2022/02/in-fighting-between-freedom-and-rights-coalition-counterspin-continues-at-convoy-protest-after-event-hijacked.html>.

transition from peaceful assemblies to displays of aggressiveness, which involved confrontations with law enforcement and acts of hostility specifically targeted towards students who were wearing masks.[21]

Initially, the law enforcement authorities adopted a permissive stance. However, when apprehensions over public health and safety grew more pronounced, they implemented measures to effectively respond to the developing circumstances.[22] The demonstration reached its climax with the forcible expulsion of demonstrators, resulting in significant damage to public property on parliament grounds as a result of fire.[23] This disruptive incident coincided with a substantial COVID-19 pandemic in New Zealand, characterised by a notable surge in daily cases attributed to the Omicron strain, which persisted until the conclusion of the protests.

Notwithstanding the considerable disruption engendered by the protest, the New Zealand Government did not accede to the demonstrators' requests, which included the elimination of vaccine mandates.[24]

The arrival of Posie Parker, (real name, Kellie-Jay Keen-Minshull) a prominent anti-transgender campaigner from the United Kingdomin March 2023, also serves as a noteworthy example that sheds light on an additional dimension of the consequences associated with the dissemination of inaccurate and misleading information.[25] Parker's anti-transgender discourse assumed the role of a 'motivational narrative' that disseminated especially among online communities that had been first established to

[21] Ella Duggan and Raya Hotter, 'Covid-19 Omicron outbreak, Parliament protest: Wellington students kept away from school', *New Zealand Herald*, 2022. Accessed a: <https://www.nzherald.co.nz/nz/covid-19-omicron-outbreak-parliament-protest-wellington-students-kept-away-from-school/XIWT3FQTQJ6BI42Y3EGAOQMLFY/>.

[22] Eva Corlett and Tess McClure, 'New Zealand police clash with anti-vaccine protesters at parliament, over 120 arrested', *The Guardian*, 10 February 2022, Accessed at: <https://www.theguardian.com/world/2022/feb/10/new-zealand-police-clash-with-anti-vaccine-protesters-during-eviction-operation>.

[23] Corlett, 'Fire and clashes break out at New Zealand parliament as police move in to clear protest'. *The Guardian,* 10 February 2022.

[24] Jack McKee, 'Protesters deliver anti-lockdown, vaccine messages to government', *RNZ,* 9 November 2021. Accessed at: <https://www.rnz.co.nz/news/national/455307/protesters-deliver-anti-lockdown-vaccine-messages-to-government>.

[25]1News, What are Posie Parker's views and why are they so controversial?, *1News,* 2023, 24 March 2023. Accessed at: <https://www.1news.co.nz/2023/03/24/what-are-posie-parkers-views-and-why-are-they-so-controversial/>.

disseminate and sustain unfounded notions around Covid-19.[26] These online communities, many of which are far-right and conspiracy theory aligned, spread this anti-trans rhetoric leading to a measurable increase in hate and harm directed towards trans people. [27] This phenomenon is referred to as the 'Parker effect'.[28]

The visit of Parker to New Zealand, for the purpose of delivering speeches as a component of her *Let Women Speak* campaign, was also characterised by counter-protests by trans activists, that added to the polarisation of her message.[29] In this example, the dissemination of inaccurate information and deliberate dissemination of false information contributed to the development of a public discourse characterised by heightened unease and animosity. Parker's purpose - and the protests against her - exemplified the potential of false narratives to incite conflict and give rise to debates about the freedom of speech. This led to an act of violence involving the hurling of tomato juice at her at during her campaign in Auckland by trans activists.[30] As a result, she abandoned event in Auckland and further cancelled the planned event in Wellington.[31]

The aforementioned occurrences highlight the significance of promoting ethical practices in sharing information and developing strong media literacy abilities. The implementation of these procedures is crucial in order to alleviate the potential negative consequences that may arise from the spread of erroneous information, especially within the realm of intense social and political debates.

The examples above also demonstrate the complex challenges New Zealand confronts as a result of the escalating spread of misinformation and deception. Moreover, these examples demonstrate how the actions of individuals can undermine the public trust.[32]

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[26] Shanti Mathias, 'Tracking the surge in online anti-trans hate'.

[27] Shanti Mathias, 'Tracking the surge in online anti-trans hate'.

[28] Shanti Mathias, 'Tracking the surge in online anti-trans hate'.

[29] Shanti Mathias, 'Tracking the surge in online anti-trans hate'.

[30] Shanti Mathias, 'Tracking the surge in online anti-trans hate'.

[31] Sharon Brettkelly, 'Parker's visit poses plenty of questions', 30 March 2023 *RNZ,* Accessed at <https://www.rnz.co.nz/programmes/the-detail/story/2018883814/parker-s-visit-poses-plenty-of-questions>.

[32] Michael Daubs, 'Trust, misinformation and social in(ex)clusion'. June 2022 Accessed at: <https://www.royalsociety.org.nz/what-we-do/our-expert-advice/speakers-science-forum/speakers-science-

This is a call for an assessment of the existing legislative framework and its robustness in dealing with the proliferation of groups spreading misinformation and disinformation.

RISING TO THE CHALLENGE OF DISINFORMATION?

The Disinformation Project is an independent research group established in February 2020 that collaborates with various sectors to understand and respond to information disorders and their growing offline consequences. The Disinformation Project tackles all forms of misinformation and disinformation in New Zealand. Though it arose from the COVID-19 infodemic, this project targets all misinformation topics, including political, social and medical related misinformation, amongst others. Since August 2021,the Disinformation Project found that there was a notable increase in the number of postings in the form of 'dangerous speech', disinformation pertaining to far-right ideologies as well as the level of user interaction, encompassing likes, shares, and comments, with content that is detrimental in nature. [33] There was a noted increase of misinformation that commenced on 17 August 2021, coinciding with the enforcement of New Zealand's Alert Level 4 Lockdown..[34] This was a time where more people resourced to online media to keep abreast with the pandemic and to interact with others. This led to excessive unfiltered information online to be spread, information that had not been fact checked.

The Project also found that prominent individuals in the public domain, such as parliamentarians, journalists, health experts, scholars, and community leaders, are subjected to deliberate and personalised acts of harassment and mistreatment.[35]

forum-2022/speakers-science-forum-misinformation/>. Gilbert Wong, 'The battle against infodemic threat', *Mātātaki | The Challenge*, 25 October 2022. Accessed at: <https://www.auckland.ac.nz/en/news/2022/10/25/battle-against-infodemic.html>.

[33] Kate Hannah, Sanjana Hattotuwa and Kayli Taylor, 'Working Paper, Mis- and disinformation in Aotearoa New Zealand from 17 August to 5 November 2021'. *The Disinformation Project,* November 2021. Accessed at: <https://thedisinfoproject.org/wp-content/uploads/2022/04/2021-11-09-FINAL-working-paper-disinformation.pdf>.

[34] Hannah, Hattotuwa and Taylor, *Working Paper, Mis- and disinformation in Aotearoa New Zealand from 17 August to 5 November 2021,* 2021 p. 7.

[35] Hannah, Hattotuwa and Taylor, *Working Paper,* p. 7.

According to the findings of the Disinformation Project's research, social media companies still need to enforce their code of conduct against individuals who distribute misinformation and disinformation. It was found that individuals spreading misinformation and disinformation take advantage of the increasing uncertainty and anxiety in communities due to the COVID-19 public health measures like vaccinations and lockdowns.[36] They do this to instil fear, alienation and division.[37] In addition, they focus on disseminating false information disproportionately targets marginalised and vulnerable communities, who already have reasons to distrust the government due to historical trauma and personal experiences of discrimination; thereby making them more likely to align and engage with conspiracy theories and disinformation.[38]

Among the social media platforms, Telegram emerged as the primary platform for the spread of misinformation and disinformation in New Zealand.[39] This platform is notable for its lack of oversight or policies around misinformation and disinformation.[40]

The enforcement of measures set by social media firms in their Community Standards and self-regulation to mitigate the spread of vaccine-related misinformation has been insufficient. This highlights the pressing need for a statutory duty of care to be imposed on these platforms.[41] The dissemination of inaccurate information regarding vaccines persists.[42] These actions have been extremely inefficient in deleting damaging and dangerous misinformation about coronavirus vaccinations; however, the scale of misinformation on Facebook, and consequently the consequence of their failure, is more extensive. According to a report issued by the Centre for Countering Digital Hate, the social media platforms in question have not demonstrated sufficient efficacy in addressing the issue of well-known anti-vaccine proponents who have consistently

[36] Hannah, Hattotuwa and Taylor, *Working Paper,* p. 2.

[37] Hannah, Hattotuwa and Taylor, *Working Paper.*

[38] Hannah, Hattotuwa and Taylor, *Working Paper.*

[39] Hannah, Hattotuwa and Taylor, *Working Paper,* p. 3

[40] Hannah, Hattotuwa and Taylor, *Working Paper,* p. 3

[41] Rachel Sue Yin Tan, 'Social Media Platforms – Duty of Care' *Australasian Parliamentary Review* 36 (2) 2022, p. 161.

[42] Center for Countering Digital Hate, 'The Disinformation Dozen – Why platforms must act on twelve leading online anti-vaxxers' 24 March 2021 Accessed at: <https://counterhate.com/research/the-disinformation-dozen>.

contravened their terms of service, nor have they effectively restricted access to the online platforms where these individuals disseminate their content.[43]

The persistent nature of this issue necessitates immediate attention, as its resolution is crucial for the prosperity of democratic nations amidst the digital revolution. Addressing misinformation and disinformation requires a multifaceted approach that balances free speech while protecting individuals from harm.[44] This includes steps to encourage independent journalism and fact-checking endeavours, educate individuals on media literacy, and hold platforms accountable for damaging information.[45]

COMBATING MISINFORMATION AND DISINFORMATION: A COMPARATIVE APPROACH OF LEGAL FRAMEWORKS

Having regard to the above experiences, it is clear that there is an important role for legislators and regulators when it comes to stemming the flow of misinformation. Past attempts to address the quality and accuracy of information online include the Online Safety Bill in the United Kingdom and The European Union's Digital Services Act. It is my contention that the passage of this legislation will, if successful, make platforms accountable for disseminating harmful content and obligate them to take measures to curb such dissemination. However, it has to be considered that regulating the content on the internet is problematic and controversial, as there are concerns about censorship and the right to freedom of speech.

The EU approach

The implementation of the Digital Services Act (DSA) on 26 August 2023, is a noteworthy achievement in the protection of digital rights inside the European Union

[43] Center for Countering Digital Hate, 'The Disinformation Dozen – Why platforms must act on twelve leading online anti-vaxxers' 24 March 2021.

[44] Molly Lesher, Hanna Pawelec and Arpitha Desai, 'Disentangling untruths online: Creators, spreaders and how to stop them', *OECD Going Digital Toolkit Notes*, No. 23 p. 19.

[45] Skylar Hughes, 'Lateral reading: The best media literacy tip to vet credible sources', Poynter. Accessed at: <https://www.poynter.org/fact-checking/media-literacy/2023/lateral-reading-the-best-media-literacy-tip-to-vet-credible-sources/>.

(EU) during the year 2023.[46] This landmark legislation represented a significant step forward in the EU's commitment to creating a fairer online environment.[47] The DSA, designed to modernise the existing e-Commerce Directive, establishes new legal obligations for online platforms. [48] It aims to enhance transparency regarding content removal and empower users with information on the reasons behind such actions.

The EU's authority to enact the DSA was granted through Directive (EU) 2015/1535, which empowered the European Commission to propose legislative measures in the field of technical regulations and Information Society services to regulate illegal content. [49]

The definition of illegal internet content, as outlined by EU legislation, encompasses four distinct categories (i) material depicting child sexual abuse; (ii) hate speech that promotes racism and xenophobia; (iii) content related to terrorism; and (iv) material that violates Intellectual Property Rights.[50] The EU's approach to regulating illegal content encompasses both horizontal and vertical regulations. Horizontal regulation, which is analogous to an all-encompassing umbrella, is applied consistently to all harmful content platforms and types, including misinformation and disinformation.[51] Vertical regulation, on the other hand, refers to measures that specifically target content that is illegal according to EU law. Referring to Article 7 of the DSA,

[46] Emma Roth, 'The EU's Digital Services Act goes into effect today: here's what that means', 23 August 2023. Accessed at: <https://www.theverge.com/23845672/eu-digital-services-act-explained>.

[47] Christoph Schmon and Paige Collings, 'The Adoption of the EU's Digital Services Act: A Landmark Year for Platform Regulation: 2022 in Review' Accessed at : <https://www.eff.org/deeplinks/2022/12/adoption-eus-digital-services-act-landmark-year-platform-regulation-2022-year> .

[48] Christoph Schmon and Paige Collings, 'The Adoption of the EU's Digital Services Act: A Landmark Year for Platform Regulation: 2022 in Review'.

[49] Council Directive of The European Parliament and of The Council [2015] *Official Journal of the European Union*, 2015/1535.

[50] Alexandre De Streel, Elise Defreyne, Hervé Jacquemin, Michèle Ledger, Alejandra Michel, Alessandra Innesti, Marion Goubet, Dawid USTOWSKI*, 'Online Platforms 'Moderation of Illegal Content Online'*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, PE 652.718 2020, p.16.

[51] Sally Broughton Micova and Alexandre de Streel, 'Digital Services Act – deepening the internal market and clarifying responsibilities for digital services' Accessed at: <https://cerre.eu/wp-content/uploads/2020/12/CERRE_DSA_ epening-the-internal-market-and-clarifying-responsibilities-for-digital-services_Full-report_ cember2020.pdf>.

intermediary service providers will not lose their liability exemptions if they act in good faith and diligently, conduct voluntary investigations to find and remove illegal content or comply with EU and national laws. This commitment is aligned with the EU's efforts to enhance the existing framework at the horizontal level, ensuring that digital service providers have clear responsibilities in addressing issues of misinformation and disinformation.[52]

The recently enacted DSA, designed to regulate online platforms, intermediaries and search engines, has been operational for a limited duration following its implementation, granting these entities a specified time frame for compliance until early 2024 to assure their adherence to its provisions. This period of transition holds significant importance for these entities as they must successfully adjust to the newly implemented regulations, establish the necessary mechanisms, and implement the appropriate procedures to effectively comply with the Act.[53] Considering the digital landscape continues to evolve, this time frame represents an opportunity for platforms, intermediaries and search engines to align with the evolving standards of digital governance and user protection. It remains to be seen whether the DSA is effectively achieving its intended goals. However, having said that it is a starting point.

Simultaneously, the European Commission endeavoured to tackle the issue of misinformation and disinformation by formulating the Code of Practice on Disinformation in 2022. The Code of Practice on Disinformation originated from the Digital Services Act (DSA) and aims to provide uniform regulations for digital material within the European Union (EU) member states.[54]

The European Union's Code of Practice on Disinformation is a voluntary commitment with the goal of preventing the spread of disinformation.[55] It was initiated in response

[52] Micova and de Streel, *'Digital Services Act – deepening the internal market and clarifying responsibilities for digital services'.*

[53] John Groom, Natasha Denton and Kathy Harford ,'European Union: The Digital Services Act – What is changing in the world of tech?' Accessed at: <https://www.globalcompliancenews.com/2023/10/22/https-insightplus-bakermckenzie-com-bm-technology-media-telecommunications_1-european-union-the-digital-services-act-what-is-changing-in-the-world-of-tech_10172023/>.

[54] Hyunuk Kim and Dylan Walker , 'Leveraging volunteer fact checking to identify misinformation about COVID-19 in social media' Harvard Kennedy School Misinformation Review, 2020. Accessed at:<10.37016/mr-2020-021>.

[55] European Commission, '2022 Strengthened Code of Practice on Disinformation'. Accessed at: <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

to concerns about the spread of misinformation and disinformation, and it involves signatories. These signatories include major technology companies such as Google, Facebook, and Twitter, in addition to advertising trade associations, media organisations, and civil society groups. Signatories commit to labelling political advertising appropriately, adhering to transparency rules, and disclosing methods for detecting and removing fake accounts, which are often instrumental in spreading disinformation.[56] They also pledge to promote media literacy among users and collaborate with media organisations and fact-checkers to identify trustworthy sources of news and combat misinformation.[57]

One notable aspect of the Code is its emphasis on collaboration and communication among signatories and stakeholders, a crucial element in addressing the challenges posed by misinformation and disinformation in the digital age .[58] The Code is a vital move forward as it makes it a legal obligation for very large platforms to mitigate and make an assessment of risks. [59]

The United Kingdom's approach

In 2017-2018 the government of the United Kingdom undertook an enquiry into the issue often known as 'fake news.' The inquiry was carried out by the Digital, Culture, Media, and Sport Committee over the period spanning from 2017 to 2018.[60] In 2019, the UK Government responded by publishing a White Paper addressing the issue of Online Harms. This paper presents a series of recommended legislative measures

[56] European Commission, '2022 Strengthened Code of Practice on Disinformation'.

[57] European Commission, '2022 Strengtened Code of Practice on Disinformation'.

[58] European Commission, 'Signatories of the 2022 Strengthened Code of Practice on Disinformation'. Accessed at: <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation>

[59]Brooke Tanner, 'EU Code of Practice on Disinformation' Accessed at: <https://www.brookings.edu/blog/techtank/2022/08/05/eu-code-of-practice-on-disinformation/> .

[60] Jack Edmond, 'Potential responses to the threat of 'fake news' in a digitalised media environment'. *University of Otago,* 2018.

designed to establish a framework of responsibility for internet platforms with regards to the dissemination of harmful content.[61]

The UK employs a statutory approach to combat the spread of misinformation and disinformation. This approach includes enhancing media literacy, urging social media companies to assume content responsibility, improving transparency in political advertising, and establishing independent bodies to address these issues. Amid public health crises like the COVID-19 pandemic, efforts have been made to identify and respond to inaccurate or misleading information through initiatives such as the Rapid Review Panel.[62] The UK's approach acknowledges the complexity of misinformation and disinformation challenges, highlighting the importance of a multifaceted response to safeguard digital integrity. [63]

The United Kingdom has undertaken a multifaceted approach to address the challenges of misinformation and disinformation. Introduced in 2019, the Online Harm Reduction Bill aimed to establish statutory duties of care on social media platforms, primarily to mitigate the harm caused by internet use. This bill also proposed the creation of the Office of Communications (OFCOM), an independent body tasked with enforcing these duties and developing industry-informed codes of practice.[64] OFCOM's objective is to enforce a statutory duty of care for all online platform users, including those on Facebook, Instagram, Twitter, and TikTok. [65]

[61] William Perrin, 'Government online harms proposals reflect Carnegie UK Trust work', Linked In post, 5 January 2021. Accessed at: <https://www.linkedin.com/pulse/government-online-harms-proposals-reflect-carnegie-uk-william-perrin?trk=public_profile_article_view>.

[62] Yuxi Wang, John Bye, Karam Bales, Deepti Gurdasai, Adityavarman Mehta, Mohammed Abba-Aji, David Stuckler & Martin McKee, 'Understanding and neutralising covid-19 misinformation and disinformation'. *BMJ* 379 2022 Accessed at: <https://www.bmj.com/content/bmj/379/bmj-2022-070331.full.pdf>.

[63] Wang, Bye, Bales, Gurdasai, Mehta, Abba-Aji, Stuckler & McKee, 'Understanding and neutralising covid-19 misinformation and disinformation'. *BMJ* 379 2022 Accessed at: <https://www.bmj.com/content/bmj/379/bmj-2022-070331.full.pdf>.

[64] Lorna Woods, 'The duty of care in the Online Harms White Paper'. Journal of Media Law, 11(1), 2019, pp. 6-17.

[65] House of Lords, Select Committee on Communications, Parliament of United Kingdom, Regulating In A Digital World, 2nd Report, Session 2017-19.

The Social Media Code of Practice also offers guidance to social media providers on actions to prevent bullying and offensive behaviour on their platforms. [66] This code, endorsed by major corporations like Facebook, Google, and Twitter, is reinforced by Section 103 of the *Digital Economy Act 2017*, rendering it a statutory code. It focuses on guiding platforms in preventing bullying and offensive conduct, distinct from the handling of illegal content. [67]

In order to address the issue of misinformation and disinformation, the government of the United Kingdom has established the Centre for Data Ethics and Innovation (CDEI).[68] This organisation promotes the conscientious utilisation of data and artificial intelligence (AI) technologies.[69] While algorithms were initially relied upon to identify disinformation, they proved less effective than human moderators in distinguishing between harmful and benign content.[70] Misinformation's contextual and ambiguous nature challenges automated detection, particularly in the context of new phenomena like COVID-19. [71]

New Zealand

In the context of New Zealand, specific forms of misinformation (if deemed as objectionable by the Chief Censor) may be considered illegal. An example of this would be the prosecution of misinformation that advocates for criminal or terrorist activities, which can be carried out in accordance with the Films, Videos, and Publications Classification Act or the Crimes Act. Likewise, racial harassment is encompassed within

[66] House of Lords, Select Committee on Communications, Parliament of United Kingdom, Regulating in A Digital World, 2nd Report, Session 2017-19.

[67] Department for Digital, Culture, Media & Sport, 'Statutory guidance - Code of Practice for providers of online social media platforms' Accessed at: <https://www.gov.uk/government/publications/code-of-practice-for-providers-of-online-social-media-platforms/code-of-practice-for-providers-of-online-social-media-platforms>.

[68] Department for Science, Innovation and Technology, 'Centre for data Ethics and Innovation' Accessed at <https://www.gov.uk/government/organisations/centre-for-data-ethics-and-innovation>.

[69] Centre for Data Ethics and Innovation, 'The role of AI in addressing misinformation on social media platforms'. Accessed at: <https://www.gov.uk/government/publications/the-role-of-ai-in-addressing-misinformation-on-social-media-platforms>.

[70] Centre for Data Ethics and Innovation, 'The role of AI in addressing misinformation on social media'.

[71] Centre for Data Ethics and Innovation, 'The role of AI in addressing misinformation on social media'.

the scope of the Human Rights Act, and the dissemination of false information on the internet with the intention of inflicting significant emotional distress can also entail legal ramifications.[72]

This is achieved by virtue of Section 3 of the Harmful Digital Communications Act 2015 (NZ), which explicitly outlines its purpose is to

> *… (a)deter, prevent, and mitigate harm caused to individuals by digital communications; and (b)provide victims of harmful digital communications with a quick and efficient means of redress.*[73]

At the Global Internet Forum to Counter Terrorism held in Paris, France, the Christchurch Call emphasised the necessity of implementing more actions to mitigate the negative impact of online activities, such as imposing a responsibility on social media platforms to ensure user safety.[74] The Helen Clarke Foundation additionally promotes the proactive investment of social media firms in damage avoidance measures.[75]

In addition, the manner in which the HDCA offers protection to users is by virtue of Section 6[76] which basically, sets forth 10 Communication Principles for users to follow and adhere to. It defines what is deemed as acceptable or unacceptable behaviour online; in context to its legislative purpose.[77]

The Harmful Digital Communications Act (HDCA) encompasses a set of ten guiding principles. According to Principle 8 of the HDCA), it is specifically stated that digital communication shall refrain from inciting or promoting violence towards any

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[72] Henry Talbot and Alali Nusiebah, 'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'. Accessed at: https://www.classificationoffice.govt.nz/news/news-items/the-edge-of-the-infodemic/> .

[73] *Harmful Digital Communications Act 2015* (NZ).

[74] Claire Mason and Kathy Errington, 'Anti-social media: reducing the spread of harm content on social media networks', Helen Clark Foundation, 14 May 2019. Accessed at: <https://helenclark.foundation/publications-and-media/anti-social-media/>.

[75] Claire Mason and Kathy Errington, 'Anti-social media: reducing the spread of harm content on social media networks', Helen Clark Foundation, 14 May 2019.

[76] *Harmful Digital Communications Act 2015* (NZ), s6.

[77] Edgar Pacheco and Neil Melhuish '2019 online hate speech insights', Netsafe – Online Safety Help and Advice for New Zealanders. Accessed at: <https://www.netsafe.org.nz/2019-online-hate-speech-insights

individual. In more accessible language, this implies that there are legal restrictions on social media content that promotes or supports harm against individuals.[78] The aforementioned legal clause is activated in instances where a detrimental post or upload leads to harm, whereby 'harm' is explicitly defined as the infliction of significant emotional distress, as outlined in s4 of the legislation.[79]

In order for a post to be deemed a criminal act, it is necessary to fulfil a three-part assessment as outlined in section 22 of the Harmful Digital Communications Act (HDCA):

> *The intention has to be proven to cause harm to the victim;*
>
> *The post caused by the harm is judged by an ordinary reasonable person in the position of the victim; and*
>
> *the post resulted in harm suffered by the victim.*[80]

In the context of New Zealand, all content intended for public consumption must undergo a thorough evaluation in accordance with the *Film, Videos, and Publications Act 1993* (NZ) (Classifications Act). This evaluation aims to ascertain whether the content in question satisfies the requirements of being non-objectionable. According to the provisions outlined in the *Classifications Act*, a publication is deemed 'objectionable' when it presents or addresses topics such as sex, horror, criminality, cruelty, or violence in a manner that has the potential to adversely impact the welfare of the general public.[81] The responsibility of evaluating the categorisation of a publication lies with the Classification Office, whereby the Chief Sensor holds the ultimate authority in making the final determination.[82]

[78] *Harmful Digital Communications Act 2015* (NZ), s6.

[79] *Harmful Digital Communications Act 2015* (NZ), s4.

[80] *Harmful Digital Communications Act 2015* (NZ), s22.

[81] *Film, Video, and Publications Classifications Act 1993* (NZ), s3(1).

[82] *Film, Video, and Publications Classifications Act 1993* (NZ), s3(1).

CULTIVATING MEDIA LITERACY

Like any other jurisdiction, COVID-19 has opened floodgates of fake news and disinformation in New Zealand.[83] According to the Classification Office, most New Zealanders trust government leaders, scientists, and the news media online and offline.[84] The Classification Office also reported that people who trust and use online-only sources of information are more apt to believe misinformation.[85] Nevertheless, it is imperative for New Zealand to examine analogous legal frameworks in order to effectively address the issue of misinformation and deception. An illustrative example of the application of this legal framework occurred in the context of the Christchurch shooting incident, wherein the judiciary scrutinised a manifesto that had been authored and disseminated online.

It is important to note that individuals in New Zealand acknowledge the seriousness of this matter as a societal preoccupation necessitating aggressive interventions. However, there exists a prevailing variety of viewpoints pertaining to the responsible parties and the appropriate methods via which they ought to address this issue. [86] A significant segment of the population is accountable for the dissemination of disinformation to governmental entities, news media outlets, and authoritative figures. [87] The role played by internet users and social media corporations is also considered crucial in tackling this issue.[88]

The New Zealand government and in cooperation with Netsafe, a non-profit organisation, are working to provide the public with information on online safety issues to improve media literacy. They have also facilitated, through the development of a voluntary reporting infrastructure the report of fraud, privacy breaches, harassment and scams that users encounter towards law enforcement.[89]

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[83] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[84] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[85] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[86] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[87] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[88] Talbot and Nusiebah, *'The Edge of the Infodemic: Challenging Misinformation in Aotearoa'.*

[89] Rachel Sue Yin Tan, 'Social Media Platforms – Duty of Care' *Australasian Parliamentary Review* 36 (2) 2022, p. 160.

CONCLUSION

In summary, the aforementioned examples underscore the critical significance of actively advocating for ethical practises in the dissemination of information and cultivating strong media literacy skills, emphasising the importance of legislation and enforceable code of conduct. Within the confines of the parliamentary chambers, where crucial decisions with far-reaching implications for a nation's future are thoroughly discussed and considered, it is imperative to foster an environment where information can be shared openly and accessible to all. These decisions impact numerous individuals, making it essential that they are based on a solid basis of factual accuracy.

The cultivation of ethical information-sharing practises within Parliament necessitates the promotion of a dedication to truth, transparency, and accountability in the communication of individual lawmakers and institutional processes. Providing parliamentarians with comprehensive media literacy skills enables them to effectively navigate the extensive and frequently tumultuous realm of information in a discerning manner. These skills provide users with the ability to make well-informed, accountable, and efficient decisions by facilitating the critical examination of sources, recognition of bias, and distinction between trustworthy and questionable information.

Currently, New Zealand is lacking in a comprehensive regulatory framework that imposes legislative measures to address the issue of misinformation. It is imperative to adopt a coherent regulatory framework that encompasses both digital and non-digital platforms. The present administration's dedication to evaluating media regulation in light of the emergence of online harm is encouraging. However, additional inventive approaches are necessary, preferably guided by comparative examinations of alternative legal frameworks. The revision of the New Zealand *Classification Act* represents a singular step in the process, necessitating the implementation of supplementary measures.

Social media platforms and technology organisations, despite lacking legal obligations, possess an ethical duty to address the dissemination of misinformation and disinformation. Unfortunately, while there are efforts by these companies to curb misinformation, there are algorithms that purport and encourage misinformation and

disinformation.[90] We learn that three significant developments emerged as a result of the COVID-19 pandemic: a worldwide push for content moderation, increased utilisation of AI, and substantial investments in reducing the digital divide.[91]

The task of effectively regulating misinformation and disinformation poses a significant challenge, particularly when considering the need to strike a balance that upholds individuals' rights to freedom of speech and expression. Fact-checking resources and programmes aimed at promoting media literacy present a feasible solution. These programmes involve the application of critical information analysis, source evaluation, and evidence-seeking techniques. Although there is significant potential in their application, the efficacy of these measures relies on individuals taking personal accountability for the information they both consume and disseminate. While this objective may not always be attainable, it remains crucial in addressing the pervasive issue of misinformation.

In short, the mitigation of misinformation necessitates a comprehensive strategy encompassing legislative interventions, ethical communication practises, media literacy instruction, and cooperative efforts with digital platforms. As New Zealand traverses this intricate terrain, it has the opportunity to glean valuable insights from comparable jurisdictions and devise innovative measures to protect the veracity of information in the era of digitalisation.

[90] Kenneth Grad and Amanda Turnbull, 'Harmful Speech and The COVID-19 Penumbra' *Canadian Journal of Law and Technology*, Volume 19, No. 1, 2021, p. 17.

[91] Grad and Turnbull, *'Harmful Speech and The COVID-19 Penumbra'* p. 34