

Expulsion, suspension, exclusive cognisance and procedural fairness — the matter of Ward

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Introduction

The expulsion or suspension of a Member of Parliament is an considered an extreme and unusual measure.¹ Expulsion has significant implications, not only for the Member, but for democratic principles, in overriding an electorate's choice of its elected representative. Suspending a Member from the service of the House, which temporarily denies the electorate representation altogether, is a similarly serious matter. Where criminal conduct is alleged, there may also be implications for the presumption of innocence.²

The NSW Legislative Assembly's expulsion and suspension powers have two sources. The common law confirms the House has the inherent powers necessary to protect its existence and the execution of its functions,³ although these powers may not be exercised for punitive or political purposes. Within these limits, the House has exclusive cognisance over when and how the powers are exercised. The Assembly also has statutory powers to adopt standing orders "regulating the orderly conduct" of the House.⁴ Standing Order 254 permits expulsion for conduct "unworthy of a Member" and Standing Order 255 confirms the alternative power of suspension in cases where *sub judice* is in issue.⁵

Events culminating in the NSW Court of Appeal decision in *Ward v Hoenig*⁶ enlivened these powers. While the decision itself is not in question, the matter raises interesting questions

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¹ NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, "Report on Inquiry into the Conduct of the Honourable Franca Arena MLC", Report No. 6, Vol 1 of 3, June 1998, p 83. Since SO 254 was adopted in 1894, Members have been expelled from the Assembly on three occasions. The Legislative Assembly suspended a Member in 2022, and on two other occasions suspension motions were defeated along party lines.

² NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, "Matters relating to the position of a Member suspended from the service of the House and subsequently re-elected", Report 1/58, June 2023, p iii.

³ *Egan v Willis* (1998) 195 CLR 424, [48 – 50]; [1998] HCA 71.

⁴ *Constitution Act 1902* s 15.

⁵ The expulsion powers sit alongside statutory provisions which automatically disqualify a Member who has been convicted of "an infamous crime, or of an offence punishable by imprisonment for life or for a term of 5 years or more": *Constitution Act 1902* (NSW) s 13A(1)(e). The lodgment of an appeal has the effect of staying the Member's disqualification, but does not preclude their expulsion or suspension in the meantime: s 13A(2).

⁶ *Ward v Hoenig* [2025] NSWCA 180. In March 2022, after being charged with historical sexual offences, Minister Gareth Ward was suspended from the Legislative Assembly pending the verdict of his trial. In the 2023 general election he was re-elected, and continued in office even after being tried, convicted, and taken into custody. When advised that an expulsion motion against him was pending, he challenged the proposed motion in the NSW Court of Appeal, and lost, before finally resigning. See further S Hunt, "Review of parliamentary expulsion powers: The significance of *Ward v Hoenig*", *Australasian Parliamentary Review*, 41(1) 2026, pp 8-23.

about how parliament should go about determining questions of expulsion and suspension, and what extent of judicial review is appropriate.

Drawing on the Ward matter, the proceedings in *Ward v Hoenig* and other relevant case law, this paper makes several observations about the NSW expulsion and suspension powers. Firstly, the powers are broadly defined at common law and the manner of their exercise relatively unconstrained. This leaves the powers open to misuse in ways inconsistent with electoral expectations of standards of conduct and the democratic process.

Another observation is that judicial oversight of the expulsion or suspension of a member is limited. This is due not only to the operation of principle of exclusive cognisance in protecting parliamentary privilege, but also due to uncertainty as to how that principle operates to define the court's jurisdictional limits, which itself may tend to constrain the court's willingness to intervene. Courts may review the legality of a suspension or expulsion but not the occasion and manner of its exercise. Where this distinction is not clear-cut, the result may be judicial caution so to avoid straying into merits review.

Ward v Hoenig also suggests that in expulsion and suspension matters, the provision of procedural fairness may be justiciable, although what procedural fairness requires will depend on the circumstances.

I suggest that the Ward matter confirms the utility of these powers, but that the Legislative Assembly has an opportunity to bring greater rigour to the processes for their application. Clearer and more detailed expression of the powers would improve the understanding of the House of their scope and purpose. Ensuring procedural fairness – in the sense of the right to be heard and freedom from bias – would help safeguard the proper exercise of these powers.

Expulsion and suspension powers

Exclusive cognisance

The NSW Parliament has inherited parliamentary privileges to ensure each House has *exclusive cognisance* – in the sense of knowledge and control – over the exercise of its functions, free from interference by the executive or judiciary.⁷ The principle of exclusive cognisance determines that the scope of parliamentary privilege is limited by those functions. Whether parliament has exercised a privilege within its proper scope is a legal question and reviewable by the courts. But within that scope, and subject to any statutory or constitutional constraints, the exercise of privilege is absolute and a matter for each House.⁸

This distinction originates in the history of constitutional law in NSW, and is reflected in the two sources of the Assembly's expulsion and suspension powers.

⁷ Another rationale is to ensure freedom of speech in the House, which on one view, is a manifestation of exclusive cognisance: *Prebble v Television New Zealand Ltd* [1994] UKPC 4, [1995] 1 AC 321, 332; E Lui, "Piercing the Parliamentary Veil against Judicial Review: The Case against Parliamentary Privilege", *Oxford Journal of Legal Studies* 2022, Vol. 42, No. 3, pp 918–942.

⁸ "(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": *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162; *Stockdale v Hansard* (1839) 112 ER 1112; *Egan v Willis* (1998) 195 CLR 424, 447; [1998] HCA 71; *Ward v Hoenig* [2025] NSWCA 180.

Existence and scope of the powers

The existence and scope of the NSW expulsion and suspension powers are defined at common law. In 1828 the colony of NSW received and adopted all existing English laws, subject to their applicability and adaptation to the colony's local conditions.⁹ Consequently the colonial Parliament only possessed the privileges deemed *necessary* to its existence and lawmaking functions.¹⁰ Essentially self-protective in nature, these privileges could not be used for the purpose of punishment or political gain.¹¹ Their scope (including the grounds and purpose of their exercise) remain largely defined by the common law as received in 1828 and since developed.¹²

The NSW Court of Appeal decision in *Armstrong v Budd*¹³ confirmed that these principles apply to the power of each House to expel or suspend a Member. The relevant function of the House that renders these powers *necessary* is the regulation of its constitution or membership.¹⁴ Neither power may be used for the purpose of punishing a Member,¹⁵ or to gain political advantage.¹⁶

Armstrong v Budd sets out the grounds upon which the expulsion and suspension powers may be exercised. The Member's conduct must be:

- (1) As to render them *unfit to perform their high responsibilities and functions* in the Council as Members.
- (2) As would prevent the Council and other Members thereof from *conducting its deliberations and exercising its functions* with mutual respect, trust and candour.
- (3) As would cause to be *suspect its honour and the good faith* of its deliberations.
- (4) As would tend to bring the Council into *disrepute* and would *lower its authority and dignity* unless it was so preserved and maintained.¹⁷

While all four of these points were unanimously accepted by the Court, the judgments vary in emphasis. While the first point centres on the conduct itself, and its impact on the Member's fitness to serve, Sugarman JA emphasised the second point, which centres on the impact of the conduct on the functioning of the House as a whole.¹⁸ Herron CJ considered the high standing of parliament, referred to in the third and fourth points, as paramount considerations.¹⁹ In that regard, he considered that "misconduct outside the House ... of sufficient gravity to render the Member unfit for service" may provide sufficient grounds for a Member's exclusion. However, he also suggested the need for a connection with parliamentary proceedings, in that the conduct must tend to "disable the [House] from

⁹ Australian Courts Act 1828 (9 Geo. IV c. 83) s 24.

¹⁰ *Barton v Taylor* (1886) 11 App Cas 197; *Willis v Perry* (1912) 13 CLR 592; *Egan v Willis* (1998) 195 CLR 424, 447; [1998] HCA 71.

¹¹ *Kielly v Carson* (1842) 4 Moo PC 63 at 88; 13 ER 225, 234.

¹² Exceptions include: *Imperial Acts Application Act 1969* (NSW) s 6 which confirms that specific English statutes including the Bill of Rights were received into NSW law in 1828 and remain part of NSW law to the extent they have not been altered by NSW statute; *Parliamentary Evidence Act 1901* (NSW); *Constitution Act 1902* (NSW) s 13A; *Defamation Act 2005* (NSW).

¹³ *Armstrong v Budd* (1969) 71 SR (NSW) 386; *Holmes v Angwin* (1906) 4 CLR 297 at 305; [1906] HCA 64.

¹⁴ *Ward v Hoenig* at [34], citing *Holmes v Angwin* (1906) 4 CLR 297 at 305; [1906] HCA 64.

¹⁵ *Armstrong v Budd* at 396.

¹⁶ *Armstrong v Budd* at 403.

¹⁷ *Armstrong v Budd* at 396.

¹⁸ *Armstrong v Budd* at 408.

¹⁹ *Armstrong v Budd* at 397.

discharging its duty" and involve a "want of honesty and probity".²⁰ For Sugarman JA, conduct lacking in "honest and probity" was also a key factor.²¹

Wallace P's formulation, which has arguably been the most influential, is the broadest of all: he considered the House must adjudge the Member "guilty of conduct unworthy of a Member", in order "to preserve and safeguard the dignity and honour" of the House.²² His formulation may be best understood as encapsulating all four of the points set out above, characterising them as relevant considerations.

Wallace P also confirmed that, as the powers are part of the common law, what is "reasonably necessary" to protect the dignity of the House will change over time, and should reflect contemporary conditions and modern habits of thought.²³

The authority of *Armstrong v Budd* was affirmed in *Ward v Hoenig*.²⁴ In that case, the Court of Appeal found the Legislative Assembly intended to act upon "conduct unworthy of a Member", "to protect the high standing of the Parliament", "for its own self-preservation and the orderly exercise of its functions".²⁵

Exercise of the powers

While the existence, scope and purpose of the expulsion and suspension powers are defined by the common law, the manner and occasion of their exercise is for each House to determine. Accordingly, the Legislative Assembly has exercised its statutory powers under the *Constitution Act 1902*²⁶ to adopt Standing Orders 254 and 255, "regulating the orderly conduct" of the House in relation to expulsion and suspension.

Expulsion

254. Expulsion

A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the Member's seat declared vacant.

255. Criminal trial pending

If the House decides not to proceed on a matter which has been initiated in the House concerning the alleged misconduct of a Member on the grounds that the Member may be prejudiced in a criminal trial then pending on charges founded on the misconduct, the House may suspend the Member from its service until the verdict of the jury has been returned or until it is further ordered.

Standing Order 254 replicates Wallace P's broad formulation of the expulsion power in *Armstrong v Budd*. Standing Order 255 confirms that the House retains its suspension power in circumstances where observance of the *sub judice* convention requires balancing the public interest in debating the motion with the interest of avoiding prejudice to criminal proceedings.

²⁰ *Armstrong v Budd* at 397.

²¹ *Armstrong v Budd* at 408.

²² *Armstrong v Budd* at 403.

²³ *Armstrong v Budd* at 402.

²⁴ *Ward v Hoenig* at [35]-[40].

²⁵ *Ward v Hoenig* at [58], [62].

²⁶ *Constitution Act 1902* (NSW) s 15. Parliament has an inherent power to enact its own Constitution, governing its constitution and powers.

As an adjunct to SO 254, it imports the same common law understanding of the suspension power as articulated in relation to expulsion.

Breadth of the powers and their exercise

Breadth of common law powers

The grounds for expulsion and suspension as formulated in *Armstrong v Budd*, and affirmed in *Ward v Hoenig*, are nuanced and somewhat ambiguous, with various considerations to be taken into account, and open to interpretation. While a broadly-expressed common law test may bring the benefit of flexibility, it lacks the predictability of a more prescriptive approach. In particular, if "conduct unworthy of a member" is to be defined by "modern habits of thought", this raises questions as to what contemporary standards require.

House-based regulation or guidance

It is not for the Assembly to constrain or alter the scope of its common law powers – that requires legislation. The role of the House is to determine the manner and exercise of its powers. However, in "regulating the orderly conduct" of the House, SOs 254 and 255 and the related guidance material do little to overcome the ambiguities of *Armstrong v Budd*. As noted above, SO 254 simply restates Wallace P's broad formulation ("conduct unworthy of a Member"). The more nuanced considerations in *Armstrong v Budd* are at risk of being lost.

Nor do the standing orders impose processes for the exercise of the powers. In particular, there is no requirement for procedural fairness in the modern sense of that term which includes the rule against bias and the hearing rule.²⁷ There are no formal requirements for referral to committee inquiry, or minimum standards for the Member's right of address or reply. Notably, this is at odds with the Commonwealth Parliamentary Association's minimum benchmarks for the removal of a Member.²⁸

True it is that SO 255 has a procedural focus, in ensuring that the House observes the *sub judice* convention. However, the rule preserves the right to suspend a Member who is facing trial, on the basis of "conduct unworthy of a Member", without necessarily debating or inquiring into the matter. If the observance of *sub judice* effectively denies a Member procedural fairness, query whether the motion should proceed at all.

Beyond the standing orders, commentary providing guidance on the exercise of the expulsion and suspension powers is limited. The section on expulsion in *Legislative Assembly Practice, Procedure and Privilege*²⁹ outlines several precedents where the power was considered or

²⁷ The bias rule requires a decisionmaker to be, and to appear to be free from bias before hearing the facts. The hearing rule requires the person affected to have adequate notice of any adverse decision against them before it is finalised, told the critical substance and details of any allegation against them, and given a fair, realistic chance to present their case, submit evidence and answer those allegations: Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129), 14.11ff; S Boyron and W Lacey, "Procedural Fairness Generally" in M. Tushnet (ed), *Routledge Handbook of Constitutional Law* (2013) 374.

²⁸ Commonwealth Parliamentary Association, Updated Benchmarks for Democratic Legislatures, Benchmark 5.2: The Legislature shall have provisions relating to the removal of Members which are narrowly defined, restricted and implemented in line with natural justice.

²⁹ NSW Legislative Assembly, *Legislative Assembly Practice, Procedure and Privilege*, last updated April 2013 (currently under review), [23.3].

applied. The powers having been rarely used, there is relatively little precedent on which to draw when considering these matters.

Implications and tensions

The breadth and ambiguity within the expulsion and suspension powers, and lack of process around their exercise, give rise to several risks, signalling tensions between the absolute nature of parliamentary privilege and other tenets of our democratic system: political dynamics, standards of conduct, standards of proof and representation.

Political abuse

It has long been recognised that the expulsion and suspension powers are open to political abuse. In *Barton v Taylor*³⁰ the Privy Council noted that an indefinite suspension or one that depends "only on the irresponsible discretion of the Assembly" is "more than the necessity of self-defence seems to require" and "dangerously liable in some cases to excess or abuse". *Erskine May*³¹ has noted that expulsion is "open to very great abuse".

This concern was a key factor in the Commonwealth Parliament's abolition in 1987 of its expulsion power. The Commonwealth Joint Select Committee on Parliamentary Privilege³² (**Joint Select Committee**) cited the example of Mr Mahon who was expelled in 1920 for alleged seditious remarks against the British government, noting "the speed with which the motion was brought on; the limited time for debate; the haste in which such an important matter was determined; and the vote on party lines". A tendency towards what *Laurie*³³ refers to as the "Westminster paradox" – smaller parliaments which are government-dominated with strong party discipline, and therefore less oversight – may heighten this risk.

On one view, this tension between privilege and political dynamics is endemic to our system of government. The Joint Select Committee referred to an "inherent danger",³⁴ and *Griffith*³⁵ has suggested expulsion is an "inescapably political process". Even so, the risk in NSW may be tempered by a stronger focus on due process.

Standards of conduct

The test of "conduct unworthy of a Member" requires the Assembly to consider whether, by contemporary standards, a Member's conduct impedes the functions of the House or erodes its dignity. Whether the House should apply its own standards of conduct, independently determined standards,³⁶ or community standards, reflects the broader tension between

³⁰ *Barton v Taylor* (1886) 11 AC 197, 205, noted in Legislative Assembly of NSW Standing Committee on Parliamentary Privilege and Ethics, "Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House", Report 2/57, May 2022, p 2.

³¹ *Erskine May's Treatise on the Law, Privileges Proceedings and Usage of Parliament*, 25th edition, Chapter 11, para 11.33.

³² Parliament of Australia, Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, Parliamentary Paper No. 219/1984, p 126; L Laing (ed), *Odgers: Australian Senate Practice*, p 77.

³³ N Laurie, "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", *Australasian Parliamentary Review*, 38(2) 2023, 73, p 76.

³⁴ Joint Select Committee, p 126.

³⁵ G Griffith, *Armstrong v Budd and the Power of Expulsion*, Winterton Ed., *State Constitutional Landmarks*, The Federation Press, 2006, p 262.

³⁶ See, for example, NSW Legislative Assembly, Code of Conduct for Members; Commonwealth Parliamentary Association, Updated Benchmarks for Democratic Legislatures.

normative and positive models of leadership.³⁷ If a positive model is adopted which aims to reflect community standards, this demands that those standards are understood and applied by the House. Either model demands that standards of conduct are applied with transparency and accountability.

This tension is illustrated by the circumstances in Ward. In 2022, soon after Minister Ward was charged with serious sexual offences, he was suspended under SO 255 on the grounds of "conduct unworthy of a Member" pending the outcome of the trial. Citing concerns around *sub judice*, the House agreed to the motion without debate or inquiry. However, in the next general election several months later, Mr Ward ran as an independent candidate and was re-elected.

Several factors may have contributed to this striking outcome. The suspension may have been seen to offend the presumption of innocence. The electorate may also have applied contemporary standards of public conduct and disagreed that the alleged misconduct impeded the House or eroded its dignity. A greater focus on inquiry, debate or other process for informing the House's understanding of community standards may have avoided this mismatch of standards.

Standards of proof

Another risk is that undefined standards of proof of the misconduct under consideration may lead to their inconsistent application.

In these matters, the practice of the House has been to rely on the formal adverse findings of misconduct of an external investigative or judicial body, such as a court or Royal Commission. However, this standard of proof has not been applied consistently. In Ward, for example, the application of SO 255 served to permit – due to concerns around *sub judice* – a suspension on the grounds of unproven charges of criminal conduct, without debate or inquiry. This tension between privilege and standards of proof calls into question the operation of SO 255 (as discussed above) and the lack of procedural fairness in its application.

Representation

On one view, any misuse, or misinformed use, of the expulsion and suspension power can be remedied through party-political repercussions and the electoral process. Indeed, the suspension and re-election of Mr Ward is one example which, in the short term, was resolved at the ballot box.

However, as *Lui*³⁸ notes, democratic processes are not a perfect safeguard. The suspension or expulsion of a Member deprives an electorate of its chosen representative unless and until the Member stands for re-election in the next general election (in the case of suspension) or by-election (in the case of expulsion). In other words, determining the question of standards through the electoral process itself constitutes denial of representation for some period.

In any case, as noted by the Joint Select Committee,³⁹ there is a risk that the reputational damage caused by the action against the Member will destroy their prospects of re-election. In that regard, Ward may even be the exception that proves the rule – his re-election suggests

³⁷ Griffith, for example, endorsed a normative model, arguing for "the need to protect standards in public life" as a rationale for the expulsion power: Griffith, p 262.

³⁸ E Lui, "Piercing the Parliamentary Veil against Judicial Review: The Case against Parliamentary Privilege", *Oxford Journal of Legal Studies*, 2022, Vol. 42, No. 3 pp. 918–942, 927.

³⁹ Joint Select Committee, p 126.

that his constituents prioritised representation by their elected candidate over the standards of alleged misconduct.

This tension between privilege and democratic representation is reflected in the Commonwealth Parliament's view that "it is for the electors, not Members, to decide on the composition of Parliament".⁴⁰ In *Egan v Willis*, McHugh J noted that Members hold office, not at the pleasure of other Members, but through election, which is governed by statute determined by the parliament.⁴¹ The tension is underscored by the modern rationale for privilege which is arguably to benefit constituents and their representatives in parliament.⁴²

Judicial oversight

The above discussion identifies issues arising from the breadth and ambiguity of the Legislative Assembly's expulsion and suspension powers, and the lack of formal process around their exercise. These issues are compounded by the limited and uncertain role of judicial oversight. The question of procedural fairness, however, may provide fertile ground for judicial review.

Practicalities of litigation

At a practical level, litigation which challenges an expulsion or suspension may be too slow to provide an effective remedy. In the case of expulsion, urgent proceedings must be brought before the motion is moved (as in *Ward v Hoenig*), or at least heard before a by-election occurs. Thereafter, the decision of the House is irreversible.

And as noted above, even where the Member obtains an order declaring their expulsion or suspension void, the associated reputational damage may have lasting effects for their political career.

Exclusive cognisance

As discussed above, the principle of exclusive cognisance operates to limit the justiciability of parliamentary privilege. While the courts may determine whether a House acted (or will act) within the scope and purpose of its privilege, the occasion and manner of its exercise are for the House.⁴³

The application of this principle to the expulsion and suspension powers in NSW was confirmed in *Ward v Hoenig*. The Court exercised its jurisdiction to determine whether a Member would be expelled on proper grounds ("conduct unworthy of a Member")⁴⁴ and for a proper purpose (i.e. for self-protection, not punishment or political reasons).⁴⁵ The Court confirmed it had no jurisdiction to consider the exercise of the power.⁴⁶

⁴⁰ Ibid.

⁴¹ *Egan v Willis* (1998) 195 CLR 424, 511, fn 430 as cited in Twomey A, *The Constitution of New South Wales*, The Federation Press, 2004, p 453.

⁴² *Hearne v Street* (2008) 234 CLR 125; 248 ALR 609, 140, [41].

⁴³ *Stockdale v Hansard* (1839) 112 ER 1112; *Egan v Willis* (1998) 195 CLR 424, 447; [1998] HCA 71.

⁴⁴ *Ward v Hoenig* at [35], citing *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396 per Herron CJ.

⁴⁵ *Ward v Hoenig* at [32], citing *Egan v Willis* (1998) 195 CLR 424, 447; [1998] HCA 71.

⁴⁶ *Ward v Hoenig* at [54].

However, as *Gonye* has noted, the precise status of exclusive cognisance is unsettled.⁴⁷ In recent years it has been tested in numerous proceedings.⁴⁸ As *Twomey* points out, in NSW the distinction between the scope and purpose of the power and its exercise, may not always be clear-cut.⁴⁹ In the context of expulsion and suspension, it may be difficult to assess whether a House has confined itself to the question of unworthy conduct, free of bias, or political or punitive intent, without examining the nature of the conduct itself.

The proceedings in *Ward v Hoenig* are interesting in this regard. Mr Ward alleged that the intent of the pending motion against him was punitive. Little evidence having been tendered either way, the Court dismissed the allegation, relying on the Government's own statement of intent which appeared in a letter to Mr Ward advising of the pending motion.⁵⁰ Possibly the Court considered, almost on judicial notice, that in the circumstances of a Member purporting to represent their electorate from prison, an expulsion motion would be inherently self-protective. But nevertheless, the finding may speak to an acknowledgement of the interplay between motive and the nature of the conduct itself.

The blurred line of exclusive cognisance may encourage what *Appelby et al*⁵¹ refer to as "unarticulated prudence" – a jurisdictional reticence to examine constitutional questions closely. *Appelby* observes that in a line of Australian constitutional cases, the courts have avoided deeply examining questions of parliamentary privilege and exclusive cognisance,⁵² other examples including *Attorney-General (Tas) v Casimaty*⁵³ and *CCC v Carne*.⁵⁴ Edelman J in *Casimaty* favoured taking a "traditional view" in cases concerned predominantly with the "internal affairs" of Parliament.⁵⁵

Procedural fairness

As noted above, the Legislative Assembly's exercise of its expulsion and suspension powers make little formal provision for procedural fairness. *Ward v Hoenig* provides some authority that this may be a justiciable issue.

After Mr Ward was convicted and taken into custody, the Leader of the House invited his written submissions on the pending expulsion motion against him. In the proceedings, Mr Ward argued he had been denied procedural fairness, not having been given the opportunity to address factual matters or allegations in person.⁵⁶ The Court of Appeal disagreed. However, it declined to determine the general constitutional question of whether procedural fairness goes to the exercise of the expulsion power (and is therefore within the Assembly's exclusive cognisance).⁵⁷ Instead, it applied administrative law principles, and held that what is required

⁴⁷ L Gonye, "Finding a Balance between Accountability and Exclusive Cognisance: Some Recent Developments in NSW", *Australasian Parliamentary Review*, Autumn 2008, Vol. 23(1), 212 at p 216.

⁴⁸ See for example, *CCC v Carne* [2023] HCA 28; *Attorney-General (Tas) v Casimaty* [2024] HCA 31; *Cullen & Ors v President of the Legislative Assembly* [2025] NSWCA 278.

⁴⁹ Twomey A, *The Constitution of New South Wales*, The Federation Press, 2004 at p 453.

⁵⁰ *Ward v Hoenig* at [12], [58].

⁵¹ G Appelby and R Goss, "Parliamentary Privilege and the Courts in *Attorney-General (Tas) v Casimaty*: A case of grand theories and lost opportunities", *Australasian Parliamentary Review*, 2025-03, Vol.40 (1), 14, p 27.

⁵² G Appelby and R Goss, pp 15-28.

⁵³ *Attorney-General (Tas) v Casimaty* [2024] HCA 31.

⁵⁴ *CCC v Carne* [2023] HCA 28.

⁵⁵ *Attorney-General (Tas) v Casimaty* [2024] HCA 31, Edelman at [104]. One outlier in this regard is *Cullen & Ors v President of the Legislative Assembly* [2025] NSWCA 278, where the Court of Appeal invoked the *Kable* principle to declare invalid legislative provisions that it considered erode its "institutional integrity".

⁵⁶ *Ward v Hoenig* at [68].

⁵⁷ *Ward v Hoenig* at [69].

in order to satisfy the need for procedural fairness will depend on the circumstances in each case.⁵⁸ On the facts, the Court found that the requirement had been satisfied.⁵⁹

While *Ward v Hoenig* avoided explicitly characterising procedural fairness as necessary to the legality of an expulsion or suspension, it suggested that procedural fairness is a justiciable issue on administrative law principles.⁶⁰ This approach to the review of these powers would seem appropriate. The exercise of the powers has certain characteristics of administrative decision-making, as defined in *Kioa v West*,⁶¹ in that a person's legal rights, interests and legitimate expectations are affected.

Alternatively, as *Spencer*⁶² suggests, the exercise of parliamentary privilege may be subject to procedural fairness on the basis of parliament's vestigial juridical nature, originating in the UK's the High Court of Parliament. While NSW has not inherited the UK Parliament's punitive powers, the exercise of the UK-inherited privileges of expulsion and suspension have juridical attributes, most obviously, its effect on the legal status of a Member. Parallels can also be drawn between the self-protective doctrine of necessity, as it applies to the exercise of privilege in NSW, and the protection of the courts' institutional integrity under the *Kable* doctrine.⁶³ As *Spencer* notes, parliamentary privilege emerged with the political sovereignty of the legislature.⁶⁴ Nonetheless, it retains a juridical origin which arguably invests the NSW Parliament with a duty to "act judicially" in its exercise.

Utility of the expulsion power

The expulsion power has been abolished by the Parliaments of Australia, the Northern Territory and the ACT,⁶⁵ due to concerns about political abuse of the power, and the principle that the membership of a House is properly determined by the electorate. The Australian Parliament also noted its other options for disciplining Members including committal and fine.⁶⁶ Historically, the power has rarely been used by Australian parliaments. In most cases either the Member has resigned, or the motion has been put but not passed.⁶⁷

⁵⁸ *Ward v Hoenig* at [76] citing *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40, [33] (Kiefel CJ, Bell and Keane JJ).

⁵⁹ *Ward v Hoenig* at [71]-[76], citing *Commissioner for ACT Revenue v Alphaone* (1994) 49 FCR 576 at 591; [1994] FCA 1074.

⁶⁰ An alternative inference is that it is open for a court to examine matters of procedural fairness on an evidential basis. Evidence as to whether the House followed processes aimed at ensuring a fair hearing and avoiding bias may be relevant to proving punitive or political intent.

⁶¹ *Kioa v West* (1985) 159 CLR 550.

⁶² T Spencer, "Natural Justice in Parliament: A Courageous Proposal, Prime Minister", *U.K. Const. L. Blog* (15th Nov. 2021), <https://www.aspg.org.au/wp-content/uploads/2023/11/Article-9-of-the-Bill-of-Rights.pdf>.

⁶³ *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24; (1996) 189 CLR 51. For further discussion of the implications of *Kable* for exclusive cognisance, see *Cullen & Ors v President of the Legislative Assembly* [2025] NSWCA 278.

⁶⁴ Spencer, p 125.

⁶⁵ The Parliament of Australia abolished the power to expel a Member from the Australian and ACT Parliaments in 1987 (*Parliamentary Privileges Act 1987* (Cth) s 8); the Northern Territory did so in 1992 (*Legislative Assembly (Powers and Privileges) Act 1992* (NT)).

⁶⁶ Joint Select Committee, p 126.

⁶⁷ Griffith, p 263. In NSW, since Standing Order 254 was adopted in 1894, Members have been expelled from the Assembly on three occasions. Since 2000, two Members charged with a criminal offence (excluding Mr Ward) have resigned; in two other cases, the Member was expelled from their party but served out their term. The Queensland, Tasmanian, South Australian and Western Australian Parliaments have never expelled Members. The Victorian Legislative Assembly has expelled Members on at least five occasions. The House of Representatives has exercised its expulsion power once in 1920.

However, the Ward matter demonstrates that in NSW the power still retains utility. Mr Ward's refusal to resign despite his conviction and imprisonment presented the prospect of representation and participation in parliamentary proceedings from prison. In these circumstances the existence of the power proved crucial to the ability of the House to manage its affairs. Extreme as the Ward circumstances may seem, a similar matter in the UK involving a Member's imprisonment gave rise to the House of Commons' most recent exercise of the power.⁶⁸

Expulsion is also relevant in more common circumstances involving misconduct that impedes the business of the House, or dishonest conduct which is inconsistent with the Member's public duty. This is particularly the case in a jurisdiction where the Parliament has no power to punish its Members. Despite the inherent tension between parliamentary privilege and representation discussed above, as *Griffith* argues, there may be cases of gross misconduct that interferes with proceedings, where it would be undemocratic to allow the Member to continue.⁶⁹ In such cases, the option of expulsion as an alternative to suspension pending a distant election may minimise implications for the electorate.⁷⁰

Opportunities for the House

The issues discussed above suggest there are opportunities for the NSW Legislative Assembly to improve the expression of its powers and to better regulate the occasion and manner of their exercise. This would support consistency, accountability and transparency in the exercise of its expulsion and suspension powers, and minimise adverse implications for Members, the electorate and the House.

Firstly, there are opportunities for SOs 254 and 255 and/or related guidance material to convey a fuller and more nuanced understanding of the common law powers. While the common law scope of these powers is not without ambiguity, improving awareness of the matters to consider would support the House's determinations.

Secondly, cases such as *Ward v Hoenig* may herald increasing judicial focus on procedural fairness in expulsion and suspension matters. Accordingly, formal measures for procedural fairness would ensure, and demonstrate, consistency in the standards applied and that a proper purpose is followed. Routine referral to committee inquiry, and an examination of what procedural fairness requires should be considered. In cases where *sub judice* is in issue, options may include referral to private inquiry and report, as measures that provide some a level of accountability and procedural fairness.

Examining the issue of Member conduct through a workplace lens, *McDonald et al*⁷¹ suggest that these types of self-regulatory measures would not erode the privileges of parliament but would align their exercise with workplace regulation and standards. The standards of Member conduct underpinning the expulsion and suspension power, the processes for exercising the powers, and the avenues of recourse for Members, are separate to those for parliamentary

⁶⁸ CJ (1954–55) 6: discussed in *Erskine May*, para 11.33.

⁶⁹ *Griffith*, p 266.

⁷⁰ *Odgers*, p 78.

⁷¹ A McDonald, P Ferguson, Z Nwokora, A Nethery, A Young, "Overcoming the barriers to parliamentary workplace regulation: Parliamentary privilege, political parties, and procedural fairness" *Parliamentary affairs*, (2026) 00, 1–35.

employees who, for example, have access to unfair dismissal laws. However, in a post *Jenkins* environment⁷² where both Member conduct and parliamentary workplaces are under intense public scrutiny, it is appropriate to apply consistent principles of procedural transparency and fairness.

As *Gonye* posits, the accountability of parliament is paramount and in this regard the exercise of its privileges should be transparent.⁷³ Clear explicit processes can only bring clarity to the exercise of the powers and to questions of justiciability and exclusive cognisance.

Conclusion

The Ward matter illustrates that defining parliamentary privileges at common law brings adaptability, while heightening the risks of inconsistent or inappropriate use. These observations may add weight to suggestions that the time for a NSW Parliamentary Privilege Act has come. In the meantime, the role of the House is not to constrain its common law powers, but to regulate the manner and occasion of their exercise.

In this paper I have outlined opportunities for the NSW Legislative Assembly to adopt House-based measures to address the risks associated with the exercise of its expulsion and suspension powers. Clearer expression of those powers would promote consistency through a better understanding of their nuances. Explicit House-based processes would help identify and apply appropriate standards of conduct, ensure that implications for Members and their electorates are considered, and minimise political abuse. This includes processes that ensure appropriate regard for procedural fairness, for example through committee inquiry and procedures for rights of speech and reply. Given that procedural fairness is mandated by CPA benchmarks and, it would seem, justiciable, the dignity of the House demands it.

⁷² Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Workplaces*, November 2021.

⁷³ *Gonye*, p 213.