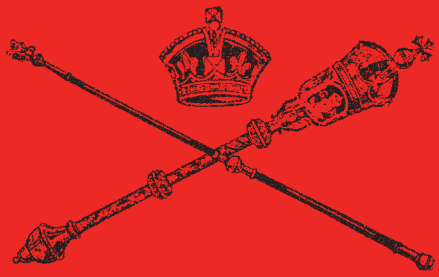

The Table

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

VOLUME 85
2017

£15.00

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EDITED BY
NICOLAS BESLY

VOLUME 85
2017

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

ISBN 978-0-904979-42-3
ISSN 0264-7133

CONTENTS

EDITORIAL

This edition of *The Table* opens with another masterful article about Archibald Milman from Colin Lee, a Principal Clerk in the UK House of Commons. The last two editions featured articles covering Milman's time as Second Clerk Assistant then Clerk Assistant, focusing on his central role in developing procedures to overcome obstructionism by late-19th-century Irish MPs. Most of the procedures developed then are recognisable today. This edition's article continues the theme, detailing Milman's involvement in establishing a structure and rules for questions to ministers. In early Victorian times the concept of notice of questions was alien: with no written notice, there was little scope for restrictions on what may be asked. Anyway the main diet of Parliament was legislation and debates; the function of holding the government to account *per se* was secondary. Milman helped change that. During his time as a clerk the number of questions to ministers increased greatly. New rules for questions were developed, principally by Milman, and largely hold true today. Let there be no question: this article is a rewarding read.

Next up is an article by the Clerk of the Australian House of Representatives, David Elder, about events which led to the federal general election in 2016. The Australian constitution is partly based on the Westminster model. However, the Commonwealth of Australia Constitution Act 1900 predates the (UK) Parliament Act 1911, which created a mechanism for resolving disputes between the upper and lower Houses. The 1900 Act was based on UK constitutional practice at that time, which was that an irresolvable conflict between the two Houses was settled by holding a general election. In Australia, where the Senate is elected, this means both Houses hold an election—a "double dissolution" election. This article tells the story of how such an election came about in 2016.

The edition covering 2016 would hardly be complete without an article on Brexit. Thankfully we have one. It is by Julia Labeta, until recently a clerk on the House of Lords' EU Committee team. The article focuses on the parliamentary aspects of the EU referendum and its aftermath. It is perhaps ironic that in spite of how controversial the debate on leaving the EU has been, and remains, the points at which Parliament has been able to exercise most control over the process have seen an unexpected level of consensus. In particular, once the government had secured an electoral mandate to hold the referendum the bill to provide for it was passed with little dissent. Likewise after the Supreme Court ruled that ministers did not have a prerogative power to trigger article

50 to start the formal withdrawal process, the bill providing the prime minister with a statutory power to do so was passed with big majorities in the House of Commons. Some would see an irony here: a process designed to return power to Westminster witnessing a Parliament seemingly reluctant to exercise ultimate power. But another way of analysing this controversial territory is to recognise that some big political decisions are taken outside Parliament; in these cases it may be the job of Parliament to make such popular choices work.

The fourth article also touches on the 2016 double dissolution in Australia. A few days before the dissolution a vacancy arose amongst the representation of Western Australia in the Senate. Such vacancies are filled following a joint sitting of the Legislative Council and the Legislative Assembly of Western Australia. But difficulties arose because the Legislative Council was adjourned and not scheduled to return until after the federal dissolution. A dispute with the executive followed about how the Council could be recalled, including whether a power to recall was vested in the Governor as part of the state's reception of UK laws or was vested in the Council's President. Nigel Pratt, the Clerk of the Legislative Council, recounts the story.

The next article covers a procedural novelty in the House of Lords. The Trade Union Bill was a politically contentious measure introduced by the newly elected Conservative government. Among other provisions it sought to limit how members of trade unions could contribute to political funds, which are used to make donations to political parties—overwhelmingly to the Labour party. Thus there was a significant party divide over the bill, with critics arguing that it addressed one aspect of party funding to the detriment of one party, without looking at the whole issue of party funding. As the bill was sent to the House of Lords it looked as though the government would be defeated in votes on some key measures. But before that could happen the House agreed to set up a select committee to examine the bill's provisions on political funds. This committee was not part of the bill's formal stages; it existed alongside the normal scrutiny procedures for a bill. It was given a month to report. The clerk of the committee, Tom Wilson, explains all.

The sixth article covers a recent experience in Jersey with a committee seeking to order the production of documents. This power is provided for in regulations made in 2006. The regulations set out criteria and a process for issuing a summons. Mark Egan, the Greffier of the States of Jersey, explains how these were tested when a quasi-state development corporation sought to resist producing documents relating to a controversial waterfront development.

The final article is by Nighat Paristan, a research officer at the National Assembly of Pakistan. He explains the important role played by the Parliamentary Committee on Electoral Reforms in Pakistan in helping to cement free and fair elections.

This edition also contains the usual interesting selection of updates from jurisdictions and a comparative study on *sub judice* rules. This is the companion to the study in volume 82 (2014) about relations between parliaments and the judiciary. At the end of the edition is a magnificent book review by Brendan Keith, the distinguished editor of this journal from 1984 to 1990.

I am grateful for all the contributions in this edition. I hope you enjoy reading them as much as I have. After nearly a decade as editor the time has sadly come for me to hand over the editorship. It has been enjoyable. Thank you for contributing and thank you for reading.

MEMBERS OF THE SOCIETY

Australia

Senate

Rosemary Laing announced in September 2016 her intention to retire as Clerk of the Senate on 8 March 2017. **Richard Pye,** formerly Deputy Clerk of the Senate, has been appointed as her replacement.

Keith Oscar Bradshaw, Clerk of the Senate from 1980 to 1982, died on 2 February 2017.

Northern Territory Legislative Assembly

Sean O'Connor joined the Legislative Assembly as Clerk Assistant Chamber and Serjeant at Arms.

New South Wales Legislative Assembly

In March 2016 **Helen Minnican** was appointed Deputy Clerk of the Legislative Assembly. In September 2016 she was appointed Acting Clerk of the Legislative Assembly.

In May 2016 **Catherine Watson** was appointed Clerk-Assistant, Committees and Corporate.

In September 2016 **Leslie Gonye** was appointed Acting Deputy Clerk, Clerk-Assistant, Table and Serjeant-at-Arms.

On 23 September 2016 **Ronda Miller** retired as the 18th Clerk of the Legislative Assembly after 26 years' service in the Assembly.

Ms Miller previously held the positions of Clerk-Assistant, Committees, Clerk-Assistant, Table, and Serjeant-at-Arms. She was the first woman to hold all of these positions before becoming the first woman Clerk of the Legislative Assembly in November 2011, when she succeeded Russell Grove.

Ms Miller's initial employment in the Parliament was in the Parliamentary Library. She left the Library to work as adviser to the Leader of the House and then to work in the Department of Attorney General.

Ms Miller returned to the Legislative Assembly in 1990, where she took up the newly created position of Clerk-Assistant, Committees. She held this position during a time of significant parliamentary reform aimed at strengthening the institution and its oversight of the executive.

During this time she supported the development of an expanded committee system and the establishment of statutory committees charged with oversight of independent bodies.

Ms Miller made an ongoing contribution in the area of members' ethics and pecuniary interests, in particular through her work with the Committee on the Independent Commission Against Corruption and the Standing Committee on Ethics.

Ms Miller made valuable contributions to wider initiatives to strengthen Parliament, including in her work for the Commonwealth Women Parliamentarians, the parliamentary twinning relationships with the parliaments of the Solomon Islands and Bougainville, and the Education Committee of the Australia New Zealand Association of Clerks-at-the-Table.

Victoria Legislative Council

Stephen Redenbach went on accumulated leave at the end of the August 2015. During this time **Michael Baker** was appointed Acting Assistant Clerk—Committees until 1 September 2016. In August 2016 Stephen Redenbach tendered his resignation to take effect from 6 January 2017. **Keir Delaney** was appointed Assistant Clerk—Committees from this date.

Canada

House of Commons

As **Pierre Rodrigue**, Principal Clerk for Information Management, became the lead on the renewal of the House of Commons website, **Robert Benoit** was appointed as Acting Principal Clerk, Information Management, as of 30 May 2016. **Guillaume LaPerrière-Marcoux** assumed a new role as Chief of Staff, Office of the Clerk, on 4 July 2016 for a three-year period.

In June 2016 **Mariane Beaudin** and **Danielle Labonté** were both promoted to the role of Acting Deputy Principal Clerk (without Table duty). They are currently assigned to the Committees and Legislative Services Directorate and to International and Inter-Parliamentary Affairs, respectively.

In November 2016 **José Cadorette** assumed new responsibilities as Chief, Business Continuity Management Service with Internal Audit, Preparedness and Planning for two years. In December 2016 **Chloé O'Shaughnessy** was appointed Acting Deputy Principal Clerk (without Table duty) with Information Management, and **Michelle Tittley** was appointed Acting Deputy Principal

Clerk (without Table duty) in Table Research Branch, to replace **Natalie Foster**, who is away for one year on maternity leave.

Alberta Legislative Assembly

In March 2016 **David McNeil** retired as the Clerk of the Assembly, having served in that post since 1987. **Robert Reynolds QC** succeeded Dr McNeil on 4 April 2016.

British Columbia Legislative Assembly

Susan Sourial was appointed Clerk Assistant, Committees and Interparliamentary Relations, with effect from 1 April 2016. She worked as a committee clerk at the Legislative Assembly of Ontario for 12 years before joining the Parliamentary Committees Office of the Legislative Assembly of British Columbia in March 2011.

Manitoba Legislative Assembly

William Henry (Binx) Remnant, Clerk of the Manitoba Legislative Assembly from 1982 to 1999, and Clerk of the Northwest Territories from 1966 to 1982, passed away on 5 January 2017. His time at the Manitoba Table included several notable events, including the French language debate of 1983–84 and the Meech Lake constitutional debate in 1990.

Binx played a key role in developing the Canadian Association of Clerks-at-the-Table, serving on the executive and presenting more papers at conferences than any other clerk in the organisation's history.

His unique stature and significance to the Manitoba Legislative Assembly was recognised by a resolution of the House on 14 December 1999, when he was granted the unique honour of access to the Legislative Loges on the floor of the chamber—a privilege usually extended only to former members. He was also the first non-MLA to be made an honorary member of the Association of former Manitoba MLAs.

A beloved figure, Binx cast a long shadow, not just from his formidable height and flowing robes. He set an example of integrity and professionalism which is followed to this day.

Ontario Legislative Assembly

After 37 years with the Legislative Assembly of Ontario, nine as Clerk of the Legislative Assembly, **Deborah Deller** retired on 31 October 2016. **Todd Decker** was appointed the new Clerk on 1 November 2016.

Saskatchewan Legislative Assembly

Kathy Burianyk was promoted from Senior Committee Clerk to Clerk

Assistant in March 2016. In addition to her new role she continues to oversee the committees branch.

India

Kerala Legislative Assembly

Shri P D Sarangadharan was relieved of the office of Secretary on 18 May 2016. **Smt P Jyalekshmi** became Secretary from 1 June to 6 October 2016. **Shri V K Babuprakash** assumed the office of Secretary on 7 October 2016.

United Kingdom

House of Commons

John Sweetman CB TD, formerly Clerk Assistant and Clerk of Committees in the House of Commons, died on 25 March 2017, as this volume of *The Table* was being prepared. As Clerk of the Overseas Office between 1983 and 1987 John made and maintained many contacts with Commonwealth colleagues, and undertook visits to many Commonwealth parliaments, including those of Fiji, Nigeria, Sierra Leone, Sri Lanka and Uganda. John was also a member of the Association of Clerks-at-the-Table of Canada.

A fuller tribute to John Sweetman is planned for the next edition of *The Table*.

Zambia National Assembly

Godfrey Haantobolo (Deputy Clerk—Procedure) retired in June 2016 and was replaced by **Roy Ngulube**.

ARCHIBALD MILMAN AND THE TRANSFORMATION OF QUESTIONS TO MINISTERS, 1871–1902

COLIN LEE
Principal Clerk, UK House of Commons

Introduction

In the closing decades of the 19th century and the opening years of the 20th, arrangements for questions to ministers in the UK House of Commons developed into recognisably modern form. Rules governing permissible questions were clarified and more rigorously enforced. Question time gained its modern prominence in the parliamentary day, and its duration was finally limited. Written notice of questions became the norm, and arrangements for written answers were established. This article seeks to shed light on this transformation, focusing on the role and views of Archibald Milman, who served as a Clerk at the Table from 1871 to 1902. In doing so, it draws on previous studies of questions,[1] Milman's own writings on the subject,[2] and contemporary reports on proceedings in Hansard and newspapers.[3]

"Asked and answered ... naturally": Milman's history of questions

In an article published in 1890 Milman offered some thoughts on the historical development of questions. Consciously or not, his account diverged somewhat from that of Sir Thomas Erskine May. The latter, in the nine editions of the treatise on *Parliamentary Practice* which he wrote, approached parliamentary questions not as a procedure in their own right, but as an "exception" to, or "indulgence" from, the general rule of debate that "no member may speak except when there is a question already before the house, or the member is about to conclude with a motion or amendment".[4] May's account accorded

[1] K Bradshaw, "Parliamentary Questions", *Parliamentary Affairs*, volume VII (1953–54), pp 317–26; P Howarth, *Questions in the House: the History of a Unique British Institution* (London, 1956); D N Chester and N Bowring, *Questions in Parliament* (Oxford 1962).

[2] A Milman, "Parliamentary Procedure: Questions", *Edinburgh Review*, January 1890, pp 253–66 (hereafter Milman, "Questions"), and *Decisions from the Chair*. The 1890 article was published without attribution: see C Lee, "Archibald Milman and the procedural response to obstruction, 1877–1888", *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*, volume 83 (2015), pp 22–44 (hereafter "Procedural response"), at pp 28–29. On the development of *Decisions from the Chair* by Milman, see C Lee, "Archibald Milman and the 1893 Irish Home Rule Bill", *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*, volume 84 (2016), pp 28–63 (hereafter "1893 Irish Home Rule Bill"), at pp 28–29.

[3] References to *The Times* are via The Times Digital Archive. All other newspapers have been accessed via the British Newspaper Archive.

[4] *Treatise* (1st edition, 1844), pp 244–45; Chester, *Questions*, p 14.

with the settled view of practice established in the 18th century.[5] Milman was sceptical about whether this had always been the rule, believing that the absence of evidence for questions reflected the inadequacy of records. He argued that "the necessity for information, which could only be obtained on authority from ministers of the Crown, must have existed from the very beginning of parliaments". He thought that "many inquiries as to matters of public interest and as to procedure must have been asked and answered as naturally, and so much as a matter of course, that it would have been nobody's special duty to record them". Milman conceded that "it *became* a fundamental principle of parliamentary procedure that, whenever debateable matter was entered upon, a motion must be made, and a question thereon proposed from the Chair". However, Milman argued that, when "there was no matter in dispute the Speaker did not immediately insist on a question being proposed", thus creating the procedural space for questions to arise, albeit on the understanding that, if debateable matter emerged, proceedings would become irregular.[6] Milman's account of the origins and development of questions broadly accords with more recent studies of the subject.[7] The difference between his account and May's is ultimately one of emphasis. May himself recorded in 1873 his discovery of a question to a minister (albeit in the Lords) as early as 1721,[8] and Milman did not deny the "novelty" of questions as a procedure.[9] Milman's stress on the organic coherence of questions as part of the House's practice perhaps only reflected a generational shift towards clerks whose whole experience was in the era when questions had become integral to business.

Questions remained spontaneous and largely absent from the official record until the orders of the day and notices of motions were first printed in 1835. According to Milman, in the years after 1835, questions "were simply notices on which the Speaker would not insist on a question being immediately proposed for debate, inasmuch as they did not include any debateable matter".[10] The possibility of giving notice led to a marked growth in the number of questions. Milman calculated that the number of questions had reached 69 in 1846.

[5] See the words of William Murray in 1754: "It is and always has been the rule of Parliament that no gentleman should rise up to speak unless there be a proper question before the House", Howarth, *Questions*, p 15.

[6] Milman, "Questions", pp 253–54; emphasis added.

[7] Bradshaw, "Questions", pp 317–20; Howarth, *Questions*, pp 16–71.

[8] *Treatise* (7th edition, 1873), p 319, n 1.

[9] Milman, "Questions", p 253.

[10] *Ibid.*, pp 254–55; Bradshaw, "Questions", pp 318, 320; Chester, *Questions*, pp 17–18.

Statistics collected later record 129 questions in 1847 and 222 in 1848.[11] At this stage, questions appeared in the sequence in which notices of both questions and motions had been given, and questions were thus intermingled with other notices of motions, and were largely confined to Tuesdays and Thursdays, the days on which notices of motions had precedence over orders of the day. The increase, coupled with the intermingling, sparked another change, as Milman noted:

> "When questions began to multiply, the inconvenience was keenly felt both by members and ministers of hanging about half an evening in their places to be ready, at the uncertain moment of the conclusion of a previous debate, to put and answer a question which was disposed of in half a minute."[12]

From February 1849, under the authority of the Speaker, all questions were placed together on the notice paper, after petitions, returns, unopposed private business and notices for future days, but before the start of public business.[13]

The establishment of a regular slot for questions to ministers, and the associated expectation that a good number of ministers would attend what was soon referred to as "the time for questions", led to growing attention on this period. One observer wrote in 1861 that "the privilege of putting questions to Ministers is one of the most valuable of those which are possessed by Members of Parliament. Debates, for the most part, are useless, except for the purposes of display."[14] The 1860s saw a further sharp rise in the number of questions: in 1860, 699 questions appeared on the paper; by 1870—the year before Milman became a Clerk at the Table—this number had reached 1,203.[15]

Milman attributed the growth of questions in part to "the extension of the parliamentary franchise".[16] The impact of the 1867 Reform Act, which widened the borough franchise to all householders, was noted at the time. One member, Ralph Osborne, who was first elected in 1841, said in 1870:

> "The country had got a new House of Commons now, and he was amazed at the thirst for information manifested by it. Formerly there used to be three or four Questions put on the Paper by Gentlemen connected with large places;

[11] Milman, "Questions", pp 255, 257; Bradshaw, "Questions", pp 318, 320; Howarth, *Questions*, pp 106, 122; Chester, *Questions*, p 316. Milman's own calculation for 1846 may be an underestimate, because he also counted only 89 questions in 1847.

[12] Milman, "Questions", p 256.

[13] *Ibid.*, p 257; Bradshaw, "Questions", p 320. Bradshaw dates the change to 7 February, while Milman chooses a later date of 22 February, a difference probably hinging on a question interspersed with other business on 19 February: HC Deb, 19 February 1849, cols 871–74.

[14] *Dundee Courier*, 16 July 1861, p 2.

[15] Milman, "Questions", p 257; Bradshaw, "Questions", p 321; Howarth, *Questions*, p 155; Chester, *Questions*, p 316.

[16] Milman, "Questions", p 255.

> but now there was scarcely a Member for the most insignificant borough who did not ask two or three Questions on matters of all kinds."[17]

A newspaper leader in 1871 regretted "the custom, introduced for the first time in the present household suffrage Parliament, and now become almost universal, of putting notices on the paper in the form of questions to Ministers … frequently these elaborate inquiries are followed by answers of equal length, and thus the progress of business during the earlier portion of the sitting is seriously retarded".[18] Before the extension of the franchise the time for questions had been referred to as "this half hour",[19] but Osborne suggested in 1870 that "an hour and a-half were taken up every night by this thirst for information" so that the House "seldom got to the business fixed for consideration before an hour and a-half or two hours had been consumed in asking Questions".[20]

This growth was a result not only of the extension of the franchise, but also of the remarkable expansion of parliamentary reporting, especially by provincial newspapers. Members could expect their questions to be reported in local newspapers, enabling those members to demonstrate activity in their locality. One newspaper argued that questions were an easy way for a member to accomplish "his purpose of getting his ideas printed, published, and widely circulated, and himself made famous, almost without having had the trouble of opening his lips".[21] Milman also thought that questions were partly about satisfying the need for constituents to "see their member's name in the paper".[22]

"Nothing controversial": the basic rules of order for questions

The growing use of questions placed greater stress on the rules of order about the permitted scope and form of parliamentary questions. These had been developed through the decisions of successive Speakers because, as Milman noted, "the whole jurisdiction over questions now rests, and has always rested, with the Speaker".[23] The starting point for these rules reflected the origins of questions to ministers as an alternative to debate, so that questions had to avoid the level of argument or reasoning which might give rise to debate: as Milman explained, "It is only because questions ought to contain nothing controversial that they have been allowed to come on before all other business".[24] According to Milman, "if debateable matter unexpectedly arose, it was the duty of the

17 HC Deb, 12 April 1870, col 706.
18 *London Evening Standard*, 29 March 1871, p 3.
19 *York Herald*, 29 June 1867, p 8.
20 HC Deb, 12 April 1870, col 706.
21 *London Evening Standard*, 29 March 1871, p 3.
22 Milman, "Questions", p 262.
23 *Ibid*., p 264.
24 *Ibid*.; Chester, *Questions*, pp 14–16, 27; Howarth, *Questions*, pp 94, 160.

Speaker to interpose and prevent the subject being pursued unless a motion were made".[25] As Mr Speaker Brand was to say in 1877, "It has always been the rule of the House that no argument or debate should be allowed on putting a Question".[26]

This central rule of order was gradually clarified by successive Speakers. In 1847 Mr Speaker Shaw-Lefevre ruled a question out of order which "involved the expression of an opinion".[27] In 1860 Mr Speaker Denison stated in respect of a question that to "discuss any matter in that House in an ironical sense is unparliamentary and out of order".[28] Denison appears to have been more active and insistent in calling members to order in question time than his predecessors,[29] and his rulings after 1868 also perhaps betray his frustration at the growing length and frequency of questions.[30] Denison's successor, Henry Brand, was also emboldened to more active intervention, stating in 1878:

> "when a Question is proposed, which appears to me to be in opposition to the Rules and Orders of this House, I consider it my duty to resist that Question, and I shall continue to act in that course, believing it to be the desire of the House."[31]

"The sworn foe of all adjectives": Milman's editing of questions

The rules as recorded up to the 1880s relied almost entirely on Speaker's rulings in the chamber during question time; but much of the day-to-day responsibility for enforcement lay with the Clerks at Table who recorded or received, and then edited, questions of which notice was given. In 1861 Mr Speaker Denison referred to contentious words having been changed in a notice by his direction.[32] When one member complained in 1867 about an alteration made to his question, the Speaker replied:

> "The House will be aware that it is continually the duty and the practice of the Clerks at the Table to amend and alter in some degree the Notices that are given, some of which are not in form, and others open to various objections. It is a very difficult duty for the Clerks to perform; but it is one which, in my judgment, they have performed with great discretion, and generally with

25 Milman, "Questions", p 255.
26 HC Deb, 12 April 1877, cols 978–79.
27 HC Deb, 13 December 1847, col 969; see also *Treatise* (2nd edition, 1851), p 245, n 2.
28 *Decisions, 1857–82*, p 213; HC Deb, 25 August 1860, col 1827.
29 See, for example, HC Deb, 6 May 1864, cols 100–01.
30 *Decisions, 1857–82*, pp 214–16; HC Deb, 14 July 1870, col 242; HC Deb, 10 March 1871, col 1764.
31 *Decisions, 1857–82*, p 218; HC Deb, 24 May 1878, col 652.
32 *Decisions, 1857–82*, p 222; HC Deb, 12 February 1861, col 342.

> great advantage to the conduct of the business of the House."[33]

He was supported in this assertion by the Leader of the House, Benjamin Disraeli:

> "We depend always upon the experience and discretion of the Clerks at the Table. I have had Notices of my own changed, and I am sure they have always been improved through the experience and information of those Gentlemen. I am sure the House will support their officers in the exercise of a duty which they discharge with so much sagacity and discretion."[34]

The scale of editorial work by Clerks at the Table is indicated by Erskine May's evidence to a select committee in 1878. He assured the committee that there was "considerable vigilance exercised over the form of questions" and that "the greatest pains are taken to eliminate anything in the nature of argument or inference from those questions, before they are printed ... They are most carefully revised, and objectionable parts removed, generally with the consent of the Member". He also said that the Speaker "does stop an infinity of questions that no one is ever aware of".[35] The following year's edition of his *Treatise* also described the editorial role, stating that "where notice has been given of an irregular question, it is either corrected at the table—if possible, in conference with the member himself—or wholly omitted by direction of the Speaker".[36] This editorial role was to prove a growing source of contention. As one writer was later to put it:

> "Our great representatives in Parliament share the feelings of humble journalists, who complain of their finest phrases being pruned by a remorseless sub-editor. An irate man, indeed, refuses to recognise a question so trimmed as his production, and then the innocent clerk looks at it with a wondering air."[37]

The main burden of this editorial role from 1871 onwards fell on Milman, not least because of the presumption that notice would usually be recorded by or given to the Second Clerk Assistant. After Milman became a Clerk at the Table, evidence about the editing of questions and the concerns to which it gave rise becomes more apparent, in part due to his editorial approach, in part due to the continuing growth in the number of questions and in part because of the more charged political environment. In 1872 one member felt that "he had to complain that his Question, as it appeared on the Notice Paper was different in terms to what it was when given in from him", a change the Speaker

33 HC Deb, 5 July 1867, col 1066.
34 *Ibid.*, col 1067.
35 *Report from the Select Committee on Public Business*, HC (1878) 268, QQ 77–82.
36 *Treatise* (8th edition, 1879), p 329.
37 *The Sphere*, 3 March 1900, p 200.

explained was due to the need to remove opinion or argument.[38] He gave the same reason the next year when another member complained that his question "has been so altered by the Clerk as to remove all meaning and justification of the interrogation I desire to put".[39] Later the same month, the same member indicated that another of his questions had been edited to remove the words "extraordinary" and "dangerous".[40]

Particular challenges arose in the mid-1870s from the activities of two members determined to campaign on what they saw as a miscarriage of justice in one of the most notorious legal disputes of the Victorian era—the Tichborne case—which hinged on whether a man who worked as a butcher in the small town of Wagga Wagga in New South Wales under the name of Thomas Castro was in fact Roger Tichborne, the heir to a baronetcy, believed to have drowned in a shipwreck, or Arthur Orton, a butcher's son from Wapping. After a civil court ruled against him, Castro/Orton was then tried for perjury and imprisoned. His case was taken up by George Whalley, who, one correspondent wrote, suffered from "monomania" or "a very severe attack of Tichborne on the brain".[41] Whalley, who had been the author of the complaint about the editing of questions in 1867 cited earlier, used questions to ministers to expose what he saw as a miscarriage of justice. In March 1877, one question by him on the subject was so heavily edited by a clerk that the Home Secretary found it incomprehensible.[42] Whalley then complained that "The non-intelligibility of the Question arises from the omission in the print of certain words which were—or ought to have been—in the manuscript".[43] The second member was Edward Kenealy, who had been Castro/Orton's defence attorney at his criminal trial and whose repeated attacks on the presiding judge led to him being disbarred. In early April 1878 Kenealy attempted to ask another question to the Home Secretary about the true identity—and criminal convictions—of one of the prosecution witnesses in the criminal trial. He received a letter from Milman, explaining that:

> "I have not put your Question on the Paper, as it purports rather to impugn the accuracy of certain information conveyed to the House than to seek information from the Government. The matter is, therefore, not properly the subject of a Question; but no doubt you might bring the matter forward on a

38 HC Deb, 5 July 1872, col 700.
39 HC Deb, 8 July 1873, col 37.
40 HC Deb, 25 July 1873, col 803.
41 *Sheffield Independent*, 12 May 1873, p 3.
42 HC Deb, 13 March 1877, cols 1857–58.
43 *Ibid.*, cols 1860–61.

Motion."[44]

Kenealy complained to the Speaker, who upheld Milman's original decision, and Kenealy found no support when he twice contended that any clerkly interference with questions was a breach of privilege.[45]

The difficulties faced by the clerks at the Table over their editorial functions became more acute after 1880, with the vast expansion in the Parnellite wing of the Home Rule parliamentary party. The clerks were now subject, as May noted in a submission to the Cabinet in November 1881, to "frequent complaints that the most offensive, and consequently irregular, passages have been omitted or modified".[46] As one British politician was later to recollect:

> "About the most troublesome part of the Clerks' business is the editing of questions. It is strictly against regulation to insert anything personal or argumentative, and the Irish, with their keen love of disorder and their ingenuity, are always trying to evade the rules and slip in something illegal. Bitter are their lamentations and wild their demonstrations when the florid flowers of their rhetoric are snipped down to regulated proportion by official scissors".[47]

No Irish member was to prove more ingenious, or greater in his love of disorder, than Tim Healy. Parliamentary obstruction had reached new heights of intensity during the debate for leave to introduce the Protection of Persons and Property in Ireland Bill, which was brought to a conclusion after 41 hours by Speaker Brand's decision to close the debate by putting the question.[48] At the next sitting, on 2 February 1881, 36 Irish members were named as they protested at Gladstone's proposals to empower the Speaker to curtail debate.[49] Towards the end of this sitting day, Healy came to the Table to submit a question in the following terms:

> "To ask the Chief Secretary [for Ireland] if he intends to proceed with such bills for the alleged better protection of life and property in Ireland until an opportunity has been afforded for trying whether in the opinion of the house the bill has been legally read a first time or not in consequence of Mr Speaker, having on his own responsibility stopped a debate which was far from being concluded, on an amendment to the question whether leave be given to introduce the said bill, and whether, in view of the great importance

[44] HC Deb, 24 May 1878, cols 645–46.

[45] HC Deb, 5 April 1878, cols 669–71; HC Deb, 24 May 1878, cols 643–56; *Treatise* (8th edition), p 329.

[46] The National Archives (hereafter TNA), CAB 37/6/29, Memorandum on the Rules of Procedure of the House of Commons, p 11.

[47] R Farquharson, *In and Out of Parliament: Reminiscences of a Varied Life* (London, 1911), p 221.

[48] C Lee, "Procedural response", p 38.

[49] *Ibid.*, pp 38–39.

> of the subject, the Government will afford immediate facilities to members of the house for considering the action of Mr Speaker."[50]

When the House sat the next day, Healy was dismayed to find his question had not appeared on the notice paper. He asked the Speaker "Whether it was not usual for a Member to be communicated with when a Question which had been given in to the Clerk at the Table did not appear on the Paper, or when it was altered".[51] At this point, the Speaker was handed a paper by a clerk, possibly containing an explanation or possibly containing only the untabled question with its indirect attack on the Speaker's conduct. The Speaker replied:

> "I understand that the terms of the Question to which the hon. Member refers were brought up to the Table yesterday about a quarter of an hour before the House rose. Sufficient time has not been given for determining whether the Question is regular; and I am bound to say, on looking at the Question, that it will require some consideration before it is submitted to the House."[52]

Healy's complaint had been met with "a low groan" in the House, which, according to one newspaper, "clearly showed that during the few weeks he has been a member of the House he is already regarded as an Obstructive of the first water", and the Speaker's wry response was met with cheers.[53]

Healy became perhaps the most persistent tabler of disorderly questions, so that it was reported in 1882 that "the Clerks at the Table, in the exercise of their duty, have again and again been compelled to tone down and even omit portions of the numerous questions which Mr Healy places upon the notice paper".[54] Healy himself acknowledged that "the work and labour thrown on the Clerks at the Table by Irish Members ... was enormous" and that this gave rise to "conflict between Members and the officials".[55]

Matters came to a head on 2 November 1882. When asking a question, Healy complained that "the manuscript Question which he had handed in at the Table had been so altered by the authorities of the House as to be now quite unintelligible".[56] When the Speaker then prevented him from putting that part of his question which had been edited out, he launched into a long tirade against the actions of the clerks and the Speaker. He claimed that Conservative members were able to table argumentative questions, while Irish Home Rule

50 *Freeman's Journal*, 5 February 1881, p 5.
51 HC Deb, 3 February 1881, col 67.
52 *Ibid.*; *Freeman's Journal*, 5 February 1881, p 5.
53 *South Wales Daily News*, 4 February 1881, p 3; *Morning Post*, 4 February 1881, p 2.
54 *Leeds Mercury*, 3 November 1882, p 5.
55 HC Deb, 10 July 1884, col 777.
56 HC Deb, 2 November 1882, col 631.

members were not allowed to:

> "The grievance about putting Questions in the House had, in his opinion, grown into a scandal. They had three gentlemen at the Table, who had the control of such matters, and who knew full well that the Speaker would back them up in whatever they did. ['Oh! oh!'] That, at least, had been his experience."[57]

This attack was met with a "clamour" in the House, but the Speaker responded calmly, suggesting that Healy should attack the authorities of the House only on a substantive motion, leading Healy to move on to the original subject matter of his question.[58] British newspapers were unsympathetic to Healy the next day. One commented:

> "Mr Healy's hitter attack upon the Speaker and those three silent gentlemen, the Clerks at the Table ... is just the kind of malicious revenge that might be expected from one of his disposition and training ... Mr Healy resents any interference with his manuscripts, no doubt because he feels that to put his questions in Parliamentary language is paying too great a deference to the House and its customs."[59]

Healy continued to pursue the "scandal" of the clerks and their power over his questions. In July 1884 he used a debate on the vote for the salaries and expenses of House officials to argue that the clerks should lose their discretionary power to amend questions. A committee of the House should be appointed to which disputed questions would be referred, in place of the role of the clerks and of the Speaker. He thought that this proposal would be welcomed, since it was "with a view to relieving the Clerks of functions which must sometimes lead to conflict" and would prevent "unseemly wrangles such as there had been".[60] Hugh Childers, the Chancellor of the Exchequer (and the cousin of a future Commons clerk, Erskine Childers), gave a cautious but sceptical reply, pointing out the delays that would arise if all disputed questions were referred to a committee and suggesting that the proposal would not be widely supported in the House.[61] The following year, Healy renewed his case for a committee of the House to act as "an independent tribunal, altogether apart from the Clerks at the Table" and pronounce on the propriety of questions.[62] He enlarged on his criticism of the clerks, stating that "he objected to any gentleman, no matter how great his experience, having the right to give, without revision, an opinion

57 *Ibid.*, cols 633–34.
58 *Ibid.*, col 634; *Bristol Mercury*, 3 November 1882, p 8.
59 *Leeds Mercury*, 3 November 1882, p 5.
60 HC Deb, 10 July 1884, cols 777–78.
61 *Ibid.*, cols 779–81.
62 HC Deb, 27 April 1885, col 908.

on which the Chair might act, and with regard to which hon. Members had no power of appeal".[63]

Healy's public criticisms were of the clerks at the Table as a group, but there is ample evidence that Milman was the particular focus of his and his colleagues' criticism. In his memoirs Healy recollected that "At first Milman was bitter against Ireland, and tried to render our questions ineffective by excisions".[64] When some newspapers reflected on the highly personal Irish Nationalist attack on Milman on 11 July 1893 led by Healy,[65] several attributed it to Milman's role in relation to questions. One noted that Milman had "committed the unpardonable sin in the exercise of the duties of his office of removing offensive expressions which Nationalists are in the habit of packing into the questions which they hand in at the table, and on that account he is looked upon as fair game for the vulgar attacks of the free lances of the faction".[66] Another thought that "the attack on Mr Milman gains vigour in consequence of him being the official with whom rests the duty of editing the questions. His stern editorial pen has cut down many an Irish question."[67] When Sir Reginald Palgrave announced his retirement as Clerk of the House in February 1900, one observer noted the contrasting approaches to the editorial role:

> "Mr Milman and Mr Jenkinson [the Second Clerk Assistant] use the blue pencil pretty freely, but Sir Reginald Palgrave rarely exercised his authority except in cases of unpardonable evasion of the proprieties ... [Milman] is the martinet of the Table and the sworn foe of all adjectives, which he rules out with relentless vigour as unnecessary expressions of personal opinion."[68]

"No rules for the guidance of Members": recording and explaining the rules

One of Healy's concerns about Milman's editing of Irish questions related to the absence of clear written rules under which the clerks' functions were exercised. In June 1882 Healy complained that the rules to which he was subject were not written down, asking the Speaker to inform the House "where the Rules of the House as to the putting of Questions are to be found", an invitation to which the Speaker did not respond.[69] In 1884 he said that "there were no rules for the guidance of Members as to what they ought or ought not to ask".[70]

63 *Ibid*., cols 907–08.
64 T M Healy, *Letters and Leaders of My Day* (London, 1928, 2 volumes), I.214.
65 On which see C Lee, "1893 Irish Home Rule Bill", *passim*.
66 *Yorkshire Post*, 13 July 1893, p 4.
67 *Aberdeen Journal*, 13 July 1893, p 5.
68 *Reynold's Newspaper*, 4 February 1900, p 1.
69 HC Deb, 16 June 1882, col 1410.
70 HC Deb, 10 July 1884, col 777.

Some guidance was in May's *Treatise*. The first edition in 1844 had noted that questions "should be put in a manner which does not involve argument or inference".[71] By 1859 May's formulation of the rule was that questions "should be put in a manner which does not involve opinion, argument or inference: nor are any facts to be stated, unless they be necessary to make the question intelligible".[72] This was expanded further in the 1883 edition, which stated that questions "should not involve opinion, argument, inference, imputations, irony, or hypothetical cases".[73] It nevertheless represented a surprisingly short account for the purposes of members, given the controversy surrounding the application of the rules.

For the period after 1857 the decisions made by successive Speakers to enforce the removal of argumentative matter in questions, and to prevent members asking a question from seeking to make a statement, are clearly recorded in the volumes prepared initially by Palgrave and then by Milman to record decisions from the chair, although these were not published and not intended for members.[74] The increasing rigour with which decisions were recorded probably contributed to closer control over questions, because precedents were readily available to inform subsequent decisions. After Milman assumed responsibility for recording these decisions, he wrote:

> "It should always be remembered that the system of Questions to Ministers is the newest of all our institutions, and that the House has entrusted the Speaker with a very wide authority over Questions, and that his decision in every new case is of very great importance".[75]

The most accessible information on the rules on questions came from a short manual of procedure prepared by the clerks. By 1893 this volume gave a fuller account of the rules, stating:

> "A question may not contain statements of argument, inference or opinion, imputations, epithets, ironical expressions, and hypothetical cases; nor may a question refer to Debates or answers to questions in the same Session ... Nor can the expression of an opinion be sought for by a question, nor the solution of an abstract legal case, or of a hypothetical proposition. A question must not be made the pretext for a Debate, nor can a question fully answered be renewed."[76]

71 *Treatise* (1st edition), p 195.
72 *Treatise* (4th edition, 1859), p 295.
73 *Treatise* (9th edition, 1883), p 355.
74 Bradshaw, "Questions", pp 322–23; *Decisions, 1857–82*; *Decisions, 1883–85*.
75 *Decisions, 1886–92*, p 336.
76 R Palgrave, ed, *Rules, Orders, and Forms of Procedure relating to Public Business* (10th edition, 1893), pp 44–45.

A fuller account was published later that year in Palgrave's edition of the *Treatise*, an expansion reflecting the fact that, in Palgrave's words, the practice of questions had reached "a formidable dimension, provoking an almost equally formidable crop of rulings from the Chair".[77]

"Chaos would come again": development of the rules of order, 1886–1900

The editorial decisions by Milman and his colleagues, and the expansion of the guidance on the form questions ought to take, were both extensions of the requirement for neutral language to avoid questions descending into debate. That requirement had long informed the approach by occupants of the chair and clerks. May's position was that the rules themselves probably could not be changed. Even faced with the increasing number of questions, he told Gladstone's Cabinet in 1881 that "Further Rules in restraint of the number, or length, or character of Questions it would be difficult to frame".[78] In Milman's view the growing volume of questions, the associated pressure of time and the potential impact of disorderly questions on the mood of the House justified more vigorous enforcement of the existing rules:

> "If the fiery energy with which questions are sometimes pressed has compelled the Chair in recent years to a careful and exact exercise of its authority, and members occasionally thereby suffer disappointment, they should recollect that, were the rules relaxed, chaos would come again, and the confusion which would ensue, breaking out at the beginning of the sitting, would leave the House in such a feverish temper that it would never settle down to permanent work".[79]

To some degree as a result of Milman's personal commitment to the exact exercise of that authority, certain rules of order were developed more actively after 1886.

This is perhaps most evident in the growing emphasis on direct enforcement of the rules about matters on which ministers could reasonably be expected to answer. May's formulation of the scope of questions to ministers had initially been quite loose: "questions are frequently put to ministers of the Crown concerning any measure pending in Parliament, or other public event".[80] Similarly, in 1854 he wrote, "Questions are permitted to be put to Ministers of the Crown relating to public affairs", a formulation that remained unaltered

77 *Treatise* (10th edition, 1893), p vii.
78 TNA, CAB 37/6/29, p 11.
79 Milman, "Questions", p 260.
80 *Treatise* (1st edition), p 195.

until the 1870s.[81] In 1859 Mr Speaker Denison ruled along these lines: questions "ought only to be addressed to Ministers of the Crown with regard to matters affecting public business".[82] However, this limitation frequently was effected by ministers declining to answer questions beyond their responsibility or knowledge, rather than by members being prevented from tabling questions.[83] As late as 1881 Mr Speaker Brand declined to prevent a question to the Attorney General on a point of law, stating: "I see no ground for interposing between the hon. and learned Member and the House. If he desires to put his Question to the Attorney General, the Attorney General will make his answer on his own responsibility."[84] This method was generally seen as effective, not least because, as Milman put it, "though the rules of the House permit almost any question to be asked, there is no power to compel a minister to give an answer contrary to his sense of duty".[85] May's last edition of his *Treatise* did little to encourage constraint on the scope of questions, extending his previous phrase by saying that questions could concern "measures pending in Parliament or public affairs and matters of administration".[86]

However, in the 1890s there were signs of a more active approach to restricting questions. In 1892 an Irish nationalist member complained about the rejection of a question asking why the authorities of Queen's College, Cork, allowed rugby but not Gaelic sports. Mr Speaker Peel replied that he had struck out the question "because I thought it was too utterly trivial to submit to the attention of the House".[87] Milman's first edition of *Decisions from the Chair*, covering the sessions from 1886 to 1892, and produced early in 1893, used the following new heading for this ruling: "Questions to Ministers *must involve Ministerial responsibility* and be definite and not trivial".[88] From a ruling which related only to triviality, Milman had begun to create a recognisable basis for ruling questions out of order because of a lack of ministerial responsibility. The short procedural guide published early in 1893 contained guidance to the same effect:

> "Questions are put to Ministers relative to public affairs with which they are officially connected, proceedings pending in Parliament, or any matter of

81 Bradshaw, "Questions", p 321, citing the first edition of the *Manual of Public Business*; HC Deb, 8 February 1872, col 141.
82 HC Deb, 11 August 1859, col 1345.
83 Howarth, *Questions*, pp 93–94, 124.
84 HC Deb, 22 February 1881, col 1521.
85 Milman, "Questions", p 265.
86 *Treatise* (9th edition), p 354.
87 HC Deb, 7 April 1892, col 869.
88 *Decisions, 1886–92*, p 323; emphasis added.

administration for which the Minister is responsible."[89]

This was further restated in the tenth edition of the *Treatise* produced later that year, edited by Palgrave but with Milman and Jenkinson responsible for the chapter covering questions.[90] In drawing attention to the new phraseology of the *Treatise*, Kenneth Bradshaw noted that "no specific rulings are cited ... to support it". He thought this suggested that "even at that date it was a generally accepted and well understood statement of practice not requiring a case history to bolster it up".[91] An alternative interpretation is that Milman was seeking to justify breaking new ground, not on the matters on which ministers would answer, but on the matters about which they could be asked.

Greater clerkly activism was also apparent in the highly contested field of subjects for which ministers had responsibility, but on which they declined to answer, usually on grounds of public interest. These included matters relating to the royal family, recommendations for mercy, matters subject to budget secrecy, matters before the courts and where the provision of information would be of assistance to a foreign power.[92] From the 1880s the general rule prohibiting a question already asked and answered from being asked again in the same session was used in some cases where a minister had declined to answer the initial question.[93] In 1898 George Curzon, the junior Foreign Office minister who answered for that department in the Commons, twice "publicly deprecated" the asking of questions about the occupation of China by foreign powers because it might prejudice ongoing negotiations, "and announced that it would be his duty in the public interest to decline to give any answer".[94] When a question was then tabled about the Prussian occupation of one part of China, a clerk at the Table, having privately sought confirmation from Curzon that this fell within the class of questions he would decline to answer, refused to allow the question to be tabled.[95]

When the member complained that "the officers at the Table took it upon themselves to suppress" the question, the Speaker confirmed that the refusal was "perfectly proper, because it is a Question of a nature which the Under Secretary for Foreign Affairs had distinctly stated he did not consider he was entitled to answer".[96] When another member asked whether there was a precedent for clerks to interpret matters on which ministers would not answer

89 Palgrave, ed, *Procedure relating to Public Business* (10th edition), p 43.
90 *Treatise* (10th edition), pp xii, 237.
91 Bradshaw, "Questions", pp 323–24.
92 Chester, *Questions*, pp 300–01; Howarth, *Questions*, pp 93–94, 122–23, 163.
93 *Decisions, 1898*, pp 74–76.
94 *Ibid*., p 68.
95 *Ibid*.
96 HC Deb, 24 March 1898, cols 769–70.

in this way, the Speaker indicated that it had been done before with the Speaker's general authority and on the understanding that individual decisions could be referred to him.[97] This incident was complicated further when Curzon indicated in debate later that evening that he had been unaware of the question thus "blocked", and might be willing to answer it if notice were given.[98] In view of what Milman termed Curzon's "change of front", the question was then put down for the next day, only to receive the reply that "this is one of those Questions which I regret I must, in the public interest, refrain from replying to", leading to the "block" being re-imposed.[99] The growing involvement of clerks acting in effect as agents of a ministerial blocking answer probably reflected Milman's views. In 1890 he had advocated the introduction of a rule allowing the Speaker to police questions on confidential matters in foreign policy, preventing them from reaching the paper without the need for reference to previous blocking answers.[100]

In 1890 Milman also regretted the fact that, on occasions, questions had been permitted on matters before the courts because Speakers were unwilling "to forbid the expression of anything felt by any member to be an urgent grievance". He argued that "Questions calculated to prejudice a pending trial in a court of law, not only trench on matters of controversy, but tend to grave public scandal, and ought to be absolutely forbidden". In such cases, a remonstrance from the chair might not prove sufficient, and so such questions should be declared "altogether out of order".[101] It is perhaps not coincidental that in the 10th edition of the *Treatise* (published in 1893) reference to matters before the courts was described as prohibited by rule for the first time and the Speaker became more active in enforcing that prohibition thereafter.[102]

Milman's period at the Table can also be associated with a tightening of rules on references to individuals in questions, and imputations more generally. In 1880 a member complained that a clerk at the Table had edited his question to remove the name of an individual. In response, the Speaker explained:

> "Names do not appear upon the Paper, unless they are necessary to make the Question plain. That has been the practice hitherto pursued. No doubt, in this case, the name was omitted because it was thought unnecessary. The introduction of a name appeared to be of an invidious character, and, on that

97 *Ibid.*, cols 870–73; *Decisions, 1898*, pp 68–71.

98 HC Deb, 24 March 1898, cols 819–20.

99 *Decisions, 1898*, pp 72–3; HC Deb, 25 March 1898, cols 913–14.

100 Milman, "Questions", pp 263–65.

101 *Ibid.*, pp 262–63.

102 *Treatise* (10th edition), pp 264, 316; First Report from the Select Committee on Procedure, *The Rule relating to Reference in the House to matters considered sub judice*, HC (1962–63) 156, pp 47, 51–52, citing precedents from 1901, 1906 and 1907.

ground, the correction was made."[103]

In July 1881 a clerk at the Table declined altogether to table a question, telling the member that "he has not done so because it contained an attack upon an individual", a decision upheld by the Speaker.[104] The strength of Milman's feelings on this matter were evident in his writings, where he sought to extend some of the protections available to members of the House to other public officials:

> "No grave charge involving personal dishonour against the character of any Member of Parliament *or official* is allowed in a Question, and the name of any person whose official conduct only is impugned is not paraded in the Question, unless it is absolutely necessary to make the Question intelligible".[105]

His desire to push the boundaries of this protection further was made clear in his article in 1890, when he contended that the order paper was "loaded with imputations of misconduct, which, when shown to be founded on false information, amount to little less than calumnies". When levelled against other members, those members at least had a chance to defend themselves, but such accusations "are often hurled recklessly as well against those entitled to well-earned respect as against the humblest and hitherto unknown public servant".[106] The 1893 guidance for members stated:

> "A question cannot be placed upon the Notice paper which publishes the names of persons, or statements not strictly necessary to render the question intelligible, or containing charges which the Member, who asks the question, is not prepared to substantiate."[107]

"The handiest weapons of party warfare": the reform of questions, 1877–1902

In 1878 Palgrave calculated that, if the number of questions continued to rise at the rate seen since the 1850s, questions would occupy a quarter of the parliamentary session by 1897.[108] The seemingly uncontrollable growth of questions was a cause of increasing concern, particularly from the late 1870s onwards. In response, a number of proposals for reform were advanced, notably to impose a limit on the duration of question time and to create a mechanism for questions to receive a written answer. This section explores aspects of the

103 HC Deb, 5 July 1880, col 1632.

104 HC Deb, 15 July 1881, cols 1012–13.

105 *Decisions, 1886–92*, pp 335–36; emphasis added.

106 Milman, "Questions", p 261.

107 Palgrave, ed, *Procedure relating to Public Business* (10th edition), p 45.

108 M Rush, *The Role of the Member of Parliament Since 1868: From Gentlemen to Players* (Oxford, 2001), p 55. Palgrave noted that there were 451 questions on the order paper in 1857, 912 in 1867 and 1,343 in 1877.

growth of questions, traces the development of reform proposals, including Milman's advocacy of them, and touches briefly on the introduction of a time limit and of written questions in 1902.

Sir Stafford Northcote, Chancellor of the Exchequer under Disraeli and Leader of the House after Disraeli's elevation to the Lords, told the Commons in March 1877 of his concern at the growth of questions which were "made, not the vehicles for asking for information, but for conveying in an indirect form attacks or imputations on the Government which it would be far better should be made in direct debate or discussion". He felt that this trend "may lead to very great inconvenience".[109] The following month, a House filled to overflowing to await his budget was kept waiting for almost two hours by notices of questions and nearly 30 questions.[110] In evidence to the Committee on Public Business which Northcote chaired, May said that he was "not aware that any limitation could well be applied" to questions.[111] However, in 1879 Northcote made a radical proposal to his cabinet colleagues:

> "I would notice in particular the importance of putting some limit to the time allowed for questions to Ministers at the beginning of business. A rule that the Speaker should always order the Clerk to read the Orders of the Day at a certain time (say 5:30 at the latest) would greatly promote the conduct of business".[112]

This proposal, which would have effectively allowed a maximum of 90 minutes for questions, was not pursued before the 1880 general election.

The increasing time taken over questions led to one immediate reform in the first session of the new Parliament. It had always been the practice that, even though questions appeared in writing, they were read again by the member during question time. One member estimated in 1880 that this practice accounted for about half of the time taken on questions.[113] Herbert Gladstone later recollected that Irish members in particular "wrote immensely long Questions and read them slowly to the House".[114] This was a matter of custom enforced by the mood of the House, with members having been rebuked for not reading their questions; but the mood soon changed and the Speaker ended the custom that year, stating that "the practice has prevailed of putting questions at such extraordinary length that I am inclined to think the House would do well

109 HC Deb, 22 March 1877, col 324.

110 *Globe*, 13 April 1877, p 3; HC Deb, 12 April 1877, cols 966–89.

111 HC (1878) 268, Q 77.

112 R Vieira, *Time and Politics: Parliament and the Culture of Modernity in Britain and the British World* (Oxford, 2015), p 101, n 43.

113 HC Deb, 8 July 1880, col 1920.

114 Rush, *Member of Parliament*, p 155.

to depart from it".[115] The time saved was not as much as had been hoped, to judge by a comment by the Speaker in his diary the following year:

> "The House has of its own motion pressed members giving notice of questions to desist reading them at full length. Thus time is saved, but after all, the answers consume the more time; and I wish that we could contrive some means of shortening answers."[116]

The problem of the growth of questions became more acute in the 1881 session. An analysis by *The Times* calculated that 4,382 questions (including supplementary questions) were asked, including 1,796 by Irish members, in the session. After the Irish, the main source of questions were the so-called "Fourth Party", with Lord Randolph Churchill asking 94 questions and John Gorst 50.[117] Henry Lucy, noting the increase, regretted "the habit of asking questions, not necessarily trivial in themselves, but … suggestive of wasted human breath and intellect". Lucy saw this growth as serving to "lengthen proceedings in Parliament, and to shorten the time for doing business".[118] This view was echoed by the reforming MP William M Torrens, who thought that the time taken on questions "obviously curtails to a significant extent that which is needed for the transaction of national business".[119] There was little doubt that questions were used to obstruct government business. *The Times*, noting the "assiduity of the Parnellite members", considered that "It is doubtful whether half so many questions would be asked if to the incitements of curiosity were not added the satisfaction of curtailing the time available for the promotion of Ministerial measures".[120] Gladstone observed during the 1881 session that "the Questioning very many times, especially on Mondays and Thursdays, continues for two hours or two and a-half hours".[121]

Although Gorst was one of the causes of the problem, he also proposed a solution, asking in July 1881 "whether it would not be possible when Questions were put requiring Departmental information that the answers should be printed with the Votes, and so save time in putting the Questions, and the time taken up by Ministers in replying".[122] Gladstone gave a cautious answer, indicating that it needed more consideration and that "it could not be adopted as a general rule".[123] In November that year, May left the cabinet in little doubt

115 Howarth, *Questions*, p 200.
116 Vieira, *Time and Politics*, p 34.
117 *The Times*, 7 February 1882, p 6.
118 HW Lucy, *A Popular Handbook of Parliamentary Procedure* (London, 1886), p 92.
119 Vieira, *Time and Politics*, p 33.
120 *The Times*, 21 March 1884, p 9.
121 HC Deb, 1 July 1881, col 1833.
122 *Ibid.*, col 1834.
123 HC Deb, 7 July 1881, col 253.

as to the need for reform of questions:

> "It will be generally admitted that the growing abuses in putting Questions to Ministers need correction. Their number is inconveniently multiplied, and their length unduly extended. They are often trivial, and unworthy of the attention of Parliament; and they are so framed as to convey charges against Ministers, magistrates, and others. They are founded upon newspaper paragraphs, without authority or evidence."[124]

Of Gorst's proposal for written answers, May observed that "It is very doubtful ... whether such a proposal would find favour with the House". He was more encouraging about the proposal for limiting the duration of questions:

> "Another suggestion, less open to objection, is that no Question shall be put after a certain hour, e.g, half-past 5, except any Question relating to the order of business for the day. A similar Rule has long prevailed in regard to Petitions, and the propriety of extending it to Questions may well be considered. In both cases the object would be the same, viz, to insure the commencement of the proper business of the day at a convenient hour."[125]

Reforms continued to be mooted later in that Parliament. In March 1882 the Government were criticised for not having "taken steps to deliver them from the most detestable delays of Business which often took place at Question time".[126] When, in April 1884, Gladstone was asked why he had not introduced proposals to limit the duration of questions, he admitted that such proposals reflected "a feeling that is widely spread, and, I am sorry to say, is only too well-founded", but made clear that it was not a current priority for the Government.[127] He gave a similar reply when pressed again later that year.[128]

The proportion of the House's time taken on questions continued to increase to 1885.[129] In response, the short-lived Conservative administration of 1885–86 proposed reforms which were a curious amalgam of the Gorst proposals for written answers and the Healy proposals for a committee. A motion was tabled to require written notice in all cases and to establish a committee, comprising five members including the Deputy Speaker, to assist the Speaker in determining which questions should be answered orally and which should be subject to written answer; the committee was also to have power to revise questions or return them to a member for revision.[130] The incoming Gladstone

124 TNA, CAB 37/6/29, p 11.
125 *Ibid.*
126 HC Deb, 23 March 1882, col 1722.
127 HC Deb, 3 April 1884, cols 1505–07.
128 HC Deb, 14 November 1884, cols 1725–27.
129 Lucy, *Popular Handbook*, p 93.
130 *The Times*, 23 January 1886, p 8.

cabinet supported the requirement for written notice,[131] which was agreed to on a backbench motion almost immediately.[132] During his brief time as Leader of the House, Lord Randolph Churchill tried to revive the idea of a committee to divide questions between those for oral answer and those for written answer.[133] His successor as leader, W H Smith, did not pursue these ideas, limiting his proposals to enshrining in standing order the general requirement for written notice, while giving effect to a proposal made by a select committee in 1886 to exempt from that requirement questions selected by the Speaker, the basis for what became later private notice (now urgent) questions.[134]

The changes made in the 1880s arguably created new problems. With almost all notices given in writing, questions became ever longer. In 1887 the Speaker made a ruling to try and bear down on this trend:

> "Of late a very large number of Questions have been given in containing a very large quantity of matter to be printed; and it was so overloading the Paper that I thought it right to stop the insertion of anonymous extracts from papers, and not to trouble the House with them."[135]

This did little to halt the trend. In 1890 Milman wrote that "Now many questions comprise elaborate statements of detail, and include even a dozen queries, and cover any number of lines up to a full folio page".[136]

Similarly, the 1880 restriction on members varying their questions from the text on the order paper when reading them encouraged the growth of supplementary questions. Before the 1880s most members were content to read their questions and hear a minister's answer. One member observed in 1886 that "there has arisen another practice of putting a number of supplementary Questions which spring out of the answers given, with the object of arguing against the view drawn out by the original Question, thereby becoming a sort of speech, and involving a great waste of the time of the House".[137] Irish members were particularly keen to use supplementaries in this way, with Thomas Sexton "the greatest exponent of the device of the Supplementary", according to Lucy. The Speaker tried hard to constrain supplementaries to those which were "purely seeking for the elucidation of former answers".[138] Milman took a jaundiced view of their growth, observing that initial questions:

> "are followed up by a demand for explanatory statements, and further

131 TNA, CAB 37/18/48, p 5.
132 HC Deb, 12 March 1886, cols 697–713.
133 TNA, CAB 37/18/19, p 3.
134 Chester, *Questions*, p 47; HC Deb, 7 March 1888, col 525.
135 HC Deb, 26 July 1887, cols 42–43.
136 Milman, "Questions", p 257.
137 HC Deb, 12 March 1886, col 699.
138 Chester, *Questions*, pp 43–48; *Decisions, 1886–92*, p 328; HC Deb, 22 March 1886, col 1504.

> questions are improvised 'on the same subject', and answers insisted on with great pertinacity, although the connexion of the offspring with the parent is hardly vouched for by any recognisable family likeness."[139]

Milman illustrated the ability of this "glut of questions" to delay later business by using the example of a single day, 21 March 1889, when "there were 85 printed questions, or about as many as in the whole session of 1847. But these included 232 separate interrogatories, which were supplemented by 95 others, making a total of 327 in a single evening before the House could proceed to legislative business".[140]

Milman acknowledged the difficulty in regulating questions. They were popular, and the opportunity to ask questions often acted as a safety valve: "a satisfactory answer has often saved a debate, and the desire to facilitate business has induced successive Speakers to be as indulgent as possible in enforcing the established restrictions".[141] He noted how the purpose of question time had changed: "From an easy mode of gaining information or drawing attention to a grievance, questions have become transmuted into the handiest weapons of party warfare".[142] His solution was a variant on the reform proposals of the early 1880s: he suggested that some questions should be chosen for written answer, although these questions could be chosen by ministers themselves rather than a committee. More significantly, he noted that some members might anyway prefer written answers, and should be able to choose that path.[143]

In 1890 Milman thought that "there is no reason to assume that questions have attained their extreme limit".[144] However, for much of the 1890s the heat of party battle cooled and the length of question time fell. In 1893 Gladstone estimated that "on three or four days a week Questions as a rule occupy an average of an hour, or at any rate the time approaches an hour".[145] This was a marked reduction on the length in the 1880s. Mr Speaker Gully, first appointed in 1895, took a much firmer line on supplementary questions, as Lucy admiringly observed:

> "It is argument, not information, that in ninety-nine cases out of a hundred members using the phrase 'arising out of that answer' are after. Few of the ninety and nine succeed in getting to the end of a so-called question. Mr Gully swoops down upon them like a hawk on a sparrow, and before they

139 Milman, "Questions", p 257
140 *Ibid.*, pp 257–58.
141 *Ibid.*, p 260.
142 *Ibid.*, pp 260–61.
143 *Ibid.*, p 262.
144 *Ibid.*, p 258.
145 HC Deb, 10 March 1893, col 1678.

> know where they are the member whose name stands next on the list of printed questions is addressing it to the Minister. This is a practice that not alone saves time by reducing the number of questions and answers. It protects the House from outbursts of the heat engendered by a sudden squabble."[146]

In 1901, one member noted that "a good deal of the cross-examination of Ministers formerly done at question time in the form of supplementary questions has been curtailed".[147]

The reduced pressure on question time was suddenly reversed in the 1901 session, partly due to growing concern among Irish nationalists and others about the conduct of the second South African war. *The Times* observed that "the multiplication of questions to Ministers, which is part of the harassing tactics the Irish Nationalists have revived, is becoming so great a nuisance that it will probably bring about its own remedy".[148] Arthur Balfour, the Leader of the House, claimed that 7,180 questions (including supplementaries) were asked during the session, taking up the equivalent of 15 eight-hour days and ensuring that public business seldom started before 6 pm.[149]

Balfour secured the cabinet's agreement to a far-reaching reform package to be put to the House in the 1902 session. It principally concerned the length and management of the parliamentary day and week, but also included reforms to questions. These proposals were modified significantly before they were agreed by the House, but in essence they gave effect to two proposals mooted for about two decades. First, the length of question time was limited, initially to 40 minutes (later an hour) from the start of proceedings. Second, some answers were to be given in writing, both to oral questions not reached and to questions when the tabling member had signified that a written answer would suffice—so-called "unstarred questions".[150]

Conclusions

The period between 1871 and 1902 saw an almost complete transformation in the House's arrangements for questions to ministers. The most enduring of these were the limits to the length of question time and the system of written answers created in 1902. Milman's writings helped to chart the growing pressures which led to these reforms, and perhaps contributed to the recognition of the value of written answers as a first choice in some cases, rather than simply being a vehicle for unreached questions for oral answer. However, Milman's role was

146 HW Lucy, *A Diary of the Unionist Parliament 1895–1900* (London, 1901), pp 134–35.
147 HC Deb, 26 February 1901, col 1296.
148 *The Times*, 1 March 1901, p 9.
149 HC Deb, 30 January 1902, col 1353; Chester, *Questions*, p 50.
150 Chester, *Questions*, pp 49–84.

more significant in some of the other changes as part of that transformation relating more directly to the role of clerks. As "the sworn foe of all adjectives", he set a pattern for clerks to be more active in the editing of questions. He played a role in seeing that the rules governing questions were considerably expanded, more forcefully expressed and more vigorously enforced. It was when he was a clerk at the Table that the rules of order governing the tabling of questions in the UK House of Commons assumed the form which they largely take to this day.

CONSTITUTIONAL ISSUES AND THE 2016 DOUBLE DISSOLUTION OF THE AUSTRALIAN PARLIAMENT[1]

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Introduction

A number of unusual constitutional issues gave rise to the double dissolution of both Houses of the Australian Parliament in May 2016 prior to the election for the Houses in July 2016. This article describes those circumstances, focusing on the constitutional issues that arose.

To tell the story, we return to the results of the Australian election held on 7 September 2013. At that election, of the 150 seats in the House of Representatives, a coalition government under Prime Minister Tony Abbott comprising members of the Liberal Party of Australia (the Liberals) and the Nationals secured a solid majority with 90 seats; the Australian Labor Party formed the official opposition with 55 seats; and minority party and independent members obtained five seats.

The Australian Parliament is bicameral with the Senate having nearly equal legislative power to the House of Representatives under the Australian constitution. From the first sitting day of the 44th Parliament on 12 November 2013 to 30 June 2014 the government would face the same Senate as for most of the previous Parliament. This Senate comprised 34 Liberal/National coalition senators, 31 Labor Party senators, six Greens senators and two independent or other party senators. These numbers meant, just as they had for much of the 43rd Parliament, that a combination of Labor and the Greens commanded a majority in the Senate. This was particularly relevant to the chances of success of legislation that the incoming government considered to be central to its agenda, and a part of its mandate for government—that is, legislation to repeal a carbon tax and a minerals resource rent tax (commonly referred to as the mining tax), both of which had been legislated for in the previous Parliament.

Perhaps of greater long-term concern to the government was the composition of the Senate elected at the 2013 election, which would come into office on 1 July 2014. This consisted of 33 Liberal/National Coalition senators, 25 Labor senators, 10 Greens senators, three Palmer United Party senators and

[1] An earlier, longer, version of this article was published as ""A Perfect Storm"—The 2016 Double Dissolution Election", *Australasian Parliamentary Review*, vol 31 No 2, spring/summer 2016, pp 19–33.

five other minority and independent senators.[2] This did not augur well for the government's legislative prospects after 1 July 2014, as it would need the support of Labor, the Greens or six of the eight other senators for its legislation to pass the Senate.

Thus the new Abbott Government faced what has been described as:

> "a recurrent fixture of the Australian Parliament that the government of the day usually does not have a majority in the Senate and that it has to engage repeatedly in negotiation with opposition parties or one or two independent senators to modify bills rather than have them rejected outright."[3]

The government begins work

On the second day of the 44th Parliament the Abbott government introduced to the House of Representatives a package of legislation to abolish the carbon tax and a bill to repeal the mining tax. The bills passed the House about a week later and were sent to the Senate. They were referred to a Senate committee. Then the major bills in the carbon tax repeal package were considered and negatived by the Senate at third reading on 20 March 2014. A similar fate befell the bill to repeal the minerals resource rent tax, with it being negatived at second reading on 25 March 2014.

The Abbott government had significant problems generally with the passage of its legislative programme through the Senate during the period to 30 June 2014, when the composition of the Senate changed. Table 1 illustrates this. It also shows the results for the Gillard government in the 43rd Parliament in a similar period when it had the Senate from the previous Parliament and did not have a majority in the Senate.

Table 1

	43rd Parliament (to 30 June 2011)	44th Parliament (to 30 June 2014)
Bills passed by House of Representatives	151	154
Bills passed by both Houses	115	94
"Success" rate	76%	61%

[2] The composition of the eight "other" senators became more disparate with Senator Glenn Lazarus and Senator Jacqui Lambie leaving the Palmer United Party and sitting as independent senators.

[3] Prof Jack Richardson, "Resolving Deadlocks in the Australian Parliament", Department of the Parliamentary Library, Research Paper No 9, 200–04, October 2000, p ii.

Section 57 of the constitution

At this point it is necessary to refer to section 57 of the Australian constitution, which concerns the resolution of deadlocks between the Houses. Paragraph 1 provides:

> "If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time."

The constitution was framed with the expectation that a Parliament of two Houses with nearly equal legislative powers but different methods of composition would lead to differences of view, so there would need to be a mechanism to resolve deadlocks. Like many key provisions of the constitution, section 57 was a compromise agreed in the convention debates in the late 1890s. It reflected a balance between two principles, that is:

> '"representation of the people of a nation in a system of British parliamentary government, and equal representation of the states in a system of American-style Federation. Those two principles find their expression respectively in the House of Representatives and the Senate. They work together, in a lopsided, power-sharing arrangement, complementary but constantly in tension: an asymmetrical symmetry."[4]

Section 57 was meant as a balancing provision because under section 53, with the exception of laws appropriating money or imposing taxation, the Senate was given equal legislative power to the House of Representatives. Section 57 is "designed to ensure that a decisive and determined majority in the national chamber [the House of Representatives] shall be able to overcome the resistance of a majority in the provincial chamber [the Senate]".[5]

There are several important features of paragraph 1 of section 57:

- it applies only to bills originating in the House of Representatives;
- the Senate must first reject or fail to pass or pass with amendments to which

[4] Helen Irving, "Pulling the Trigger: the 1914 Double Dissolution and its legacy", Senate Papers on Parliament, No 63, pp 23–42, at pp 23–24.

[5] J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p 339.

the House of Representatives will not agree the proposed law;
- the House of Representatives must then, after three months have elapsed, pass the same bill and send it to the Senate for consideration;
- if the Senate again rejects or fails to pass the bill or passes with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both Houses simultaneously for an election; and
- the dissolution cannot take place within six months of the expiration of the House of Representatives by effluxion of time.

Bills which fail to pass the Senate twice, having met the other tests in section 57, are referred to as double dissolution "triggers". There can be more than one "trigger" bill: triggers do not have to be used immediately they arise, or at all (as the Governor-General "may" dissolve both Houses). There have been many occasions on which double-dissolution triggers have arisen without a double-dissolution election following.

Possible triggers

In relation to the core bills in the package to repeal the carbon tax, the government waited until three months had expired following the Senate's rejection of the bills to ensure that they could qualify as double-dissolution triggers. The second package of bills was introduced in the House on 23 June 2014 and passed two days later.

The government had scheduled sittings of both Houses in July 2014 so that the new Senate could consider legislation—particularly the carbon-tax repeal package—that had been rejected by the Senate. In the event, all the carbon-tax repeal bills, except one, were passed by the Senate. Therefore these bills did not become double-dissolution triggers.

The exception was the Clean Energy Finance Corporation (Abolition) Bill 2013. This was first negatived by the Senate on 10 December 2013. An identical bill was passed by the House of Representatives on 27 March 2014 and negatived at second reading by the Senate on 18 June 2014, thus making this bill a double-dissolution trigger.

By the end of 2014, following the institution of the new Senate, the Abbott government's legislative record had improved. But it was widely recognised that the disparate nature of the new Senate made it more difficult to negotiate with. Table 2 shows the legislative record as at 31 December 2014. It is compared with the record of the Gillard government at a similar period in the previous Parliament.

Table 2

	43rd Parliament (to 31 December 2011)	44th Parliament (to 31 December 2014)
Bills passed by House of Representatives	249	193
Bills passed by both Houses	222	149
"Success" rate	89%	77%

Further double-dissolution triggers

The government continued to experience difficulties in the Senate. Of particular interest were the three bills which, ultimately, were listed on the proclamation dissolving both Houses of Parliament as having met the requirements of section 57. The Fair Work (Registered Organisations) Amendment Bill 2014 was passed by the House of Representatives on 15 July 2014. It was negatived at second reading by the Senate on 2 March 2015. The House passed an identical bill on 15 July 2015 (more than three months after the Senate's rejection). This was also negatived at second reading by the Senate, on 17 August 2015, making this bill a double-dissolution trigger.

Two other bills—the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013—were passed by the House and subsequently negatived at second reading by the Senate on 17 August 2015. These bills sought to re-establish the Australian Building and Construction Commission and to regulate union activity in the building and construction industry. They became a key part of the story of the double dissolution in 2016 and were the other two bills listed in the proclamation of dissolution as having met the requirements of section 57.

Prorogation and recall of Parliament

When the Senate adjourned on Friday 18 March 2016, it did so with an amendment to the usual motion to fix the next sitting day, which was to be 10 May 2016. The effect of the amendment was that an absolute majority of senators would have to advise the President of the Senate in writing that they wished to fix an alternative meeting time. In moving the amendment, the Leader of the Opposition in the Senate, Senator Wong, said:

> "we have had a game of national kabuki over these last weeks as this government tries to make a decision on whether or not it will go to a double dissolution or early election and whether or not this will require the bringing

> forward of the federal budget … I want to make it very clear, from the Labor party's perspective, that we will not be agreeing to a sitting of the Senate that is not currently scheduled simply to assist this government in an election timetable."[6]

The amendment made it difficult for the Senate to reconvene before its next scheduled sitting, on 10 May 2016. This caused a problem for the government if it was contemplating an earlier double-dissolution election. As noted earlier, the latest a double-dissolution election may be called under section 57 is six months before the House of Representatives expires by effluxion of time. As the House first met on 12 November 2013, the final day on which a double-dissolution election could be called was 11 May 2016, only a day after the next scheduled sitting of the Senate, and also Budget day. On the other hand, to keep future half-Senate elections co-ordinated with House of Representatives elections, the election would have to be held after 1 July 2016 if the terms of the senators elected at the double-dissolution election were to be taken to have begun on 1 July 2016 rather than on 1 July 2015 (in accordance with section 13 of the constitution).

Thus the route to a double-dissolution election seemed unclear, particularly with the Budget scheduled for 10 May 2016. In addition, there had not yet been time for the two bills to re-establish the Australian Building and Construction Commission, which had already been rejected once by the Senate, to be considered again by the Senate. While the government already had a double-dissolution trigger, these bills could give extra weight and urgency to its view that the Senate was disrupting key government legislation.

This set the scene for the next and perhaps least predictable part of the story. On 21 March 2016, the Monday after the Senate had adjourned the previous Friday, the Prime Minister advised the Governor-General, under section 5 of the constitution, to prorogue Parliament on Friday 15 April 2016 and summon Parliament to sit on Monday 18 April 2016 for a second session of the 44th Parliament. Section 5 provides:

> "The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue the Parliament …"

In advising the Governor-General the Prime Minister said that the purpose was to enable consideration of the two bills to re-establish the Australian Building and Construction Commission. Reference was also made to the Fair Work (Registered Organisations) Bill 2014, which was already a double-dissolution trigger, and the need for this bill to be considered by the Senate.

[6] Senate Debates, 17 March 2016, pp 2731–32.

In relation to the motion passed by the Senate at the conclusion of its sitting on 18 March 2016, the supporting advice to the Governor-General from the Attorney-General emphasised the role of executive government in determining the agenda for Parliament:

> "Since Federation, the power of prorogation and recall of Parliament has been exercised by the Governor-General, on ministerial advice, because ministers have believed that the proposed arrangement of sessions of Parliament is the best way, in the circumstances of the time, to manage government business."[7]

Thus the Senate's attempt to prevent further sittings until 10 May 2016 had been trumped by a provision in the constitution not used since 1977 to prorogue Parliament and summon senators and members for a second session.

Having secured the Governor-General's agreement to the prorogation and recall of Parliament, the Prime Minister made clear that if the bills to restore the Australian Building and Construction Commission were not passed by the Senate in the additional sittings planned from 18 April 2016, they would be double-dissolution triggers and so used to advise the Governor-General to dissolve both Houses under section 57, to enable an election to be held on 2 July 2016. In addition, and to fit into a timetable for a dissolution on or before 11 May 2016, the Budget was to be brought forward by a week to 3 May 2016. The government was setting for itself a clear pathway towards an election.[8]

The Houses met on 18 April 2016 for the first meeting of a second session of Parliament since 1977. In accordance with the constitution and the standing orders of both Houses, members of the House of Representatives attended the Senate chamber to hear an address by the Governor-General. He spoke of the government's reasons for recalling the Houses, in particular referring to the Senate giving full and timely consideration to the bills re-establishing the Australian Building and Construction Commission and the Fair Work (Registered Organisations) Bill. The Governor-General stated:

> "I have, on the advice of my ministers, recalled you so that these bills can be considered again, and their fate decided without further delay."[9]

One effect of prorogation is that all matters on the notice paper, including

[7] Advice from the Attorney-General, Senator the Hon George Brandis QC, to the Governor-General, His Excellency General the Hon Sir Peter Cosgrove AK MC (Retd), 21 March 2016, p 4.

[8] For commentary on Prime Minister Turnbull's move see Paul Kelly, "Enemies outfoxed by strength and smarts", *The Australian*, 22 March 2016; David Crowe, "PM pulls the trigger", *The Australian*, 22 March 2016; and Peter Hartcher, "Hopeless ditherer to decisive leader in masterful stroke", *Sydney Morning Herald*, 22 March 2016.

[9] Senate Debates, 18 April 2016, p 2738.

legislation, lapses.[10] In the case of bills that have passed the House and are under consideration in the Senate, the House may, by resolution, send a message to the Senate asking for it to resume consideration of the bills. A motion asking the Senate to resume consideration of the two building and construction bills was the first business in the House after the formalities of an opening day of the new session. The resolution was agreed and the message sent to the Senate. The Senate agreed to the message, duly began its consideration of the bills and, after a brief debate, negatived the bills at second reading. These bills therefore became double-dissolution triggers.

The fate of the Fair Work (Registered Organisations) Bill was a little different. It was introduced in the House but not further debated. It appeared that the fate of the two building and construction bills in the Senate caused the government not to proceed further with it in the House. This bill was, though, already a double-dissolution trigger.

The day after the Senate's rejection of the building and construction bills the Prime Minister, in response to a question from the Leader of the Opposition, made the government's plan clear:

> "after the budget I will advise the Governor-General to dissolve both Houses of Parliament and I will advise him to call an election on 2 July. The Governor-General will consider that request and that advice and he will make a decision, and that is the constitutional fact. That is why I say I expect there to be an election on 2 July. But of course my constitutional duty is, under section 57, to advise the Governor-General of my wishes in that regard, and it is up to him whether to agree to dissolve both Houses and issue the writs."[11]

Supply and the Budget

In accordance with the government's plan both Houses met on 2 May 2016, the day before the rescheduled Budget. Supply bills to provide funding for the essential services of government and Parliament for approximately five months from 1 July 2016 were introduced and passed by the House the same day without opposition. The next day the bills passed the Senate, thus providing appropriation for the core services of government and Parliament through the period of an election campaign, the finalisation of election results, the formation of a government, the meeting of a new Parliament and the passage of the main appropriation bills. This was a crucial for a double dissolution. Without the passage of the supply bills a 2 July 2016 election would not have been possible, as agencies would not have had appropriation from 1 July 2016. Following the

[10] For the effects of prorogation on the business of the House see *House of Representatives Practice*, 6th edition (2012), pp 230–31.

[11] House of Representatives Debates, 19 April 2016, p 3886.

conventions which were accepted by all sides after the blocking of supply by the Senate in 1975, the opposition said it would not seek to delay or block supply bills.

There was now only one more event before the inevitable election. This was the presentation by the Treasurer of the Government's Budget. Its importance had been signalled in the Governor-General's speech at the opening of the second session, when he referred to the Budget reflecting an "economic plan for jobs, growth, saving and investment".[12] The Budget enabled the government to set out its agenda for an election campaign. The Treasurer delivered the Budget on 3 May 2016. The Leader of the Opposition delivered the usual reply to the Budget speech on 5 May 2016, in what was to prove the final speech in the House of Representatives of the 44th Parliament. When the House rose that evening the expectation was that it would not sit the following week as scheduled.

The double dissolution

The final act came with the anticipated call by the Prime Minister on the Governor-General on 8 May 2016. The Prime Minister advised that there were grounds for a section 57 double dissolution of the Senate and the House of Representatives in respect of the three industrial relations bills detailed above. He advised the Governor-General to dissolve both Houses at 9 am the next day, before the scheduled sitting time of either House. The advice of the Prime Minister was accompanied by copies of the relevant bills certified by the Clerk of the House of Representatives and detailed advice from the Attorney-General about the passage of the three bills which demonstrated that they met the requirements of section 57. The Prime Minister's advice also referred to the availability of supply during and after the election period and stated the Houses were to be dissolved before the restriction imposed in section 57 (i.e. before 11 May 2016).

The Governor-General accepted the advice and the Houses were dissolved at 9 am on 9 May 2016 in a ceremony at the front of Parliament House. The last double dissolution had been in 1987; this was the seventh double dissolution in the 115-year history of the Commonwealth.

Reflections on the 2016 double dissolution

It is too early to make anything more than preliminary observations on the 2016 double dissolution.

The unique circumstances that led to the 2016 election demonstrate that

[12] Senate Debates, 18 April 2016, p 2738.

legislative triggers for a double dissolution are a necessary but not sufficient basis for a double-dissolution election to be called. There have been legislative triggers in several Parliaments since the previous double-dissolution election in 1987, without double dissolutions following. This reflects the wording of section 57. It does not require an immediate, or any, double dissolution. That suggests that other factors will be relevant to whether a government chooses to advise the Governor-General to dissolve. These factors, as in 2016, will be particular to the circumstances.

It might therefore be expected that double dissolutions will remain the exception rather than the norm. Only seven of the 45 federal elections since federation have been double-dissolution elections. Four of the seven elections between the mid-1970s to the late 1980s were double-dissolution elections, followed by nearly 30 years without one. 2016 might suggest a return to the norm rather than the first of a new spate of double dissolutions.

As was noted earlier, section 57 was designed to counterbalance what otherwise is the near equal legislative power of the two Houses (as provided in section 53). A former Solicitor-General, in advising then Prime Minister Menzies on the 1951 double dissolution, noted that section 57:

> "is designed to prevent deadlocks in the legislative process, by permitting the Governor-General to give the electorate an opportunity to make a fresh choice for every seat in both Houses, when resistance by the Senate to a measure approved by the House of Representatives has been evinced in a certain manner and has proceeded to a certain point."[13]

This advice points to two features of section 57. It allows the majority in the House of Representatives (i.e. the government) to advise the Governor-General to dissolve both Houses when the conditions have been met in respect of legislative disagreements. This is a powerful mechanism that can be used to resolve disagreements, and perhaps to obtain a generally more co-operative Senate. However, once an election proceeds then:

> "the people as the final arbiters will be the gainers of power by the liability of both Houses to dissolution."[14]

In other words, ultimately the democratic process determines the fate of the protagonists in any dispute between the Houses.

This points to a danger for governments of double-dissolution elections:

> "From the point of view of the government with its majority in the House of Representatives, the idea of a double dissolution may constitute a greater

[13] Documents relating to the simultaneous dissolution of the Senate and the House of Representatives by His Excellency the Governor-General on 19 March 1951, Parliamentary Paper No 6, 1957–58.

[14] Quick and Garran, *op. cit.*, p 688.

deterrent than for opposition parties since a dissolution may afford the opposition an opportunity to win government."[15]

Governments have lost office in three of the seven double-dissolution elections held. In 2016 the government did not lose office, but it retained office with only a slim majority.

A further danger is that the government may not secure a majority in the Senate or a Senate that is any more conducive to compromise. In only one of the seven double-dissolution elections has the government secured a majority in the Senate—in 1951. In 2016 a new electoral system for the Senate seems to have been counterbalanced by a lower quota required for election and the continuation of a drift away from voting for the major parties. Commentators generally agree that the government faces a Senate that may be as difficult as the previous Senate; the early days of the 45th Parliament are pointing in that direction.

It is interesting to note the fate of the legislation that has caused double dissolutions. On the three occasions that the government was not returned to office in a double-dissolution election (1914, 1975 and 1983) the legislation which was the subject of disagreement unsurprisingly did not proceed in the new Parliament. In 1951, when the Menzies government was re-elected with a majority in the Senate, the new Parliament passed the bill that had been the subject of disagreement. In 1987 the Hawke government, which was re-elected at the double-dissolution election, eventually decided not to proceed with the bill which was the subject of the disagreement. In the only other instance before 2016 in which a government was re-elected after a double dissolution, the Whitlam government in 1974 proceeded with the only joint sitting held since federation. A joint sitting is provided for under section 57 if the Senate in the new Parliament again rejects the bill that was the subject of the disagreement. At the 1974 joint sitting all six bills that were the subject of disagreement were passed, although one of the bills was subsequently judged by the High Court to be invalid.[16]

The three bills which were the subject of the disagreement in 2016 were passed by both Houses in the new Parliament by the end of 2016. This could be seen as vindicating the double dissolution, although the fact that there were significant amendments to the bills suggests the balance between the House and Senate continues.

15 Richardson, *op. cit.*, p 16.

16 The High Court considered the necessary three-month interval for the second passage through the House of Representatives had not been met and that the Senate had not "failed to pass" the bill.

THE EUROPEAN UNION REFERENDUM AND PARLIAMENT

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Introduction

On 17 December 2015 the European Union Referendum Bill, which provided for a UK-wide referendum on the United Kingdom's membership of the European Union, received royal assent. This article revisits parliamentary scrutiny of the bill by the House of Commons and the House of Lords, and its implications in the aftermath of the referendum, which was held on 23 June 2016.

The bill's passage through Parliament was, in hindsight and in view of the dramatic consequences of the referendum result, remarkably smooth. Where the Parliamentary Voting System and Constituencies Bill took 17 days in committee in the House of Lords in 2010–11, and the House of Lords Reform Bill failed to secure a programme motion in the House of Commons in 2012, the EU Referendum Bill made swift progress through both Houses. It was presented for royal assent following a single round of ping pong and only two government defeats—one in each House, on purdah rules (in the Commons) and on allowing 16 and 17 year-olds to vote in the referendum (in the Lords). The bill benefited from cross-party consensus that the referendum should be held, with only the Scottish National Party putting up concerted opposition in the House of Commons. Perhaps as a consequence of that consensus, the bill attracted no more than routine attention by select committees in either House.

Also striking was the extent to which the courts were drawn into the acrimonious debate over how the government should give effect to the result of the referendum—the bill itself having made no provision for what happens in the event of a leave vote.

Background

The modern history of referendums in the United Kingdom begins in 1973. In that year the UK joined the European Economic Community (without a referendum held first) and Northern Ireland voted in a referendum to remain part of the United Kingdom rather than join the Republic of Ireland. Since then, a further 11 referendums have been held in the UK. The first UK-wide referendum was in 1975, on whether the United Kingdom should stay in the European Community. This followed the then Labour government's renegotiation of the terms of the UK's membership of the Community.

No further UK-wide referendums were held until 2011, when the public were invited to vote on whether to change the system for electing MPs to the House of Commons from first past the post to the alternative vote. In the intervening period, most of the referendums held in the UK were about devolution. A spate of referendums in the late 1990s resulted in the establishment of the Scottish Parliament, the National Assembly for Wales, the Greater London Authority and the Mayor of London. In addition the Belfast Agreement (also known as the Good Friday Agreement) was endorsed through a referendum held in Northern Ireland in May 1998.

The current legal framework for referendums was established by the Political Parties, Elections and Referendums Act 2000. This created the Electoral Commission, and charged it with regulating elections and referendums held under the Act. The Act prescribes the means by which a referendum question, a referendum period and lead campaign groups (known as designated organisations) are determined. It also prescribes the assistance the lead campaign groups are entitled to receive. The Act places requirements on individuals and groups who campaign in referendums (known as permitted participants), including controlling how much they may spend and the donations they may accept.

In their manifesto for the 2015 general election the Conservative party pledged to "negotiate a new settlement for Britain in Europe, and then ask the British people whether they want to stay in the EU on this reformed basis or leave". They undertook to "hold that in-out referendum before the end of 2017 and respect the outcome".[1] The Liberal Democrats undertook to "hold an in/out referendum when there is next any treaty change involving a material transfer of sovereignty from the UK to the EU" and to "campaign for the UK to remain in the European Union when that referendum comes".[2] The Labour party pledged to "legislate for a lock that guarantees that there can be no transfer of powers from Britain to the European Union without the consent of the British public through an in/out referendum."[3] Of the main parties represented in the House of Commons, only the Scottish National Party campaigned against a referendum on EU membership, pledging to "oppose a referendum on membership of the EU" and undertaking that "if an in/out EU referendum does go ahead, we will seek to amend the legislation to ensure that no constituent part of the UK can be taken out of the EU against its will. We will propose a 'double majority' rule—meaning that unless England, Scotland, Wales and Northern Ireland each vote to leave the EU, the UK would remain a

1 2015 Conservative manifesto, p 72.
2 2015 Liberal Democrat manifesto, p 149.
3 2015 Labour manifesto, p 77.

member state."[4]

The EU Referendum Bill 2015

> "The Bill takes the best examples of good practice from previous referendums in the United Kingdom, and sets out rules on who can vote, and how they vote, which are reasonable and robust. It ensures a fair campaign so that the deck is not stacked in favour of one outcome or the other. This bill sets the stage for one of the biggest decisions that the people of these islands have been asked to make in a generation."[5]

Following the 2015 general election, won by the Conservative party, the government introduced a bill to give effect to the Conservatives' manifesto commitment. Clause 1 of the bill provided that a "referendum is to be held on whether the United Kingdom should remain a member of the European Union". The clause also provided that the referendum should be held on a day appointed by the Secretary of State and set by regulations; that the referendum should be held no later than the end of 2017; and specified the question that should appear on ballot papers. The remaining clauses of the bill included provisions on entitlement to vote in the referendum, the conduct of the referendum, rules around campaigning and financial controls.

Like the Act that provided for the 1975 referendum on the UK's membership of the European Community, the EU Referendum Bill 2015 made no provision for the consequences of either possible outcome of the referendum.

Scrutiny in the House of Commons

> "It is to my eternal regret that Parliament launched down this route without being sufficiently vigilant or diligent with regard to the risks we faced in the referendum or the nature of the referendum we were offering to the country. It was a profoundly flawed referendum in many ways, and one that many across the House feel could have been dramatically improved with greater scrutiny and care. Why did we not offer that scrutiny? I do not think that many members on either side of the debate seriously thought we would lose."[6]

The second reading of the EU Referendum Bill in the House of Commons was held in June 2015. The opposition Labour party indicated that they would "support the bill and its passage through Parliament".[7] Consistent with their

4 2015 Scottish National Party manifesto, p 9.

5 Baroness Anelay of St Johns, moving the second reading of the bill in the House of Lords (HL Deb, 13 October 2015, col 94).

6 Owen Smith MP, HC Deb, 7 February 2017, col 309.

7 HC Deb, 9 June 2015, col 1057.

manifesto commitment, the Scottish National Party—the second-largest opposition party in the House of Commons—opposed the bill. Its former leader, Alex Salmond MP, described the referendum as "nonsense" because "nobody believes that the Prime Minister wants to take the country out of the European Union."[8] Scrutiny of the bill in the House of Commons mainly focused on the "ground rules" for the contest, rather than the implications of either possible outcome.

The provisions that attracted most debate during second reading concerned the franchise for and timing of the referendum, and the lifting of so-called "purdah" provisions in the Political Parties, Elections and Referendums Act 2000, which restrict government activity during the campaign period.

The government had proposed using the Westminster franchise as the starting point for the referendum, with "modest additions" in the form of Commonwealth and Irish citizens in Gibraltar, and peers who are members of the House of Lords. The opposition argued in favour of extending the franchise to 16 and 17 year-olds, consistent with the Labour party's policy of lowering the voting age in all elections.[9] The Scottish National Party (SNP) argued that EU nationals living in the UK should be included in the franchise as well as 16 and 17 year-olds.[10]

The SNP objected to the bill not ruling out holding the referendum on the same days as elections to the devolved legislatures.[11] The opposition also argued that the referendum should not be held on the same day as other elections, and that it should take place as soon as possible to avoid unnecessary uncertainty.[12]

On "purdah" the debate centred on the government's claim that, if left unaltered, section 125 of the Political Parties, Elections and Referendums Act 2000 (PPERA)—which restricts the ability of central and local government to publish material relating to the referendum in the final 28 days of the campaign—would "stop the government from publishing material that deals with any issue raised by the referendum question". The Foreign Secretary argued that this was "unworkable" and "could prevent ministers from conducting the ordinary day-to-day business of the UK's dealings with the European Union".[13]

A number of MPs, including Conservatives on the government benches, expressed concern about lifting the purdah provisions, on the ground that it

8 HC Deb, 9 June 2015, col 1069.
9 HC Deb, 9 June 2015, col 1061.
10 HC Deb, 9 June 2015, cols 160–72.
11 HC Deb, 9 June 2015, col 1067.
12 HC Deb, 9 June 2015, cols 1062–63.
13 HC Deb, 9 June 2015, col 1055.

might lead to a perception that the referendum was "rigged".[14] This included Conservatives in favour of leaving the EU, such as Peter Bone—who raised the prospect of the government using "the apparatus of state to push a case, rather than letting the two sides have equal and fair access"—and those against leaving, such as Dominic Grieve—who warned against conveying "an impression that the government will come in and try to load the dice".[15]

At the end of the second reading debate the House of Commons rejected by 338 to 59 a reasoned amendment[16] tabled by the Scottish National Party declining to give the bill a second reading. Only the SNP voted against the second reading.

The committee stage took place on the floor of the House of Commons over two days in June 2015. No amendments other than government amendments were carried. Amendments seeking to reintroduce purdah provisions, to use the local-elections franchise and to extend the vote to 16 and 17 year-olds were negatived on division, as was an amendment seeking to prevent the referendum from coinciding with other elections. On behalf of the SNP, and with the support of Plaid Cymru, Alex Salmond moved an amendment seeking to require a double majority for withdrawal, so that the UK could leave the EU only if there was a majority in the whole of the UK and a majority in each of its four constituent parts for leaving.[17] The government argued that "in respect of EU membership, we are one United Kingdom" and that therefore "there should be one referendum and one result".[18] The amendment was negatived without a division.

The bill's report and third reading in the House of Commons took place on 7 September 2015. The main point of contention at report was purdah, in the form of section 125 of the PPERA. There was concern that the government's proposal to modify the purdah rules preventing ministers, government departments and local authorities from publishing "promotional material" in the month before voting could lead to the "Whitehall machine" being used to promote continued EU membership. The government was defeated by 312 votes to 285 on its proposal—made as a concession—to apply the section 125

14 Owen Paterson MP, 9 June 2015, col 1065.

15 HC Deb, 9 June 2015, col 1056.

16 The reasoned amendment proposed that the House should decline to give the bill a second reading because it did not give 16 and 17 year-olds or most EU nationals living in the UK the right to vote in the referendum, did not provide for a double-majority threshold to ensure that no nation or jurisdiction of the UK could be taken out of the EU against its will, and did not include provision to ensure that the referendum could not be held on the same days as elections to the devolved legislatures.

17 HC Deb, 16 June 2015, col 186.

18 HC Deb, 16 June 2015, col 232.

purdah provisions with modifications. Thirty-seven Conservative rebels joined Labour and the SNP to defeat the government in the House of Commons for the first time in the 2015 Parliament. An opposition amendment applying the section 125 restrictions in full was instead passed, together with a new clause proposed by the government creating a power to make exceptions to those restrictions through regulations subject to the affirmative procedure.

Scepticism about how the government might handle the referendum was also evident in an amendment tabled by Conservative backbencher Bernard Jenkin. This sought to prevent a snap poll from being held by requiring four months' notice of how the final purdah rules would work—an amendment accepted by the government "in the interests of bridge-building".

Meanwhile the Electoral Commission warned that the question proposed by the government—"Should the United Kingdom remain a member of the European Union?"—was subtly biased. It recommended that the question should instead be "Should the United Kingdom remain a member of the European Union or leave the European Union?" A government amendment changing the question to reflect that advice was agreed without a division.[19]

An SNP amendment to extend the franchise to EU nationals eligible to vote in European Parliament elections in the UK was defeated on division, as was an opposition amendment that would have lowered the voting age for the referendum to 16. The Commons agreed to a government amendment ruling out 4 May 2017 as the date for the referendum, and defeated on division an SNP amendment that would have ruled out holding the referendum within three months of elections to the Scottish Parliament, Welsh Assembly or Northern Ireland Assembly.

MPs took an interest in the information that would be made available to the public in advance of the referendum campaign. An opposition amendment that would have required the government to produce a white paper on the results of the government's renegotiation with the EU and the consequences for Britain of leaving the EU was rejected on division.

The bill was passed and sent to the Lords after the Commons had voted to give it a third reading by 316 votes to 53—the latter total made up of 52 SNP MPs and the Labour MP Dennis Skinner.

Scrutiny in the House of Lords

"During the passage of that European referendum bill through your Lordships' House there were debates, often heated, about the virtues or otherwise of membership of the European Union. A great many amendments

[19] HC Deb, 7 September 2015, col 171.

> were put down, but they were concerned with the franchise—what one might call the rules of engagement in relation to the referendum campaign. All the major parties agreed that there should be a referendum. No parliamentarian put down an amendment spelling out what the consequences of an out vote would be. There was, for example, no amendment on thresholds or the sort of Brexit that would follow—let alone anything about a second referendum."[20]

In the House of Lords the EU Referendum Bill engaged the Salisbury convention, under which the Lords accords a second reading to a government's manifesto bills, does not subject them to "wrecking amendments" which change the government's manifesto intention as proposed in the bill, and sends or returns them to the Commons in reasonable time for any amendments it has proposed to be considered.[21]

Second reading in the House of Lords was held on 13 October 2015. The opposition reiterated the Labour party's support for the principle of holding a referendum, while stressing that "it is imperative that we win and retain our membership".[22] On behalf of the Liberal Democrats—the second-largest opposition party in the Lords—Baroness Smith of Newnham said the party recognised "that the Conservatives won the general election and that we are to move towards a referendum … we will not get into the detail today of whether we will have a referendum: it will clearly happen."[23]

During second reading the issues that attracted most debate were the franchise for the referendum—specifically whether it should extend to 16 and 17 year-olds, to EU nationals living in the UK and to UK nationals living in the EU who had been overseas for more than 15 years—and public information, in the form of calls for the government to publish a series of reports to inform the public in the run-up to the referendum. The bill's provisions on purdah attracted less interest than in the Commons, although the issue was raised, notably by Conservative backbenchers. The motion for second reading was agreed without a vote.

Between second reading and committee the House of Lords' Select Committee on the Constitution published its report on the bill. The committee observed:

> "If the United Kingdom were to leave the European Union it would be the most significant change to the United Kingdom's constitutional arrangements in decades, with far-reaching effects on every part of our constitutional

[20] Lord Faulks, HL Deb, 20 February 2017, col 68.

[21] Joint Committee on Conventions, *Conventions of the UK Parliament* (2005–06, HL Paper 265, HC 1212), para 99.

[22] Baroness Morgan of Ely, HL Deb, 13 October 2015, col 94.

[23] HL Deb, 13 October 2015, cols 99–100.

framework.

We do not intend to comment on the bill in detail. Although the referendum it institutes will be of the utmost constitutional importance, the bill itself simply provides for the holding of a referendum."[24]

The committee drew the attention of the House to "three issues which it may wish to consider during the passage of the bill":

(i) the timing of the referendum—whether further restrictions were necessary to prevent the referendum from being held on the same day as any other polls;

(ii) purdah—ensuring that the circumstances under which the government could make regulations to mandate exemptions to the rules in section 125 of PPERA were clearly set out; and

(iii) whether the bill should be amended to avoid a situation where one side could, in effect, prevent the lead campaign group on the other side from being designated.

During second reading the chairman of the House of Lords' Select Committee on the European Union observed that as the bill was domestic legislation, that committee had "no scrutiny locus to apply to it". The EU Committee would instead conduct an inquiry into the government's vision for EU reform and the renegotiation process.[25]

The committee stage of the bill was held over three days in late October and early November 2015, on the floor of the House. No amendments were pressed to a vote; the only amendments agreed were government amendments, most of them minor and technical. Report stage took place in the second half of November, over two days. Two amendments, both relating to the franchise, were pressed to a vote: an opposition amendment extending the franchise to 16 and 17 year-olds, and a Liberal Democrat amendment extending the franchise to UK citizens who had lived in the EU for more than 15 years. The opposition amendment was carried by 293 votes to 211, while the Liberal Democrat amendment was defeated, by 214 votes to 116.

On report a series of government amendments were made by unanimous agreement of the House. The most notable were two amendments—proposed as concessions—placing a duty on the Secretary of State to publish and lay before Parliament a report outlining what had been agreed by EU member states as a

[24] House of Lords Select Committee on the Constitution, *European Union Referendum Bill* (5th report, 2015–16, HL Paper 40), paras 3–4.

[25] Lord Boswell of Aynho, HL Deb, 13 October 2015, cols 143–44. See also House of Lords Select Committee on the European Union, *The referendum on UK membership of the EU: assessing the reform process* (3rd report, 2015–16, HL Paper 30); and *The EU referendum and EU reform* (9th report, 2015–16, HL Paper 122).

result of the renegotiation and offering the government's view on the outcome; and a further report providing information about the rights and obligations that arise under EU law as a result of the UK's membership, and describing alternative arrangements that other countries which are not members of the EU already have with the EU. Both reports were to be published at least 10 weeks before the poll.

These amendments resulted in three government white papers: *The best of both worlds: the United Kingdom's special status in a reformed European Union*, published in February 2016; *Alternatives to membership: possible models for the United Kingdom outside the European Union*, published in March 2016; and *Rights and obligations of European Union membership*, published in April 2016.

On third reading in December 2015 further government amendments were made to the bill. The bill was read a third time without a vote, passed and returned to the Commons.

Ping pong

During ping pong the main contention between the two Houses was on whether the franchise for the referendum should be extended to 16 and 17 year-olds. This was the only issue on which the government were defeated in the Lords. On 8 December 2015 the Commons disagreed with the Lords amendment extending the franchise by 303 to 253. All other Lords amendments—45 in total—were agreed to without a vote. The bill was considered again by the Lords on 14 December 2015. The opposition invited the House to offer an amendment in lieu on 16 and 17 year-olds, but was defeated by 263 votes to 246. Disagreement between the Houses had thus been resolved after a single round of ping pong, and the bill went on to receive royal assent shortly before Christmas.

Secondary legislation

At the same time as the EU Referendum Bill was making its way through Parliament, prime minister David Cameron was leading negotiations with other EU member states on reforms to the UK's relationship with the EU which the government wanted to secure before holding the referendum. A deal was finalised at the European Council meeting of heads of government on 18–19 February 2016. The following day the Prime Minister announced that the referendum would be held on Thursday 23 June 2016. Under section 1(2) of the EU Referendum Act 2015 the date for the referendum had to be set by regulations and approved by both Houses.

The draft European Union Referendum (Date of Referendum etc.) Regulations 2016 were laid before both Houses on 22 February 2016. They set the referendum date as 23 June 2016, with the referendum period, during

which campaign expenses were restricted, being the 10 weeks starting on 15 April and ending on 23 June 2016.[26] While the EU Referendum Bill had proceeded through Parliament on a normal timetable, the passage of the draft regulations was expedited: the instrument was approved by both Houses the week after being laid. The government argued that they chose the date of 23 June because it allowed as much time as possible after the May local elections without running into the school holiday period (which was due to start on 24 June in parts of Scotland). Therefore the government proposed to reduce the time normally available for parliamentary scrutiny of affirmative instruments rather than compressing the campaign and designation periods.

The two Houses accepted the government's case. The draft regulations were approved in the Commons on 29 February 2016, by 475 votes to 59. Those voting against approving the date were mainly SNP MPs, but also included MPs from the Democratic Unionist Party, Plaid Cymru, the Ulster Unionist Party and the Social Democratic and Labour Party, as well as Labour and independents. The devolved administrations in Scotland, Wales and Northern Ireland were concerned that the date selected would mean launching the referendum campaign part-way through the campaigns for certain local, mayoral, and Police and Crime Commissioner elections. The House of Lords approved the draft regulations on 2 March 2016, without a division, thereby taking the final legislative step to enable the referendum to be held.[27]

Aftermath of the referendum

> "The result of the referendum on the UK's membership of the European Union will be final. The government would have a democratic duty to give effect to the electorate's decision. The prime minister made clear to the House of Commons that "if the British people vote to leave, there is only one way to bring that about, namely to trigger article 50 of the treaties and begin the process of exit, and the British people would rightly expect that to start straight away"."[28]

The EU Referendum Act 2015 did not make provision about the aftermath of the referendum. In *R v Secretary of State for Exiting the European Union* the Supreme Court contrasted this with other statutes, observing that "more

[26] The draft regulations also set 4 March 2016 as the start of the 28-day period in which applications could be made to become a designated organisation at the referendum.

[27] The arrangements for how the poll was to be organised were set out in the EU Referendum (Conduct) Regulations 2016, which had already been laid and approved separately.

[28] HM Government, *The Process for withdrawing from the European Union* (Cm 9216, February 2016), para 2.1. See also the prime minister's statement to the House of Commons on the European Council: HC Deb, 22 February 2016, col 24.

often than not" legislation authorising a referendum has provided for the consequences on the result.[29]

For example, the Scotland Act 1978 provided for devolution, but stipulated that the minister should bring the Act into force if there was a specified majority in the referendum; if there was not the minister was required to lay an order repealing the Act (which is what happened when the specified majority was not reached). The Parliamentary Voting System and Constituencies Act 2011 included a provision requiring the alternative vote system to be adopted in elections to the House of Commons, but in section 8 stipulated that the minister should bring that provision into force if it was approved in a referendum; if it was not, the minister should repeal it (which is what happened when the referendum resulted in a rejection of the alternative vote). The Northern Ireland Act 1998 was less prescriptive, but nonetheless provided in section 1 that if a referendum resulted in a majority in favour of the province becoming part of a united Ireland the Secretary of State should lay appropriate proposals before Parliament.[30] Perhaps fittingly, an outlier is the Act that paved the way for the 1975 referendum on the UK's membership of the European Community. It provided only that the referendum should be held, and did so in substantially similar terms to the 2015 Act.

Although the 2015 Act did not make provision about next steps after the referendum, one point that was not in doubt was that the referendum result would not be legally binding.[31] Indeed, ministers were explicit during the passage of the bill that the government would respect the result of the referendum even though it would not be binding in law.[32]

In contrast to what was envisaged in their white paper *The process for withdrawing from the European Union*, the government did not trigger article 50 of the Treaty on European Union—the legal mechanism for withdrawing from the European Union—"straight away" following the referendum vote to leave.[33] Instead, David Cameron signalled his intention to resign as prime minister and to leave the decision to his successor. Within days of the referendum, he told the House of Commons that "the British government will not be triggering article 50 at this stage. Before we do that, we need to determine the kind of relationship we want with the EU, and that is rightly something for the next prime minister

29 *R v Secretary of State for Exiting the European Union*, UKSC 5 [2017], paras 118–19.

30 *Ibid.*

31 On whether referendums in the UK can ever be legally binding, see House of Lords Constitution Committee, *Referendums in the United Kingdom* (12th report, 2009–10, HL Paper 99), para 197.

32 See for example Baroness Anelay of St Johns, HL Deb, 13 October 2015, col 222.

33 Cm 9216, *op. cit.*, para 5.4.

and their cabinet to decide."[34]

During the pause that ensued a number of legal challenges were brought on the steps that the government should be required to take as a matter of domestic law before triggering article 50. The two principal cases concerned the government's use of its prerogative powers and the role of the devolved legislatures in initiating the withdrawal process.

In proceedings brought by Gina Miller and Deir dos Santos against the Secretary of State for Exiting the European Union the applicants questioned the extent of ministers' power to effect changes in domestic law through exercise of prerogative powers at the international level.

In proceedings brought by Steven Agnew and others and by Raymond McCord against the Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland the courts were invited to rule on whether the terms on which powers had been statutorily devolved to the administrations of Scotland, Wales and Northern Ireland were such that, unless Parliament provided for withdrawal by statute, it would not be possible for formal notice of the United Kingdom's withdrawal from the EU treaties to be given without first consulting or obtaining the agreement of the devolved legislatures.

The *Miller* case reached the Supreme Court following an appeal by the Secretary of State for Exiting the European Union. Devolution issues raised in the Agnew and McCord cases were referred to the Supreme Court by the Attorney General for Northern Ireland and the Northern Ireland Court of Appeal.

By a majority of eight to three, the Supreme Court dismissed the Secretary of State's appeal against the High Court's ruling in the *Miller* case and held that an Act of Parliament was required to authorise the government to issue a notice to withdraw from the EU under article 50.

The court held that prerogative powers, including the power to make and unmake treaties, could be curtailed by an Act of Parliament, whether expressly or by implication. It decided that the European Communities Act 1972 provided "a new constitutional process for making law in the United Kingdom" and that as long as the Act remains in force, its effect is to constitute EU law as an "independent and overriding source of domestic law". The loss of this source of law—which would follow from serving the article 50 notice, which both parties to the appeal agreed was irrevocable—"is a fundamental legal change which justifies the conclusion that prerogative powers cannot be invoked to withdraw

[34] HC Deb, 27 June 2016, col 24.

from EU treaties."[35]

The Supreme Court concluded that there is no general rule on the legal effect of referendums: "the effect of any particular referendum must depend on the terms of the statute which authorises it."[36] The court held that, where "the implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through parliamentary legislation."[37]

As regards the issues raised in the *Agnew* and *McCord* cases, the Supreme Court concluded that the devolution Acts were passed by Parliament on the assumption that the UK would be a member of the European Union, but they did not require the UK to remain a member. It held that relations with the European Union were reserved to the UK government and UK Parliament, and that the devolved legislatures did not have parallel legislative competence in relation to withdrawal from the European Union.[38] The devolved legislatures were not, therefore, required to pass legislation authorising the triggering of article 50.

The Supreme Court also rejected—unanimously—the argument that the Sewel convention[39] (according to which the Westminster Parliament does not normally legislate with regard to devolved matters except with the agreement of the devolved legislature) meant that an Act of Parliament authorising the UK's exit from the EU was contingent on the devolved legislatures' consent. The court held that Parliament's intention in recognising the Sewel convention in the Scotland Act 2016 was to entrench it as a political convention, not a legal rule justiciable by the courts.[40]

Two aspects of the Supreme Court's judgment are worth highlighting. Both parties in the *Miller* case agreed that issuing the article 50 notice was irrevocable and would inevitably lead to the EU treaties, and with them most EU law, ceasing to have effect in the United Kingdom. Lord Pannick QC, on behalf of Mrs Miller, submitted that the giving of notice would pre-empt the decision of Parliament on repeal of the European Communities Act 1972. Had the government argued that the article 50 notice could be withdrawn once issued, it would have been harder to make that case. The reversibility of an article 50

35 *R v Secretary of State for Exiting the European Union*, UKSC 5 [2017], paras 62, 65, 83.

36 *Ibid.*, para 11.

37 *Ibid.*, para 121.

38 *Ibid.*, para 130.

39 Named after John Buttifant, Lord Sewel, a Scotland Office minister at the time of the passing of the Scotland Act 1998, who expressed his desire that such a convention would be adhered to.

40 *Ibid.*, para 148.

notification is disputed, and has never been tested, but it appears to have suited both parties in this case to assert otherwise, not least in order to avoid a possible "preliminary reference" to the Court of Justice of the European Union for a binding view on the matter.

The Supreme Court's conclusion on the Sewel convention, and the effect of its incorporation into statute, is also significant. It could become relevant again during the passage of the European Union (Withdrawal) Bill 2017—which seeks to repeal the European Communities Act 1972 and make other provision enabling the UK to leave the EU—since it implies that legislative consent for the bill from the devolved legislatures is not required as a matter of law (as opposed to as a matter of politics).

Aftermath of the Supreme Court judgment

At the time that the legal challenges to the government's intention to use prerogative powers to trigger article 50 were brought, it was thought that the need to take a bill through Parliament could play havoc with the government's timetable for notification, force it to reveal more about its plans for a new relationship with the EU in order to ease passage of the bill, and even thwart notification altogether if the bill were to run into sustained opposition in Parliament.

In the event, none of those predictions came to pass. Two days after the Supreme Court handed down its judgment in January 2017 the Government introduced the European Union (Notification of Withdrawal) Bill, intended to give the prime minister power to notify the European Council of the government's intention to withdraw from the European Union, under the procedure set out in article 50. Like the referendum bill that went before it, the bill's passage through Parliament was relatively smooth: the government suffered no defeats in the House of Commons and two defeats in the House of Lords, which were overturned in a single round of ping pong. The bill received royal assent on 16 March 2017, and the prime minister wrote to the President of the European Council triggering article 50 later that month, thereby initiating the United Kingdom's withdrawal from the European Union.

IRRECONCILABLE DIFFERENCES AND THE FATHER OF RECONCILIATION

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Introduction

This article is only indirectly about Patrick Dodson, widely accepted as the father of aboriginal reconciliation in Australia, and an eminent Australian. On 28 April 2016 Mr Dodson was selected unopposed at a joint sitting of the two Houses of the Parliament of Western Australia to fill the vacancy in the Australian Senate resulting from the resignation of Senator Joe Bullock. Mr Dodson was sworn in and took his seat in the Senate on 2 May 2016. Six days later the Prime Minister advised the Governor-General to dissolve the two Houses of the Federal Parliament at 9 am the next day, 9 May 2016. The double-dissolution federal election would take place on 2 July 2016.[1]

Mr Dodson is in a select group of senators who have served for less than two weeks before becoming a political "feather duster".[2] Being number three on the Western Australian Senate ticket for the Australian Labor party in the 2 July 2016 poll guaranteed him a reprise as senator for Western Australia.

Mr Dodson is a minor player in the story that follows. He is the object and cause of the Western Australian executive requiring the Houses of the WA Parliament to convene a joint sitting at a time of the executive's choosing to fill a Senate vacancy when the person chosen to fill that vacancy would be a senator for a matter of days. This story is about the powers and privileges of a House of Parliament and its capacity to resist executive will.

Political theory tells us that Parliament is supreme and that in accordance with the privilege of exclusive cognisance it determines its business and when it adjourns and reconvenes. The privilege of a House of Parliament to determine its adjournments is subject to any statutory power granted to the Crown or any Crown prerogative. The most common example of a statutory power to determine adjournments is the power of the Crown to prorogue Parliament, to dissolve Parliament and to fix a date for the Parliament to convene for a new session.

In unicameral parliaments in which the executive commands a majority

[1] See the article "Constitutional issues and the 2016 double dissolution of the Australian Parliament" in this edition of *The Table*.

[2] Pat Dodson served 12 days as senator for Western Australia until the dissolution on 9 May 2016.

and party discipline is strong, political theory and political reality converge. Parliament chooses to adjourn and reconvene its sittings at the time in effect determined by the executive. To a casual observer this raises no concerns. However, in bicameral legislatures where the executive does not command a majority of votes in a chamber the members of the House, not the executive, ultimately determine the dates and times of sittings. In some cases, as will be shown, the presiding officer is able unilaterally to alter an adjournment notwithstanding the absence of an express power in standing orders or statute.

Resignation of Senator Joe Bullock

Senator Joe Bullock announced that he would resign from the Senate on 1 March 2016.[3] However, he did not formally resign until 13 April 2016. The effect was that if a person was to fill the Senate vacancy there would need to be a joint sitting of the Houses of the WA Parliament. The problem was that the two Houses had on 7 April 2016 each adjourned until 10 May 2016. There was to be a double-dissolution federal election on 2 July 2016. The timing of the federal election meant that under section 57 of the Commonwealth constitution the federal Houses had to dissolve no later than 11 May 2016. This was to comply with the constitutional requirement that a simultaneous dissolution of the Senate and House of Representatives "shall not take place within 6 months before the date of expiry of the House of Representatives by effluxion of time."[4]

In Western Australia joint sittings to fill a casual vacancy in the Senate occur on a day that the Houses would usually sit for other business. This is convenient to members and minimises the cost to taxpayers (the cost of a sitting day is approximately $63,000). The difficulty arising from the timing of Senator Bullock's resignation and the intended date of the federal election was that the Senate would be dissolved on or before the date when a joint sitting of the WA House would usually occur: 11 May 2016. Even if chosen by a joint sitting that day, Mr Dodson would not have an opportunity to be sworn in and take his seat in the Senate. If the vacancy was to be filled, a joint sitting would therefore need to take place in April 2016 and the adjournments of the two Houses altered. To comply with the standing joint rules for the filling of a Senate vacancy[5] the Houses would first need to meet separately to pass the necessary resolutions to convene a joint sitting and then to hold that joint sitting.

This all appeared to be academic given that any person chosen to fill the vacancy would sit in the Senate for only a matter of days before the Senate

[3] SD, 1 March 2016, pp 1521–26.

[4] Commonwealth of Australia Constitution Act 1900, section 57. There was some debate as to whether this date was in fact 10 May 2016.

[5] Agreed by both Houses of the Parliament of Western Australia in 1903.

dissolved.[6] The usual process of Senate party whips granting pairs would mean that failure to fill the vacancy would have no influence on the outcome of votes for the bills that were the triggers for a double-dissolution federal election.[7] The Senate rejected these bills before the Houses of the Western Australian Parliament convened for a joint sitting to select Mr Dodson.[8] It was with some surprise, not only to the clerks but also the presiding officers, that moves were afoot on 12 April 2016 for a joint sitting. The premier of Western Australian, Hon Colin Barnett MLA, announced in the media on 21 April 2016 that the two Houses would conduct a special joint sitting to select Pat Dodson to fill the Senate vacancy.[9] This announcement, in the middle of a four-week break and when the President of the Legislative Council was overseas, was not warmly greeted by all MPs.[10]

Commonwealth of Australia Constitution Act 1900

Section 15 of the Commonwealth constitution provides two mechanisms for filling vacancies in the Senate.

First, the most common is that the relevant state parliament convenes to choose a person to fill the vacancy. In the case of a bicameral parliament this is by a joint sitting of the Houses.

Secondly, in the event that the parliament of the state is not in session when the vacancy is notified, the governor of the state, on the advice and with the consent of the executive council, may appoint a person to hold the place for the remainder of the senator's term and until 14 days after the beginning of the next session of the state parliament. The appointment is later ratified at a joint sitting before the end of that 14-day period.

In the past the Senate has criticised the time taken by the WA Parliament to

6 On 21 March 2016 the prime minister wrote to the Governor-General requesting that he prorogue the Senate and House of Representatives on 15 April 2016 and summon Parliament to sit on 18 April 2016. The Senate subsequently resolved to sit on 18 and 19 April, and 2–4 May 2016.

7 Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]; and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]. The Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] had already been rejected twice by the Senate and satisfied the constitutional requirement for a double-dissolution election (see 17 August 2015, J.2963).

8 18 April 2016, J.4117-8.

9 Premier's press release, 21 April 2016. On 18 April 2016 the Senate rejected two bills which were the main trigger for the double dissolution.

10 "WA Parliament recall to ratify Pat Dodson Senate spot condemned by angry country MPs", by Jacob Kagi, ABC Online, 22 April 2016.

fill a Senate vacancy and has passed a resolution to this affect.[11] These occasions demonstrate that the 1977 amendments to the Commonwealth constitution following the manipulation of the then convention for filling Senate vacancies by the premier of Queensland, Joh Bejelke-Peterson, may not have entirely eliminated the capacity of states or territories to affect voting in the Senate by delaying the process for filling vacancies. An alternative view is that, when in place, the pairing arrangements in the Senate make a delay more frustrating to the nominee than to voting outcomes in the federal Parliament.

Constitution Act 1889 (WA)

In the present case there appeared to be no power for the Governor in Executive Council to appoint Mr Dodson unless the Houses of Parliament were first prorogued.

Under section 3 of the Constitution Act 1889 the Governor has power to fix a place and time of sessions of Parliament, to prorogue the Houses and to dissolve the Assembly. In exercising these powers the Governor acts on the advice and with the consent of the Executive Council—so in effect the executive controls when the Houses are prorogued. Nothing in the Constitution Act 1889, or in letters patent issued under the Royal Sign Manual, provides the Governor of Western Australia with power to alter adjournments of the Houses of Parliament other than by prorogation or dissolution and setting a date for a new session or Parliament.

The alternative mechanism for filling a vacancy (i.e. appointment by the Governor in Executive Council) is dependent on the parliament of the state being "not in session when the vacancy is notified". This alternative mechanism is therefore available only when the Houses are prorogued.

Prorogation was an unpalatable option for the executive because it would clear the notice paper of business and require an opening of Parliament for a new session. When the notification of the vacancy was received by the Governor on 13 April 2016[12] Parliament was in session but adjourned. The only politically acceptable option for filling the vacancy was a joint sitting. The question therefore arose of how the Western Australian Parliament could be recalled to achieve the premier's objective.

[11] 3 June 1992, J.2401, on the motion of Senator Chamarette. Ms Chamarette was chosen by joint sitting 41 days after the vacancy arose by the resignation of Senator Jo Valentine. The WA record is 108 days, when in 1997 Hon Ross Lightfoot MLC was chosen at a joint sitting to fill a Senate vacancy caused by the death of Senator JH Panizza.

[12] Letter from the President of the Senate, Hon Stephen Parry, to Her Excellency the Governor of Western Australia, Hon Kerry Sanderson AO, dated 13 April 2016.

Standing orders

This problem did not concern the Western Australian Legislative Assembly. Under its standing orders the Speaker may vary a date of an adjournment on request from the Leader of the Government.[13] The Legislative Council's standing orders do not contain equivalent provision.

Members of Parliament value certainty in the sittings and adjournments of the House. A review of the Legislative Council's standing orders in 2011 sought to achieve that by requiring the Leader of the Government to table a schedule for the next year's sittings before the House adjourns for the summer recess. The House adopts the sitting schedule by resolution and it may be varied only by a motion supported by an absolute majority.

Adjournments have been altered so as to add or vacate sitting days. This can occur only via a motion to do so. There is no standing order permitting the presiding officer unilaterally to alter adjournments by recalling the House to a date not previously determined. The only power of the President to set a date for a sitting is following a state general election (because on these occasions the House adjourns *sine die*).

Standing orders are intended to facilitate. This is reflected in standing order 1 of the Legislative Council, which provides:

> "These standing orders shall in no way restrict or prejudice the method in which the Council may exercise and uphold its powers, privileges and immunities."

The question arose of whether there was a power, privilege or immunity that permitted the House to return to a date and time earlier than the adjournment set out in the agreed sitting schedule.

New Zealand and the first Gulf war

New Zealand faced a similar problem at the outbreak of the first Gulf war in January 1991. At that time the New Zealand Parliament was adjourned until 19 February 1991. There was no provision in statute or its standing orders for the House of Representatives to abridge its adjournment. The mechanism used to alter the adjournment was for the Governor General of New Zealand to prorogue the House and convene a new session of parliament.[14] This resulted in a new standing order to enable adjournments to be shortened or lengthened.

United Kingdom House of Commons

In the United Kingdom House of Commons standing order 13 permits the

[13] Standing order 25.

[14] *Parliamentary Practice in New Zealand*, David McGee, 3rd edition, p 153.

Speaker, following representations from the government and if he is satisfied that it is in the public interest to do so, to alter an adjournment and recall the House to an earlier date.

This arrangement is relatively recent.[15] In the Commons and the Lords the capacity of the presiding officers to alter adjournments was first formalised by sessional resolutions. These resolutions arose from the frequent need for recalls experienced during World War II. House of Commons standing order 13 was first made in 1947.

UK statutes empower the Crown to recall Parliament during an adjournment in the event of war, a national emergency[16] or the demise of the Crown.

Solicitor General's advice

The Western Australian executive sought to assist the President of the Legislative Council and its Chief Clerk by providing a copy of the advice of the Solicitor General, Grant Donaldson SC, to the premier and the Attorney General. The Solicitor General contended that there were several bases on which the Legislative Council could sit before 10 May 2016 to facilitate a joint sitting. All of these required the adjournment of the Legislative Council to be abridged.

Parliamentary Privileges Act 1891

The Solicitor General argued that the presiding officers of the Western Australian Parliament have power to alter adjournments and to recall the Houses under section 1 of the Parliamentary Privileges Act 1891. This Act granted each House, to the extent that they are not inconsistent with the Act, "the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989."[17]

The 21st edition of *Erskine May* states that both Houses of the UK Parliament may alter their adjournments under powers conferred by each House on their presiding officers. In his advice the Solicitor General conceded that, although *Erskine May* recites a custom of the Houses by which they could be recalled,

15 *Erskine May*, 21st edition, p 224.

16 Civil Contingencies Act 2004, section 28.

17 This date was chosen and the Act amended in 2004 to avoid what were seen as undesirable consequences of section 13 of the Defamation Act 1996 (UK), which permitted individual members of Parliament to waive privilege. (See "Waiving good riddance to section 13 of the Defamation Act 1996?", *The Table*, volume 83 (2015), pp 45–53.) In addition, the Human Rights Act 1998 (UK) brought the Westminster Parliament under the jurisdiction of the European Court of Human Rights in certain matters, including aspects of parliamentary privilege. See Legislative Assembly Procedure and Privileges Committee Report No. 5, 2004, *Parliamentary Privilege and its Linage to the UK House of Commons*.

there was nothing in *Erskine May* to suggest that, in respect of the House of Commons, the practice or power of recalling emanates other than from a standing order.

Although not referred to by the Solicitor General in his advice, *Stockdale* v *Hansard*[18] is relevant. This case established the principle that a resolution of a single House could not create a new privilege nor alter the law of the land. Applying that principle to the current situation would mean that merely because the House of Commons had a standing order that permitted its Speaker to abridge adjournments, this did not itself mean that the President of the Legislative Council possessed this power.

So the Solicitor General concluded that the power of recall granted to the Speaker in the Commons standing order was not a privilege or power of the House of Commons and therefore could not be imported to Western Australia by section 1 of the Parliamentary Privileges Act 1891. On this point we agreed.

Meeting of Parliament Act 1799 (UK) and Meeting of Parliament Act 1870 (UK)

The first ground on which the Solicitor General argued that the Legislative Council could abridge its adjournment also related to the Parliamentary Privileges Act 1891. This argument centred on two British statutes: the Meeting of Parliament Act 1799 and the Meeting of Parliament Act 1870. The 1799 Act, which remains in force in the UK, enabled the Crown to issue a proclamation for the Houses of Parliament to meet in circumstances where they have adjourned for not less than 14 days. The 1870 Act amended the 14-day adjournment period to six days. A minimum of six days' notice is required in respect of any proclamation to recall the Houses to an earlier date.

The Solicitor General argued that these UK Acts could be understood to concern "the privileges, immunities and powers" of the House of Commons, within the meaning of section 1(b) of the Parliamentary Privileges Act 1891. Because these privileges, immunities and powers were not inconsistent with the 1891 Act he reasoned that they were also powers of the two Houses of the Western Australian Parliament.

In this argument the Solicitor General misconceived the purpose of the UK Acts and the tripartite nature of the UK Parliament as distinct from two of its constituent parts: the House of Lords and the House of Commons.

The two UK Acts grant power to the Crown. The purpose is to modify the privilege of exclusive cognisance of two of Parliament's three constituent parts by granting the other constituent part—the Crown—a power to modify

[18] (1839) 9 ad. & E. 1.

adjournments in certain circumstances. These UK Acts are therefore the opposite of a privilege, immunity or power of a House of Parliament. As such the power granted by the Acts to the Crown to alter adjournments is not capable of being imported to the two Houses of the Western Australian Parliament by section 1 of the Parliamentary Privileges Act 1891.

Reception of laws

The second ground on which the Solicitor General argued that the Legislative Council could be recalled was that the Meeting of Parliament Act 1799 (UK) was received law in Western Australia. As a result he submitted that the Crown could exercise the powers under that Act. Thus there could be a proclamation recalling the Houses.

The Solicitor General conceded that the Meeting of Parliament Act 1870 (UK) could not be received law as it was enacted after the colony was founded on 1 June 1829 and no Act had been passed applying that imperial Act to the colony or adopting or re-enacting it. Only the 1799 UK Act could be received law. The fact that the 1870 UK Act could not be received law made no material difference as the Western Australian Parliament at the material time was adjourned for longer than 14 days.

If the 1799 UK Act was received law then the Western Australian Governor, on the advice of her Executive Council, could recall the WA Parliament using the power in that UK Act. The Solicitor General cited the position in Victoria to support his argument. However, the constitutional arrangements in that state are different to those in Western Australia. In Victoria the 1799 UK Act (and its 1797 predecessor) was included in an Imperial Acts Application Act and the State's Constitution Act;[19] that was not the case in Western Australia.

The test for the reception of laws doctrine is well known, though its application in particular cases can be problematic. The rule is referred to by Blackstone.[20] *Cooper* v *Stuart*[21] is a good illustration of the long-established rule that when Englishmen settled on land which:

> "consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominions … the law of England must (subject to well established exceptions) become from the outset the law of the Colony and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified,

19 Imperial Acts Application Act 1922 (Vic), section 66; Constitution Act 1975 (Vic), sections 20–22.

20 Blackstone, *Commentaries on the Laws of England* (London, 1876) vol. 1, p 107.

21 (1889) 14 App. Cas. 286.

either by ordinance or statute."[22]

Captain James Stirling, the founder of the Swan River Colony and later its Lieutenant Governor, issued a proclamation on 18 June 1829 which reflected this position:

> "The Laws of the United Kingdom so far as they are applicable to the circumstances of the case … do immediately prevail and become security for the Rights, Privileges and Immunities of all His Majesty's Subjects found or residing in such Territory."[23]

The argument that the Meeting of Parliament Act 1799 (UK) could reasonably be applied to the circumstances of the colony at settlement is difficult to accept. The 1799 UK Act provided the Crown with a capacity to shorten adjournments of the two Houses of Parliament. For a law of the United Kingdom to be received in Western Australia it must be reasonably applicable to the circumstances of the colony. The colony of Western Australia did not have an elected legislature until 1870, when the Legislative Council consisted of 18 members, 12 of whom were elected. From 1832 to 1870 the legislature consisted of appointed members. There was no parliament in Western Australia when the colony was founded. Bicameral responsible government did not arrive until 1890. It is hard to understand how a UK statute applicable to the Houses of the UK Parliament could become part of Western Australia law in 1829 but lie dormant for over 60 years until the state had a Parliament to which it could supposedly apply.

Western Australia did not automatically receive the equivalent powers, privileges and immunities of the Houses of the British Parliament on establishment of the colony in 1829. Western Australia had to pass a privilege statute in 1891 for this to happen.[24] Unlike in Victoria, there was never an adoption statute or a statutory equivalent of the 1799 UK Act passed.

The Law Reform Commission of Western Australia in 1994 expressed doubt about the reception of some UK laws as a result of the reasonable application test.[25] The commission included the Meeting of Parliament Act 1797 in a list of received UK statutes. Its report also referred to various United Kingdom statutes on parliamentary privilege. The commission recommended that the UK statutes on parliamentary privilege be repealed as, whether or not they were part of the received law, they were effectively incorporated into Western

[22] *Ibid.*, p 291.

[23] See *A History of Law in Western Australia and its Development From 1829 to 1979*, by Enid Russell, UWA Press, 1980, chapter 6.

[24] The Parliamentary Papers Act 1891 was also enacted, in direct consequence of the judicial decision in *Stockdale v Hansard* (1839) 9 ad. & E. 1.

[25] Law Reform Commission of Western Australia, Project 75: *United Kingdom statutes in force in Western Australia*.

Australian law by section 1 of the Parliamentary Privileges Act 1891. About these statutes on parliamentary privilege the commission said:

> "In any case, the statutes might not have been inherited when the colony of Western Australia was founded because they were not reasonably capable of being applied under local conditions, there being no local legislature."[26]

The Meeting of Parliament Act 1797 (UK) was not listed in the commission's report as one of the statutes on parliamentary privilege. It seems that the commission, unlike the Solicitor General, considered that the Meeting of Parliament Act 1797 (UK) did not relate to the powers, privileges or immunities of the House of Commons.

Contrary to the Solicitor General's view, I considered it extremely doubtful that the Meeting of Parliament Act 1799 or its 1797 predecessor was received law in Western Australia. The 1799 UK Act was not reasonably capable of being applied under local conditions in the colony of Western Australia.

Retrospective validation of sitting

The third and final argument by the Solicitor General was that the Legislative Council could be recalled by the President unilaterally convening a sitting at the request of the leaders of government and opposition, then informing all members of the new sitting date and ordering members to convene on this date. At that sitting the House would retrospectively validate the abridged adjournment. In supplementary advice to the Attorney General the Solicitor General stated that this was the State Governor's preferred approach.[27]

Western Australian parliamentary committees had made similar arrangements when all their members agree by way of a circular resolution later ratified at a meeting. There was no precedent in Western Australia for such action for a sitting of a House. The New Zealand Parliament did not proceed in this way in 1991. Given the absence of any express power in standing orders or statute the President of the WA Legislative Council did not want unilaterally to recall the House without clear and independent advice that he had such a power. Short of prorogation the executive and the President of the Legislative Council appeared to face a standoff.

An invalid proclamation

By the time the Solicitor General's opinion was received it was clear that if the President of the Legislative Council did not act to recall the House then the executive would have the Governor issue a proclamation under the Meeting

[26] *Ibid*., p 92, appendix I.

[27] Note from Solicitor General, Grant Donaldson SC, to the Attorney General, Hon Michael Mischin MLA, *The Process for Filling of a Casual Senate Vacancy*, 19 April 2016.

of Parliament Act 1799 (UK) on the ground that this was part of the received law of Western Australia. The President of the Legislative Council warned the premier that there was legal doubt that the 1799 UK Act was received law in Western Australia.[28]

Unexpectedly, the Secretary to the Executive Council gave me a copy of the proposed proclamation for my comment before it was presented to Her Excellency in Executive Council. Of most concern was its omission of a statutory basis for issuing it. Perhaps it was feared that the reference to an ancient UK statute would have raised eyebrows when the proclamation was read by the clerks in their respective chambers. Perhaps it was thought that the omission of a statutory basis would help prevent a possible legal challenge to its validity. Whatever the reason, the omission was a matter for Her Excellency and her advisers but was in stark contrast to past proclamations calling a meeting of the Houses.

The proclamation to recall the Houses was issued on 21 April 2016 and published in the Gazette. Notwithstanding its omission of a statutory basis it complied with the requirement in the Meeting of Parliament Act 1799 that six days' notice be given to members of the specified meeting date: 28 April 2016. Although not stated, it was clear that this was the statutory power relied upon by the executive, consistent with the Solicitor General's advice.

Advice from independent counsel

When the Solicitor General's advice was received and it became obvious that the executive would force the Legislative Council to sit earlier I sought independent legal advice. Like other clerks I turned to Australia's pre-eminent constitutional lawyer, Bret Walker SC. He was in London. Nevertheless the relevant documents found their way to him in his hotel room. The material included the Solicitor General's advice and information I had received from the Clerk of the Journals in the House of Commons about the history of Commons standing order 13, giving the Speaker power to recall the House.

Given the urgency of the matter, Bret Walker's location and the seven-hour time difference he was unable to provide a written opinion. However, we had a lengthy telephone conversation on 20 April 2016 in which he went through and dismissed each of the Solicitor General's arguments.

However, one argument that had been considered and dismissed by the Solicitor General and me found favour with Bret Walker. In his view the power of the House of Commons to recall the House was an existing power regulated

[28] Letter from the President of the Legislative Council, Hon Barry House MLC, to the premier, Hon Colin Barnett MLA, 20 April 2016.

by Commons standing order 13 rather than created by it. As such it was a power of the House of Commons that could be considered to be possessed by each House of the Western Australian Parliament under section 1 of the Parliamentary Privileges Act 1891.

Bret Walker was concerned that if the Legislative Council abided by the Crown's proclamation purporting to shorten its adjournment, it would provide legitimacy to a Crown power that did not exist in Western Australia. He urged the Council to take an alternative approach. This was for the President to recall the Legislative Council under the power of recall arising from the same power of the House of Commons, vested in its Speaker, and incorporated in Western Australia under the Parliamentary Privileges Act 1891.

Recall of the Legislative Council under House of Commons practice

The President decided to recall the House based on Bret Walker's advice. House of Commons practice was followed as far as possible. The President informed members of the basis for this action after the proclamation was gazetted.[29] A notice was placed in *The West Australian* newspaper on 26 April 2016 which mirrored the wording of Commons Speakers' notices in the *London Gazette*.

When the Legislative Council convened at 10 am on 28 April 2016 to pass the necessary resolutions for a joint sitting I read the notice issued by the President, not the proclamation of Her Excellency.[30] This ensured that no legitimacy was given to a proclamation of dubious validity and so a precedent would not be set, at least in respect of the Legislative Council.

At the joint sitting later that morning Mr Dodson, the only nominee, was chosen to fill the vacancy.

Conclusion

In the absence of the co-operation of a presiding officer the executive has no power to alter the adjournments of a House of Parliament other than in accordance with the law. In this instance section 3 of the Constitution Act 1889 (WA) allows for an adjournment to be altered via a prorogation.

The advice of Bret Walker SC was that the presiding officers of the Western Australian Parliament each have power, imported from the House of Commons under section 1 of the Parliamentary Privilege Act 1891, to abridge adjournments. This power is independent of any standing order which expressly provides such a power, or indeed which may be inconsistent with this power.

I remain uncomfortable that a standing order of the House of Commons,

29 Memorandum emailed to all members of the Legislative Council, 24 April 2016.

30 By contrast the proclamation was read in the Legislative Assembly.

first introduced as a sessional order in the 20th century, can be elevated to the status of a power or privilege and so imported by reference as a power of the Houses of the WA Parliament. Those Australian jurisdictions which "peg" their privileges and powers to those of the House of Commons as at 1901, when the Commonwealth and federation of states was created, would not have this 20th-century "power" available. These jurisdictions would need to rely on an express power in their standing orders, a local statute or the application of ancient UK laws such as the Meeting of Parliament Act 1799 (UK) and the Meeting of Parliament Act 1870 (UK), via an Imperial Act application Act.

Standing orders are merely resolutions of a House. They cannot create a privilege or alter the law. This was put beyond doubt in *Stockdale* v *Hansard*. However, standing orders regulate the proceedings of a House of Parliament; this includes the times that it meets and the means by which it determines adjournments. This is one of a House of Parliament's undoubted powers as part of the privilege of exclusive cognisance.

Moves are afoot to amend the Legislative Council's standing orders so as to give the President power to alter adjournments of the House where certain criteria are met. This power would be similar to that of the Speaker of the Commons and the Speaker of the WA Legislative Assembly. This power will be at the discretion of the presiding officer, who may not necessarily do the bidding of the government of the day.

In the event, Mr Dodson's appointment to the Senate via the hurriedly convened joint sitting made no difference to the Senate's consideration of the bills that became double-dissolution triggers. That matter had been resolved 10 days earlier.

A POLITICAL ACT? THE STORY OF THE TRADE UNION BILL AND AN UNEXPECTED LORDS COMMITTEE

TOM WILSON
Register of Lords' Interests, House of Lords

Introduction

This article looks at how a procedurally novel committee in the House of Lords ended up in the unlikely position of mediating between the main political parties over the highly political issues of trade union reform and party funding. It explains the background to the establishment of the Select Committee on Trade Union Political Funds and Political Party Funding, the unusual aspects of the committee's work, the events that led to a major concession by the government and the legacy of the committee's work.

The Trade Union Bill

The Trade Union Bill was introduced by the newly elected Conservative government on 15 July 2015. It sought to amend the Trade Union and Labour Relations (Consolidation) Act 1992, the overarching legislation governing UK labour-relations law, in a number of ways which were controversial with the unions and the opposition Labour party. The bill would, for example, set minimum turnout thresholds and (for important public services) support thresholds for strike ballots. It would also tighten requirements around picket lines and paid time off for union officials.

The most controversial clauses, in party political terms, were perhaps those relating to trade union political funds. A trade union which wishes to engage in political activities or contribute to a political party is required by law to set up a political fund which is separate from its day-to-day general fund. The members of a union must vote to set up such a fund and, once established, all members contribute a small amount each (the "political levy") to that fund unless they actively opt out of doing so. The question of whether the political levy should be subject to opt-in or opt-out has long been disputed, and throughout the 20th century Liberal and Labour governments legislated for "opt-out" while Conservative governments in turn legislated for "opt-in".

Clause 10 of the bill sought to move from the current opt-out system to an opt-in system, with members paying the political levy only if they opted in writing to do so, and renewed that decision every five years. The bill allowed unions a three-month transition period to move to the new system. Clause 11 required unions to publish more detailed information about their political fund

expenditure, if it exceeded £2,000 per annum, in their annual reports to the Certification Officer who oversees trade union administration.

Establishment of the Select Committee on Trade Union Political Funds and Political Party Funding

Of the 163 listed unions in the UK, 25 have political funds. Their average political levy is £4.84 per member per year. Around 89% of members do not opt out of paying the levy. The money involved may seem trifling, but between 2010 and 2015 the unions donated £64.8m to the Labour party from their political funds—nearly half of the party's total income of £135.8m. The Labour party was concerned about the likely adverse effect of moving to an opt-in system; their fears were not assuaged by the surprising statement in the bill's explanatory notes that "Our main estimate is that there will be no change in the number of members contributing to the political fund".

Following the Lords second reading of the bill on 11 January 2016 the Leader of the Opposition in the Lords, Baroness Smith of Basildon, tabled a motion to establish a select committee "to consider the impact of clauses 10 and 11 of the Trade Union Bill in relation to the Committee on Standards in Public Life's report, *Political Party Finance: ending the big donor culture*, and the necessity of urgent new legislation to balance these provisions with the other recommendations made in the committee's report."

Although the reference to the Committee on Standards in Public Life's 2011 report turned out to be something of a red herring—apart from anything else, its Labour and Conservative members had both dissented from parts of the report—the import of the motion was clear. As Baroness Smith said when she moved it on 20 January 2016, "our genuinely held concern is that this aspect of the bill will have a significant impact on the resources of one major political party—my party, the Labour party". This would, she said, "disrupt the political balance in the UK and have a damaging effect on the electoral process and on our democracy."

The minister, Baroness Neville-Rolfe, responded that "these clauses relate to trade union reform and not to party funding reform", explaining that they "embrace the good democratic values of choice, transparency and responsibility".

The motion was agreed by 327 votes to 234. The vote was almost entirely on party lines, with the independent Crossbench members dividing fairly evenly. The committee was appointed on 28 January 2016 and given a very short deadline for reporting by 29 February 2016. The chairman was Crossbench peer Lord Burns, a former Permanent Secretary of HM Treasury; for him, this was the latest in a long line of chairmanships of controversial reviews, including those looking at freedom of information laws, the Football Association and

hunting with dogs. The other members (four Conservative, four Labour, two Liberal Democrat and one other Crossbencher) included experienced trade unionists and proponents of party funding reform. The committee, which had not been foreseen, was supported by existing Committee Office staff. The clerks were the author and Celia Stenderup-Petersen.

Procedural aspects

The committee was a procedural novelty. It was not a select committee on a public bill, a rarely used additional bill stage which causes delay and can result in the bill being amended (as happened with what became the Constitutional Reform Act 2005) or a recommendation that the bill should not proceed. Nor was it a special public bill committee, which is an alternative form of committee stage generally used for non-controversial bills such as those proposed by the impartial Law Commission. Rather, it was a normal select committee and not a legislative stage, and it was tasked with operating in parallel with the bill's committee stage in the House. This made it easier for the committee's proponents to rebut any suggestion that it was a wrecking tactic to delay or even halt the bill.

The committee conducted its inquiry like any other select committee: it issued a call for evidence, eliciting 48 responses; it held oral hearings with 19 witnesses; it deliberated in private; and it published a report with conclusions and recommendations. The committee was however different in two key ways. First, it had to conduct all its work in just one month; this meant that it was necessary to start taking oral evidence before the call for written evidence had closed. Second, unlike most Lords committees, by its nature it was highly party political: indeed, the party political members took the precaution of declaring their membership of parties and unions, and any donations made.

One unanticipated effect of operating the committee in parallel to the committee of the whole House on the bill was that it made scrutiny of clauses 10 and 11 in the chamber something of a damp squib. For example, one member urged the House "to wait for the report of the select committee, which will help this debate enormously"; another said, "it is a pity in many ways that we are having this debate tonight because I would like to have had it after reading the report of the committee chaired by the noble Lord, Lord Burns … In a sense, we are having this debate in a bit of a vacuum." Baroness Smith of Basildon closed the debate on an amendment to clause 10 by saying, "I am sorry for the noble Lord, Lord Burns … We are expecting a lot from him."

The committee's work

The committee took evidence over four days from six broad types of witness:

- trade unions

- political parties
- regulators
- academics
- behavioural experts
- key politicians.

Out of the evidence the committee identified two issues at the heart of the arguments for and against moving to an opt-in system.

First, the government argued that the unions had not abided by a 1980s agreement between the Thatcher administration and the Trades Union Congress in which the unions pledged to do more to promote awareness among their members of the right to opt out. The unions, by contrast, argued that there was no evidence of the agreement being breached, pointing out that neither they nor the Certification Officer had received any complaints in 32 years. Two of the key parties to this agreement, Lord King of Bridgwater and Lord Monks, are now in the House of Lords and debated these matters at the committee stage of the bill.

Second, the government argued that it is, in general, modern best practice to operate opt-in arrangements where payments to organisations are concerned. Opponents countered that an opt-in system was unnecessary in this case because there was already a "triple lock" protection for trade union members: the ability to opt out at any time; the opportunity to vote in a ballot every 10 years on whether or not to retain a political fund; and the right to change the rules of any political fund. They also argued that unions were already subject to stricter regulation of political donations than other organisations.

Instead of getting caught up in this argument, the committee chose to examine the likely impact of the clauses on union political funds and indirectly on the Labour party. In doing so, it considered the lessons of history, the slightly different experience in Northern Ireland, behavioural evidence about default systems and the power of inertia, and predictions from witnesses. The committee concluded that the reintroduction of an opt-in process "could have a sizeable negative effect on the number of union members participating in political funds." It was concerned that several details of the scheme (short transition, hard copy opt-in only, requirement to renew the opt-in) might exacerbate that effect.

The committee concluded that there would be a "significant reduction" in union payments to the Labour party and that this would be "broadly in proportion to the decline in the total income of the unions' political funds."

Furthermore, the committee considered that clause 11, which would require unions to provide more details of their political expenditure, could be "disproportionately burdensome" given the sums involved. There was confusion about exactly how much detail unions would need to provide, and

concern that it might extend to individual expenses claims for bus tickets or similar.

The committee then examined the history of party funding reform. It concluded that there was no formal convention that all party funding reform must take place by consensus, but that governments had generally acted "with a degree of restraint". Pointedly, the committee said: "If any government were to use its majority unilaterally to inflict significant damage on the finances of opposition parties, it would risk starting a tit-for-tat conflict which could harm parliamentary democracy." It commended the approach of the Committee on Standards in Public Life (even if not the details of its proposals), which recommended balanced reform proposals to ensure that all parties would be treated in a "proportionate and broadly fair manner."

Accordingly, while the committee acknowledged that the Government could claim a democratic mandate to move to an opt-in system, because it had been in the Conservative manifesto (albeit in an "inexact" and "careless" form), it warned: "clause 10 will have an impact on party funding and … is very far from commanding the consensus which we have said is desirable".

Deliberation and party buy-in

Having reached these conclusions, the committee faced the seemingly impossible task of proposing a solution on which all of its members could agree. In addition to the normal private deliberations, the chairman (accompanied by the clerk) took the unusual step of meeting the party members of the committee separately in their three party groups, in order to ascertain each party's bottom line and to see if there was sufficient common ground to reach a solution. He also consulted the other Crossbench member of the committee.

Eventually the committee agreed the following unanimously:

- the opt-in system should apply to all new union members;
- the transition period should be extended to 12 months;
- there should be no requirement to renew an opt-in decision, but all members should be reminded annually, in writing, of their right to opt out at any time;
- the Certification Officer should issue a code of practice for unions with political funds, and monitor compliance with it;
- clause 11 should be revised after consultation to make it less burdensome; and
- the government should convene talks to make progress on party funding reform.

The one outstanding point of disagreement was whether the opt-in system should apply to existing union members, or whether they would remain on an opt-out basis. The majority of the committee thought that the opt-in should

extend to existing members only as part of wider party funding reform; the minority thought that it should be extended to them in the bill but perhaps on a longer transition period. Rather than have a division, the committee agreed to offer the two alternatives to the House.

The committee agreed the report on 29 February 2016 and published it on 2 March 2016.

Debate

Since the House needed to digest the committee's report rapidly if it was to have a bearing on the remaining stages of the Trade Union Bill, the government agreed to provide time for a debate on it far more quickly than is normal for select committee reports. The debate took place a week after publication and attracted 21 speakers.

Report stage

Clauses 10 and 11 of the bill were considered on report on 16 March 2016. The chairman tabled amendments to implement both the unanimous recommendations of the committee and the majority recommendation on existing union members. They were co-signed by one member from each of the three main parties, although none of the Conservative members of the committee signed it (the Conservative signatory was an experienced parliamentarian who believed that clause 10 as drafted would "seriously disadvantage one of the great parties of the realm and unbalance our democracy in the process"). Moving the amendments, Lord Burns said that they would "enable the government to meet their manifesto commitment through gradually increasing the number of union members subject to the opt-in system and, at the same time, enable them to act with the restraint that is desirable in the field of party funding."

Responding for the government, Baroness Neville-Rolfe said that she was open to discussing a longer transition period and more efficient ways of opting in, but that she could not accept the amendments because they excluded existing union members. In the resulting division, the amendment was agreed to by 320 votes to 172. Nearly all of the Crossbench peers who voted did so in favour of the amendment.

Lord Burns also moved an amendment to clause 11, but withdrew it after the minister accepted that the clause might not have the effect the government intended, and promised to return to the issue at third reading. The government accordingly tabled its own amendment at third reading, which Lord Burns said "is less onerous for the unions and deals with the practical concerns of the select committee." It was agreed unanimously.

Conclusion of proceedings on the bill

When the bill returned to the Commons, the government tabled a motion disagreeing with the Lords amendments but proposing amendments in lieu which offered concessions on the transition period and the mechanics of opting in. Several days later, the government withdrew its amendments in lieu and replaced them with alternative amendments which implemented the entirety of the committee's majority recommendations on opt-in. The minister in the Commons, Nick Boles MP, stated that amendments in lieu were required (instead of simply accepting the Lords amendments) because of "some legally defective drafting" in the original amendments. The amendments were shown to Lord Burns who confirmed that he was content that they implemented the committee's scheme. On 27 April 2016 the Commons agreed the amendments in lieu unanimously.

The bill then returned to the Lords, where Baroness Neville-Rolfe explained that concerns about the initial government amendments had been expressed "by a number of colleagues from both benches in both Houses", and that the new amendments had been tabled in the interests of getting the bill "through the House and on to the statute book". Lord Burns, welcoming the amendments, said that he had told Nick Boles that the initial amendments were "unsatisfactory and fell somewhat short not only of the majority recommendation of the select committee but of the minority view". He continued: "I explained that … there would have to be further stages between the two Houses. Then I was subsequently told … the following day, that the revised proposal was being set down."

The reaction of the Conservative members of the committee was less warm. Lord Robathan reflected that this was "the wrong decision" and that he was "gravely disappointed". Lord Sherbourne of Didsbury regretted the "abandonment" of a manifesto pledge. Other Conservative peers referred to media reports that the government's decision to accept the committee's recommendations was connected to increased trade union expenditure on the "remain" campaign in the EU referendum, with one calling it "a very shoddy deal". Nonetheless the House approved the amendments without a vote.

It is worth noting in parenthesis that the hastily drafted government amendments in lieu which went into the bill appeared, like Lord Burns' original amendments, to be defective: instead of restricting just the opt-in requirement to new union members, as the committee recommended, they restricted three further statutory requirements to new members only. This has a material effect in one case, but in the other two cases the impact is uncertain or negligible.

Postscript: party funding reform

One of the committee's unanimous recommendations, which had no direct

implications for the bill, was that "the political parties should live up to their manifesto commitments and make a renewed and urgent effort to seek a comprehensive agreement on party funding reform." With this in mind, the committee said, "We urge the government to take a decisive lead and convene talks itself, rather than waiting for them to emerge."

Lord Burns wrote to the Minister for the Constitution in November 2016 to pursue this recommendation. In December 2016, the minister replied to say that the government was "currently considering the recommendation". This was followed by a formal government response which stated that there was "no cross-party consensus" on party funding reform and that "the government is open to constructive debate and dialogue on small-scale measures which could command broad support—if there was a positive reaction to such a potential step from the main political parties."

At the time of writing, one of the committee members, Lord Tyler, was continuing to press the government to take the initiative in reforming party funding.

Conclusion

Although it can be foolhardy to draw conclusions from a unique set of circumstances such as those described in this article, it is tempting to offer the following two reflections.

First, the committee's work demonstrated that the ability to take evidence during the parliamentary passage of a bill can have a significant bearing on the ensuing debates. While such evidence-taking happens as a matter of course in the House of Commons and other legislatures across the world, it rarely happens in the House of Lords (the key exception being special public bill committees). On this occasion, the committee obtained a range of interesting information and opinions that the government had seemingly not gathered in their preparation of the bill, and some members (but not all) would argue that the bill was improved as a result.

Second, this episode runs contrary to the received wisdom that select committees are not suited to dealing with intensely party political issues. Committees of the House of Lords pride themselves on making unanimous cross-party reports, and some caution against them looking at overtly political issues for fear of undermining this ethos. The experience of the Trade Union Committee might justify revisiting this view.

COMMITTEE OF PRIVILEGES: INQUIRY ON SELECT COMMITTEES AND CONTEMPT

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Greffier of the States of Jersey

In 2016 Jersey's statutory mechanism for enforcing a committee summons was tested for the first time. This article describes what happened and some of the issues raised.

First, a little background information. Jersey is a Crown Dependency, separate from the United Kingdom, with its own legislature (the States Assembly) and legal system. Primary legislation must be approved by the Privy Council and registered by Jersey's Royal Court before it can come into effect. Before 2005 committees of the States Assembly had executive responsibilities over the island's public services. In 2005 a ministerial system of government was introduced and the Assembly set up scrutiny panels to oversee government departments, akin to the UK's system of departmental select committees.

Various constitutional provisions are in the States of Jersey Law 2005. Article 49 provides a power to make regulations to "confer powers on any committee or panel established by or in accordance with standing orders to require any person to (i) appear before it, and (ii) give evidence and produce documents to it". Those regulations may provide for penalties in the event of non-compliance with an order by a committee or panel to attend to give evidence or to produce documents.

The States of Jersey (Powers, Privileges and Immunities) (Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006 make detailed provision about the summonsing power. In summary, a scrutiny panel must first request a witness to appear (or a document to be produced) and must accommodate reasonable requirements that the witness might have—for example around the timing of a hearing or receiving documents in confidence. In addition, the panel must be satisfied that the evidence it seeks is relevant to the matter it is investigating. The regulations set out procedural requirements for the contents of summons and various grounds on which a summons may be challenged. Challenges are heard by the Assembly's Privileges and Procedures Committee (PPC) which may uphold a summons, uphold a summons with such alterations as it considers appropriate, or direct that a summons should not be obeyed.

As in the UK, the vast majority of witnesses appearing before scrutiny panels do so voluntarily; formal powers have only rarely been exercised. However, in 2015 a summons was issued by the Corporate Services Scrutiny Panel (whose broad remit relates principally to financial and governance matters) for

documents held by the States of Jersey Development Company (SoJDC) on the development of land on the waterfront in St Helier for the construction of a new financial centre. This issue had been politically controversial for several years and some members of the panel were longstanding critics of the use of what is reclaimed land for this purpose. In addition, SoJDC is wholly owned by the States of Jersey but operates as an arm's-length company: the blurring of the line between public and private sector added an extra dimension to this dispute. The summons was appealed and the PPC met in public in January 2016 to hear the appeal. The committee's decision has been published and makes for interesting reading.

The documents required by the panel included a pre-let agreement with a bank and a construction contract. These were commercially confidential. The grounds of challenge to the summons were that clear and enforceable arrangements for receiving the documents in confidence had not been offered by the panel; the summons was imprecise in terms of the documents demanded; the documents were not necessary for the panel's work; and the prejudice to SoJDC of disclosing the documents far outweighed the usefulness to the panel of the information they contained. Human rights arguments on this last point were also heard. Counsel were engaged on both sides and the PPC was assisted by the island's Solicitor General.

The committee upheld the summons with various modifications about the manner in which the documents could be made available to the panel, which were intended to help protect their confidentiality. This was at the heart of the argument. SoJDC wanted the panel to sign a confidentiality agreement which was enforceable in court; it argued that this was a procedural requirement on the panel before a summons could be issued. The panel declined to accept such an agreement because of the privilege implications. It offered to sign a non-binding confidentiality agreement, which SoJDC regarded as essentially worthless.

The panel permitted its advisers, Ernst & Young, to sign a confidentiality agreement so that they could review the contested documents, but the advisers were then unable to discuss what they had seen with the panel. This was described by the PPC as "not best practice" which had created an "unfortunate situation" where the panel's advisers were drawing conclusions about the financial viability of the waterfront development from information the panel was prevented from seeing itself.

The PPC concluded that Assembly members could not waive parliamentary privilege on an individual basis by signing a confidentiality agreement. Such an agreement could not be enforced if disclosure of confidential information took place during parliamentary proceedings. However, it thought that privilege should not "be invoked with impunity" and that a breach of confidence "might

well attract serious consequences for the … member concerned" such as a vote of censure or no confidence.

The original summons required the production of a number of specific documents and "any side letters and other documentation to those agreements". This wording was contested by SoJDC as being imprecise. The PPC noted that the 2006 regulations provide for a summons to require production of "documents described by reference to their subject matter or any other factor" and concluded that the panel's wording was sufficiently precise. However, as there now existed a list of relevant documents, which had been reviewed by Ernst & Young, the committee revised the summons to refer more specifically to them.

The two final grounds of challenge—whether it was necessary for the panel to see the documents and whether the usefulness to the panel of the information in the documents was outweighed by the harm to SoJDC and the various firms involved—were closely related. The committee also had to consider whether forced disclosure of the information infringed rights under article 8 (respect of private and family life) or article 1, Protocol 1 (protection of property) of the European Convention on Human Rights (ECHR). On this point, whether or not SoJDC was an organ of the state, and therefore not entitled to claim protection under the ECHR, was left undecided. However, the banks and construction firm which had provided confidential information to SoJDC did have rights under the convention.

Here the key point was that when the Assembly approved the redevelopment of the waterfront land in 2010 it repeatedly emphasised the scrutiny panel's role in providing scrutiny and oversight. The report laid before the Assembly when the proposition for the redevelopment was debated referred to "all elements of the process" being "open and responsive to scrutiny". The committee concluded that "it is clear … that the intention of the island's legislature was to ensure that scrutiny … had an important and wide-ranging role in ensuring the delivery of effective regeneration which was additional to the role of the minister". SoJDC and the firms it contracted with ought to have recognised this, and the legal and constitutional framework in which scrutiny panels operate, when working on the project.

Furthermore, Ernst & Young, in its report to the panel, stressed the importance of the confidential documents it had reviewed in reaching its conclusions. This, the committee argued, demonstrated the importance of them being seen by the panel—otherwise scrutiny of one of the island's largest commercial developments was effectively being outsourced from the political arena. This conclusion was reached despite the panel's decision to publish an interim report based on the Ernst & Young work which was critical "in trenchant terms" of SoJDC, something the PPC also regarded as "not best practice".

The PPC decision was published in May 2016 and SoJDC complied with the terms of the summons, making the relevant documents available to panel members under specified conditions for three months. The panel subsequently asked for additional documents which were disclosed on the same basis by adding them to the scope of the committee's earlier decision. At the time of writing (April 2017) the panel's final report on the matter is in draft.

The main outcome was that the scrutiny panel received the information it required, in the face of sustained and well-reasoned opposition from a government-owned company and a number of large private-sector firms. Had SoJDC chosen not to comply with the order they could have been fined up to £10,000. The procedure for administering the fine is untested but the committee would have been invited to write to the Attorney General to ask him to take matters up in the Royal Court, which would have been able to decide whether or not SoJDC had a "reasonable excuse" in law for not paying. SoJDC could have chosen to take the financial hit but there may have been serious political and reputational consequences in doing so.

The process was not swift: nine months from the issuing of the original summons to the publication of the committee's decision. Given the legal heavyweights involved, some delay was inevitable.

The PPC, which normally deals with procedural matters and Assembly governance, found itself in an unfamiliar quasi-judicial role, particularly in considering human rights arguments and the balance between the harm to SoJDC of the potential disclosure of confidential information and the need for the scrutiny panel to receive that information. The role of the Solicitor General in guiding the committee through that process was crucial. However, the clinching argument was political. Scrutiny had been promised a central role in oversight of the waterfront regeneration; if this was to be meaningful the panel had to be given access to information about whether the regeneration would achieve value for money.

PARLIAMENTARY COMMITTEE ON ELECTORAL REFORMS IN PAKISTAN

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Introduction

Article 21 of the Universal Declaration of Human Rights 1948 affirms that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

A country cannot be truly democratic until its citizens have the opportunity to choose their representatives through elections that are free and fair. Elections advance democratisation and encourage political liberalisation in developing democracies. Even for well-established democracies the legal framework and administrative processes for elections require regular review and modification. Effective legal frameworks and administrative processes allow compliance with international standards and obligations. They reflect a broader political need to engage in continuous efforts to maintain confidence in the effectiveness of the democratic system. This can be done only by ensuring that electoral processes are transparent and inclusive, and aligned with the expectations of all stakeholders.

Electoral reforms in Pakistan

Pakistan has had a turbulent political history marred by military dictatorships. The democratic transition of power through free and fair elections remained a distant dream as election processes and results were criticised by political parties and the media.

The 2013 general election was considered the first successful democratic transition. Its aftermath set the stage for a remarkable moment in Pakistan's democratic process, reflected by unprecedented voter interest, especially among women and youth. Before elections, debate focused on the fundamental issue of transiting power to elected governments; now debate has shifted towards the role of democratic actors like the Election Commission of Pakistan, political parties, the judiciary and civil society. After elections some parties had reservations; concluding the election was rigged. Many complaints regarding procedural loopholes were received right after elections. Some political parties clearly rejected the results while some raised concerns about elections in some

constituencies. Complaints such as the politicisation of polling staff and the supply of extra ballot papers to parties were also filed.

Parliamentary Committee on Electoral Reforms

To ensure fair and transparent elections in 2018 the Parliamentary Committee on Electoral Reforms was formed on 25 July 2014 after the prime minister wrote to the National Assembly Speaker seeking to constitute a special parliamentary committee for electoral reforms composed of members of both Houses of Parliament. Pursuant to motions adopted by the National Assembly on 19 June 2014 and the Senate on 30 June 2014, the Speaker of the National Assembly, in consultation with the Chairman of the Senate and parliamentary leaders, constituted the Parliamentary Committee on Electoral Reforms. It was mandated to consider and make recommendations for ensuring free, fair and transparent elections.

The committee invited proposals for electoral reforms from civil society organisations, lawyers (including the Pakistan Bar Council and Provincial Bar Councils, and the Supreme Court and High Courts Bar Associations) and the general public. More than 500 proposals were received. On 24 October 2014 the committee established a sub-committee headed by the Minister for Law and Justice to examine and make recommendations on the proposals received by the committee, including those on adopting the latest technology, and to prepare draft legislation or constitutional amendments, if required.

The sub-committee has prepared a draft Unified Election Bill. The draft bill includes chapters on the Election Commission of Pakistan, delimitation, electoral rolls, the conduct of elections to various bodies, election expenses, election disputes, offences, penalties and procedures, political parties and caretaker governments. The draft bill consolidates nine election laws, dating from 1974 to 2002.[1]

Twenty-second constitutional amendment

The Parliamentary Committee on Electoral Reforms discussed the mode of appointment of the Chief Election Commissioner and members of the Election Commission of Pakistan. In view of the impending completion of the term

[1] The Electoral Rolls Act 1974 (Act No. XXI of 1974); the Delimitation of Constituencies Act 1974 (Act No. XXXIV of 1974); the Senate (Election) Act 1975 (Act No. LI of 1975); the Representation of the People Act 1976 (Act No. LXXXV of 1976); the Election Commission Order 2002 (Chief Executive's Order No.1 of 2002); the Conduct of General Elections Order 2002 (Chief Executive's Order No.7 of 2002); the Political Parties Order 2002 (Chief Executive's Order No.18 of 2002); the Qualifications to Hold Office Order 2002 (Chief Executive's Order No. 19 of 2002); and the Allocation of Symbols Order 2002.

of office of members of the Election Commission of Pakistan in early June 2016, it was decided that the sub-committee should expedite consideration of proposals relating to these appointments. On 26 April 2016 the sub-committee finalised proposed constitutional amendments and submitted an interim report to the committee recommending the draft Constitution Amendment Bill. The committee presented the interim report and the 22nd constitutional amendment to both Houses.

The Constitution (Twenty-Second Amendment) Bill 2016 was introduced in the House by the Minister for Law and Justice. Parliament passed the bill unanimously and on 8 June 2016, following approval by the President of Pakistan, the amendment became part of the constitution.

The amendment set the maximum age for the Chief Election Commissioner and members of the Election Commission of Pakistan at 68 and 65 years respectively. "Civil servants" and "technocrats" became eligible for appointment. Previously, only retired judges of the Supreme Court of Pakistan and the High Courts were eligible to be Chief Election Commissioner and members of the commission respectively.

The amendment identifies senior a civil servant as someone who has served for at least 20 years and retired in grade 22 positions. A technocrat is someone who has 16 years of education from an HEC-recognised university and at least 20 years of work experience, including "a record of achievement at the national or international level".

The amendment abolished the practice of all four commission members retiring simultaneously. Instead, two of the members retire every two and a half years. The commission will draw lots on which two members will retire after the first two and a half years.

The Chief Election Commissioner and members of the commission are appointed in consultation with the Prime Minister and the Leader of the Opposition. If there is no consensus each forwards separate lists to a parliamentary committee for consideration; the committee may confirm any of the names.

The amendment provides that one member of the commission will come from each province. The powers of the commission will be extended to include delimitation of constituencies of local governments.

Approval of committee recommendations by the Cabinet

The Parliamentary Committee on Electoral Reforms reached another landmark

when on 7 February 2017 the Federal Cabinet approved[2] the draft Electoral Reforms Bill prepared by the Parliamentary Committee on Electoral Reforms. The proposed law, which will grant financial and administrative autonomy to the Election Commission of Pakistan, is expected to be presented to Parliament shortly.

The Minister of Law and Justice summarised the draft bill in a press conference. He said that the recommendations envisaged total financial, administrative and functional autonomy for the Election Commission of Pakistan. It would be empowered to take disciplinary action against officials deputed from other departments and ministries for election purposes. The commission would prepare a comprehensive action plan six months ahead of elections to seek the views of political parties and candidates. A formal system would be introduced for complaints about electoral malpractice. Votes would be counted and results compiled at the polling station. The form containing the result would be transmitted to the returning officer and the commission via a mobile application to ensure prompt transmission. If the margin of victory is less than 5% or 10,000 votes then a recount would be mandatory. A uniform system for printing ballot papers would be introduced for all constituencies.

Under the reforms, a citizen would be automatically registered as a voter when their computerised national identity card is issued; no application would be needed.

The minister added that special measures would be introduced to encourage the registration of women voters if there is a difference greater than 10% in the number of male and female voters. All political parties would have to issue 5% of tickets to female candidates in general seats. Disabled voters would be provided with postal ballot facilities and the delimitation of constituencies would be carried out every 10 years.

Conclusion

The deliberation processes of the Parliamentary Committee on Electoral Reforms have not stopped, as the draft bill will be presented to Parliament next session. But the achievements so far will make the electoral process more transparent. These reforms will strengthen democratic institutions, leading to legitimate outcomes with minimal miscalculation.

The committee has succeeded in addressing the issue of electoral incongruity and has forced the repair of the "nuts and bolts" of the system. Substantial progress has been made through constitutional amendments, computerisation

[2] Rule 16 of Rule of Business 1973 requires a "proposal for legislation, official or non official, including a money bill [to be] brought before the cabinet for formal approval before introducing in parliament".

of electoral rolls, the introduction of biometric identification and use of electronic voting machines for the 2018 elections. These changes will hopefully lead to revitalised electoral institutions.

MISCELLANEOUS NOTES

AUSTRALIA

House of Representatives

Prorogation of Parliament; resumption of lapsed bills

Acting on advice from the prime minister, who wrote to the Governor-General on 21 March 2016, the Governor-General issued a proclamation proroguing Parliament with effect from 15 April 2016 and summoning all members and senators to meet at Parliament House for a new session on 18 April 2016. It is unusual, in recent times, for Parliament to be prorogued for the purpose of ending one session and beginning another. The last time it happened was in 1977, to enable the Queen to open a new session. Recent practice has been for Parliament to be prorogued just before the dissolution of the House of Representatives.

In the second session of the 44th Parliament proceedings on a number of bills which lapsed at prorogation were resumed. On 18 April 2016 the House agreed to ask the Senate to resume consideration on the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and a related bill. Immediately beforehand, a message from the Governor-General was announced recommending an appropriation for the purposes of the bill. This was the first occasion that the Senate was asked to resume consideration of a bill requiring a Governor-General's message. The Senate agreed and consideration of the bills resumed with the second reading. Following debate, the question that the bills be read a second time was negatived on division.

The House resolved to resume consideration of certain bills before the House at prorogation at the stage where they were interrupted—on 19 April (two bills) and 2 May (five bills).

On 2 May a message from the Senate was reported asking that the House resume consideration of a private senator's bill. A private member moved that the message be considered at the next sitting and the question was carried. The item went before the Selection Committee and was allocated time during private members' business (both Houses were dissolved before consideration of the item). This was the first time that the House has been asked to resume consideration of a lapsed private senator's bill.

Also on 2 May 2016 the House asked the Senate to resume consideration of 13 lapsed bills; the Senate agreed.

Sitting suspended following disturbance in public gallery at question time

On 30 November 2016, shortly after question time began, a number of protestors

disrupted proceedings from the public gallery. The Speaker suspended the sitting at 2.04 pm and proceedings resumed at 2.40 pm. On resumption, the Speaker stated to the House that his action in suspending the sitting was taken as a last resort, having formed the view that the dignity of the House would have been severely compromised had the sitting continued. He indicated that a thorough review of events would be undertaken. The Speaker's action in suspending the sitting was precedented, with previous Speakers having taken the same action following disruptions in the galleries on two occasions in the 1970s and once in 1920.

The following day the Speaker made a further statement to inform the House that an investigation had begun and would cover procedures for security screening of people entering the public galleries, ticketing procedures for question time and procedures for non-ticketed attendees. The review would also consider security response procedures and capacity within Parliament House.

First e-petitions received

On 13 September 2016 the House agreed to new standing orders establishing an e-petitions system for the House of Representatives. On 7 November 2016 the chair of the Standing Committee on Petitions presented the committee report comprising the first petitions lodged through the House's e-petitions system. The chair said that the committee was pleased to see members of the public embracing the new system and noted the ease with which petitioners had been able to gather signatures electronically to streamline the process of petitioning.

Senate

Qualification of senators

The question of the qualifications of two senators to stand for election or to sit in the Senate arose in the latter part of 2016.

Section 44 of the constitution provides various grounds on which persons may be ineligible to stand for election or to continue to sit in either House. These include being an undischarged bankrupt or insolvent; owing allegiance to a foreign power; being convicted and under sentence, or awaiting sentence, for an offence carrying a penalty of imprisonment of one year or longer; holding an office of profit under the Crown or having a direct or indirect pecuniary interest in an agreement with the public service of the Commonwealth (except in specified circumstances). The main purpose of these provisions is to ensure that those elected to Parliament are beholden to no-one but the electorate and may therefore perform their duties free from undue external influence, including from the executive government, foreign governments and commercial

pressures.

On 7 November 2016 the Senate referred two sets of questions to the High Court, sitting as the Court of Disputed Returns, under the Commonwealth Electoral Act 1918 (CEA), based on information received by the President that two senators were potentially ineligible to have been chosen at the election on 2 July 2016.

Early in the day, the President informed the Senate that the two matters had been brought to his attention—one relating to former Senator Day and the other serving Senator Culleton. He tabled correspondence from the Special Minister of State with numerous attachments, and emails from former Senator Day, providing information about a possible breach of section 44(v) (direct or indirect pecuniary interest in relation to the lease for his electorate office), and from the Attorney-General and Senator Culleton about a possible breach of section 44(ii) (convicted and awaiting sentence for a relevant offence).

Later that day motions to refer both matters to the Court of Disputed Returns under section 376 of the CEA were moved by leave, debated and agreed to. Further documents were tabled during the debates, including a copy of advice from the Solicitor-General which the Attorney had provided to Senator Culleton, and tabled by the latter.

On 9 November 2016 the President tabled his covering letters on both matters to the Principal Registrar of the Court of Disputed Returns, describing the questions and the material transmitted (which included all the tabled documents, the relevant journals, copies of certificates of election attached to the returned writs and extracts from the debates). The President informed the Senate that these had been delivered to the Court by the Usher of the Black Rod. The next day the President tabled notices of directions hearings on both matters, which would be held by the Court of Disputed Returns on 21 November 2016.

On 3 February 2017 the court delivered its judgment on the eligibility of Mr Culleton to stand for election or to continue to sit as a senator. It unanimously held that Mr Culleton had been convicted and subject to be sentenced for a disqualifying offence at the time of the 2016 federal election. He was therefore incapable, under section 44(ii) of the constitution, of being chosen as a senator. The judgment affirmed the proper construction of section 44(ii)—that it covers a person convicted and either under sentence or subject to be sentenced—and explained the meaning of "subject to be sentenced".

The court ordered that the resulting vacancy be filled by way of a special count of the ballot papers, under the supervision of a justice.

Two questions arose about Mr Culleton sitting in the Senate despite being ineligible. The first was on the effect of his disqualification on Senate proceedings in which he took part. *Odgers' Australian Senate Practice* cleared this matter up:

> "The presence in the Senate of a senator found not to have been validly elected or to be disqualified does not invalidate the proceedings of the Senate in which the senator participated." (14th edition, p 174)

The second question was whether Mr Culleton would be required to repay any salary or allowances paid to him as a senator. In previous cases Attorneys-General advised that those whose elections were declared void were not entitled to retain salary payments made to them, but such debts were, in effect, waived. Under current legislation unauthorised payments automatically become debts due to the Commonwealth. The decision whether to waive such debts is for the government, not the Senate.

The President further informed the Senate that Mr Culleton had been disqualified on a separate ground, when a sequestration order—effectively a declaration of bankruptcy—was made against his estate on 23 December 2016. As the Federal Court later noted, "The *prima facie* effect of the order … was to cause the vacation of his office as a Senator for Western Australia." This consequence flowed from sections 44 and 45 of the constitution. Section 44(iii) disqualifies a person who "is an undischarged bankrupt or insolvent"; section 45 provides that the place of a senator who becomes subject to such a disability "shall thereupon become vacant", triggering a requirement for the President to notify a vacancy.

On 11 January 2017, after receiving formal notification of the bankruptcy, the President therefore notified the Governor of Western Australia of a vacancy. He advised Her Excellency that the method for filling the vacancy depended on the matter before the Court of Disputed Returns. A similar approach had been taken following the resignation of former Senator Bob Day. Mr Culleton argued that the notification was "premature", but in an article detailing the "litigious imbroglios" of the matter, Emeritus Professor Tony Blackshield described the action as consistent "with the idea of the inexorable self-executing operation of the constitution". In the end, the bankruptcy disqualification is somewhat academic given the judgment of the Court of Disputed Returns.

The Court of Disputed Returns delivered its judgment on Senator Day's eligibility to be chosen or to sit as a senator on 5 April 2017. Section 44(v) of the constitution prevents any person with a "direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons" from being chosen or sitting as a senator or member. The court found that the financial arrangements concerning Senator Day's electorate office rendered his election in July 2016 invalid, and that he had been incapable of sitting as a senator since 26 February 2016. As occurred in the Culleton matter, the court ordered that the vacancy in the representation of South Australia be filled by a special count of the ballot

papers from the July 2016 election, under the supervision of a justice.

Unparliamentary language used in quotations

The President made a statement on 29 February 2016 on the use of unparliamentary language in quotations, an issue that had aroused concern the preceding week in question time when highly derogatory language allegedly used towards building and construction industry watchdog officials was quoted extensively by the Minister for Employment.

The President confirmed the principle that quoting another source did not allow a senator to bypass the normal rules on unparliamentary language. He referred to the limits that all Houses placed on free speech. Distinguishing between language that was unacceptable because it was contrary to the various prohibitions in standing order 193 and language that was regarded by the chair as unacceptable in debate, the President suggested that contentious language (not otherwise contrary to standing order 193) should be quoted only where it was strictly necessary to the point being made. Acknowledging senators' right to freedom of speech, the President reminded them of their obligations under Privilege Resolution 9, which concerned the responsible exercise of the privilege of freedom of speech. He urged them to be mindful of the wider audience, including children, when quoting from sources containing offensive material, and undertook to refer the matter to the Procedure Committee for consideration of the general principles.

After the statement ministers appeared to adjust their answers accordingly.

Australian Capital Territory Legislative Assembly

Allocation of chairs and deputy chairs of committees

On 9 February 2016 the Manager of Government Business moved an amendment to the resolution of appointment for general purpose standing committees to ensure that where a chair of a committee is a government member, the deputy chair shall be an opposition member; and where the chair is an opposition member, the deputy chair shall be a government member.

The Leader of the Opposition moved an amendment noting that there was an ongoing police investigation into a former minister's chief of staff and resolving that the Assembly should not to appoint a government MLA to be a chair or deputy chair of any committee until the police investigation and other related matters were resolved. The amendment was negatived, and the Assembly agreed the original motion.

Report on Family Friendly Workplace

On 7 April 2016 the chair (the Speaker) of the Standing Committee on Administration and Procedure presented a report entitled *Family Friendly*

Workplace. The report noted that although members were able to bring a nursing infant being breastfed by an MLA into the chamber, the constitutional provisions in the Territory's Self Government Act prevented the Assembly from adopting standing orders to enable proxy voting. The committee recommended that the party whips should develop protocols/guidelines for the operation of pairs to encourage and support members who are nursing mothers or who have carer responsibilities.

In August 2016 protocols were tabled in the Assembly signed by the government, opposition and Greens whips.

Parliamentary Budget Officer—select committee

On 7 June 2016 the Assembly resolved to establish a select committee to examine and report on a bill to provide for a parliamentary budget officer. The committee comprised three members: the opposition member who introduced the bill, the Chief Minister and the Greens minister. The resolution specified that the Greens minister would chair the committee. This is the first time that a minister has chaired a committee and that the Chief Minister has been on a committee.

Expansion of the Assembly

On 9 June 2016 the Speaker informed members that the Assembly now had capacity for 25 MLAs to be housed in the refurbished building, as well as providing new meeting room space.

Appropriation for the Office of the Legislative Assembly's budget

On 7 June 2016 the Treasurer presented the Appropriation Bill (Office of the Legislative Assembly) Bill 2016–17 together with a statement of reasons for departing from recommended appropriations, in accordance with the Financial Management Act 1996.

The Speaker's recommended appropriations included an amount to cover the increased workload associated with the 47% increase in the Legislative Assembly's membership. The Treasurer's statement of reasons indicated that there was some increased funding to reflect the additional workload in areas such as payroll, security and Hansard, but:

> "while the funding … for these functions is less than requested, the government considers that the additional appropriation provided in the bill reflects an appropriate balance between the need to provide services to a larger Assembly, while ensuring that the Assembly is run at the minimum cost to ACT taxpayers."

Resignation of member; election of oldest MLA

On 2 August 2016 the Speaker informed the Assembly that she had received the resignation of a member of the Assembly, the fourth resignation since the last election in 2012. This is the largest turnover of MLAs caused by resignations since the beginning of self-government in 1989.

Under the Hare Clark electoral system which operates in the territory, there was a count back for the vacant member's seat and a new MLA declared elected. The member was sworn in before a Supreme Court judge on 2 August 2016 and immediately made his inaugural speech. At 81 the member was the oldest elected to the Assembly.

Election of 9th Assembly

The last sitting of the 8th Assembly was on 11 August 2016. The territory went to the polls on 15 October 2016 (the Assembly has a fixed four-year term). It was the first time Territorians elected 25 MLAs, up from 17.

The make-up of the 9th Legislative Assembly is:

- Australian Labor Party: 12 MLAs
- Canberra Liberals: 11 MLAs
- ACT Greens: two MLAs

Of the 25 MLAs elected, 13 were women. This is 52% of the Assembly's members—a first for the Legislative Assembly and possibly for an Australian legislature.

The Assembly met on 31 October 2016 and elected a new Speaker, Joy Burch from the ALP. The former Speaker, Vicki Dunne (Canberra Liberals) was elected Deputy Speaker. The Assembly then elected a Chief Minister and appointed a Leader of the Opposition in accordance with standing order 5A.

Reports on alleged breaches of code of conduct

On 31 October 2016 the Speaker presented two reports from the Standing Committee on Administration and Procedure about possible breaches of the code of conduct (report nos. 11 and 12). The reports had been prepared in the 8th Assembly but not published until the 9th. In both cases the committee recommended that no further action be taken on the case. It also in both cases recommended that the Standing Committee on Administration and Procedure in the 9th Assembly should reconsider the role of the Speaker and Deputy Speaker in referring possible breaches of the code to the Commissioner for Standards. In a dissenting report to the 11th report it was alleged that the Speaker, in referring the matter to the commissioner, commented on the merits of the complaint and effectively gave drafting instructions and analysis to the commissioner.

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

Parliamentary privilege, the Code of Conduct and the interests disclosure regime

On 1 June 2016 the premier of New South Wales, the Hon. Mike Baird MP, wrote to the Speaker, the Hon. Shelley Hancock MP, and the President, the Hon. Don Harwin MLC, indicating the government's broad agreement to the proposals for reform in the 2014 reports of the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council's Privileges Committee. The reports proposed a parliamentary ethics/standards commissioner, a code of conduct for members and an interests disclosure regime.

The premier expressed a preference for uniform agreements in both Houses on these matters and asked the Parliament to develop a single approach for reform. The government were open to considering other reforms that may improve the integrity, transparency or operations of Parliament.

On 21 June 2016 the Speaker and the President wrote to the premier stating that they agreed with his proposal and outlining their proposed approach to carrying out the reforms. They noted that legislation would be required to give effect to the committees' recommendations. This presented an opportunity to make progress with other integrity-based measures and certain administrative reforms at the Parliament, including:

- introducing legislation on parliamentary privilege;
- introducing a legislative basis for employing the staff of the three parliamentary departments.

It was agreed that the President would oversee the preparation of the relevant legislative drafts and the Speaker would oversee the review of the Constitution (Disclosures by Members) Regulation 1983.

It was noted that the Legislative Assembly Committee on Parliamentary Privilege and Ethics was already inquiring into the code of conduct for members. In early 2017 premier Baird resigned, and President Harwin resigned to take up a ministerial position. The matters referred and the areas for reform proposed by the presiding officers are still under consideration.

New South Wales Legislative Council

Orders for papers from statutory bodies

A significant matter relating to the power of the Council to order the production of documents from statutory bodies was finalised in 2016. In September 2015 the Council agreed an order for the production of papers from, amongst others, a statutory body known as Greyhound Racing NSW (GRNSW). No return was received from GRNSW. Correspondence from the Department of Premier

and Cabinet noted that section 5 of the Greyhound Racing Act 2009 provides that GRNSW does not represent the Crown and is not subject to direction or control by or on behalf of the government.

The Council received legal advice that statutory bodies are amenable to orders for papers addressed to them directly by the Council, and are compelled to comply with such orders. Failure to do so would result in the responsible officer being in contempt of Parliament.

In September 2016 the House again pursued the matter. In August the government had passed the Greyhound Racing Prohibition Act 2016, section 27 of which stated that the minister may, at any time after royal assent to the Act and until the dissolution of GRNSW, require GRNSW to produce any specified record and may make the information publicly available.

The House agreed a new resolution noting the order originally made in September 2015, the legal advice and section 27, and calling on the Minister for Racing to require GRNSW to produce the documents originally ordered in September 2015, together with any related documents created since then.

In October 2016 the Clerk tabled a return received from the Administrator of GRNSW. The return comprised public documents and documents over which a claim of privilege was made, which were made available to members only.

Northern Territory Legislative Assembly

General election

The 13th Assembly began in October 2016 following a general election on 27 August 2016. The opposition Northern Territory Labor Party defeated the former (one-term) Country Liberal Party government. The opposition was reduced to two members, which required the Speaker and the Clerk to consult the Solicitor-General for the Northern Territory to confirm that an opposition could be formed with only two members.

Queensland Legislative Assembly

Four-year terms

In the last edition of *The Table* it was reported that the Constitution (Fixed Term Parliament) Amendment Bill would be taken to a referendum. The referendum was held on 19 March 2016 and the bill was approved by 53% of electors.

The bill was assented to on 5 May 2016 and the Act will commence on the date of the proclamation by which the Governor summons the Legislative Assembly after the next general election. Fixed four-year terms will begin from the start of the 57th Parliament, with polling day being the last Saturday in October in the relevant year.

Electoral district increases and a return to full preferential voting

In accordance with the Electoral Act 1992 an electoral redistribution was due to begin in March 2016. However, due to the holding of local government elections and the four-year term referendum on 19 March 2016, the appointment of the Redistribution Commission was delayed.[1]

On 19 April 2016 the Shadow Attorney-General introduced the Electoral (Improving Representation) and Other Legislation Amendment Bill. The bill sought to increase the number of electoral districts from 89 to 93. The House agreed that it be treated as an urgent bill to pass through its remaining stages at that week's sitting.

During consideration in detail the Attorney-General was granted leave to move amendments outside the long title of the bill to reintroduce full preferential voting in Queensland elections.[2] The amendments were agreed and the bill was assented to on 5 May 2016. The redistribution process is expected to finish in June 2017 and will now be on the basis of 93 electoral districts.

Amendments to Constitution of Queensland

On 21 April 2016 the Constitution of Queensland and Other Legislation Amendment Bill was introduced to implement certain recommendations in the Committee of the Legislative Assembly's *Review of the Parliamentary Committee System* report. The recommendations were intended to strengthen the parliamentary committee system. The bill was passed on 13 September 2016.

The Act amended the Queensland Constitution so that, at the start of each session, the Assembly must:

- establish at least six portfolio committees to cover all areas of government activity;
- refer all legislative proposals to committees for examination for a period of no less than six weeks (unless a bill is declared urgent by ordinary majority);
- refer the annual appropriation bill to portfolio committees for examination in a public hearing.

The Act provides that all future amendments to the Constitution of Queensland 2001 require the support of an absolutely majority of members before they may

[1] Section 38 of the Electoral Act 1992 provides that a redistribution is to occur either one year after the third general election which was held after the last electoral redistribution or 7½ years after the last electoral redistribution was finalised, whichever is the later. The last redistribution was finalised in August 2008 and three general elections have been held since then: March 2009, March 2012 and January 2015.

[2] Optional preferential voting has been in place since 1992. Its introduction was recommended by the Electoral and Administrative Review Commission as part of the post-Fitzgerald Inquiry reforms.

be presented for assent.[3]

The Act amended the Parliament of Queensland Act 2001 to provide committees with the power to self-initiate inquiries within their portfolios.

Absence of message from Governor

On 13 September 2016 the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 was introduced and referred to a committee for examination. The bill made provision to implement heavy-vehicle policy initiatives and relating to the regulation of personalised transport services (e.g. Uber).

In August 2016 the government announced a $100 million Industry Adjustment Assistance Package to support the industry to adjust to the regulation of personalised transport services. The bill proposed an amendment to the Transport Operations (Passenger Transport) Act 1994 to enable a regulation to provide for the scheme for financial assistance.

On 3 November 2016 the Speaker ruled on the absence of a message from the Governor for the bill, which is required under section 68 of the constitution.[4] The ruling noted that the relevant minister had been advised by the Office of the Queensland Parliamentary Counsel that no message was required as the assistance package was being funded by existing appropriations and the bill did not appropriate new funds from the consolidated fund.

Following the introduction of the bill, the Clerk raised the issue with parliamentary counsel. They agreed to seek joint legal advice about the application of section 68 generally and to the bill specifically. They later sought further advice from the Solicitor-General.

The advice stated that generally an appropriation for the purposes of section 68 is any conferral of authority on the executive to pay an amount from the consolidated fund. An amendment that would potentially increase an existing appropriation, extend the objects and purposes of an existing appropriation or alter the destination of an existing appropriation will itself amount to an appropriation. Specifically, the bill was an appropriation for the purposes of section 68.

The advice clarified the timing of the presentation of the message and stated

[3] Currently this means a majority of the 89 members of the Legislative Assembly: 45 votes. A casting vote by the Speaker or Deputy Speaker or an absent member's vote by proxy will be counted as a vote.

[4] Section 68(1) of the Constitution of Queensland 2001 provides that the Legislative Assembly must not originate or pass a vote, resolution or bill for the appropriation of: (a) an amount from the consolidated fund, or (b) an amount required to be paid to the consolidated fund, that has not first been recommended by a message of the Governor.

that an appropriation bill can neither be introduced nor passed before it has been recommended by a Governor's message. To avoid uncertainty it was advised that the bill should be withdrawn and reintroduced with a message. The advice suggested that consideration be given to amending section 68 in line with the New South Wales equivalent so that government bills are not required to have a message.

While it was determined that compliance with section 68 was not justiciable, it was considered prudent for the Assembly to follow constitutional procedures. Accordingly, the Speaker ruled the bill out of order. On the same day the minister moved a motion without notice to discharge the bill from the notice paper and then to withdraw the bill.

The minister later moved a motion without notice to reintroduce the bill following the presentation of a message and for the bill, having already been reported by a committee, to be set down for its second reading immediately after its reintroduction and first reading. The minister then presented a message from the Governor recommending the bill and reintroduced it.

On 1 December 2016 the bill was debated. An opposition member circulated an amendment relating to the financial assistance scheme. The Speaker considered that the proposed amendment extended the objects and purposes of the appropriation and would require a message before it could be moved otherwise it would be ruled out of order.[5] The amendment was moved without a message and was therefore ruled out of order.

South Australia House of Assembly

Division of a bill

The practice of dividing a bill is not common in the Parliament of South Australia. The last recorded instance was in 2001.

On 15 November 2016, following a motion to that effect, the House of Assembly divided the Relationships Register Bill into the Relationships Register (No 1) Bill and the Statutes Amendment (Surrogacy Eligibility) Bill. The motion further provided that the committee of the whole House would have power to insert the words of enactment into the Statutes Amendment (Surrogacy Eligibility) Bill (the original enacting clause having remained in the Relationships Register (No 1) Bill). Following amendments both bills were passed.

[5] The member's amendment proposed that the regulation could not include criteria for eligibility for financial assistance that excluded licences held by a corporation or individuals who held a licence for the benefit of another entity, or limit the amount payable to persons on the basis of the number of licenses held.

Tasmania House of Assembly

Motion of no confidence in the Speaker

A motion that the House has no confidence in the Speaker was moved by the Leader of the Opposition, the Hon. Bryan Green MP, on the first sitting day of the year. The motion cited a number of reasons, alleging conflict of interests, failure to adhere to the Code of Ethical Conduct under the standing orders, failure to adhere to precedents of the Commonwealth Parliament and erring in disallowing questions relating to ministerial responsibility.

The motion was defeated on division.

Victoria Legislative Council

The Ombudsman, the Supreme Court and the role of the Presiding Officer as the House's representative in court proceedings

The Legislative Council of Victoria passed a resolution on 25 November 2015 referring a matter to the Victorian Ombudsman under section 16 of the Ombudsman Act 1973. The motion before the House was in direct response to public controversy about the use of electorate office staff in the lead up to the general election in November 2014. Members of the House were aware that Victoria Police were investigating the matter; however there were no requirements to report to Parliament or to make any findings public. As such, the resolution to investigate the administrative behaviour of certain members of the Parliament was carried.

Section 16 of the Ombudsman Act 1973 sets out which matters Parliament may refer to the Ombudsman for investigation and report. In summary, both Houses of Parliament and their committees may refer any matter other than judicial proceedings.

The Clerk wrote to the Victorian Ombudsman, Deborah Glass, to inform her of the resolution agreed by the House. The Ombudsman wrote to the Special Minister of State on 1 December 2015 indicating she had reflected on the resolution and considered that the Ombudsman had power and jurisdiction to investigate and report to Parliament on the matter. The Special Minister of State responded to the Ombudsman's letter indicating that the government's view was that the Ombudsman did not have jurisdiction to conduct the investigation. The minister provided a copy of the legal advice in support of that claim.

In February 2016 the Ombudsman made a public statement expressing uncertainty about the Ombudsman's power to investigate and seeking a ruling from the Supreme Court under section 27 of the Ombudsman Act 1973. The statement emphasised that the Ombudsman would remain neutral throughout the proceedings. The Attorney-General later joined the Supreme Court proceedings to affirm the view that the Ombudsman does not have jurisdiction or power under section 16 to investigate and report on the matter.

On 10 February 2016 the Legislative Council reconvened after the summer break and passed a further resolution directing the President to join the Supreme Court proceedings to represent the views of the House. Members of the government party voted against the motion.

The further resolution sought to affirm the view of the House that the Ombudsman had jurisdiction and power under section 16 of the Act to investigate the matter. The resolution directed the President to apply to the Supreme Court to act as the Legislative Council's representative in accordance with any direction from the House, which included but was not limited to seeking legal advice, engaging counsel and making submissions.

The President thought it would not have been wise nor reasonable for him to have joined the Supreme Court proceedings without a direction from the House. The matter was highly contentious; in order for the President to maintain the confidence and co-operation of the House he had to continue to be impartial and not act without the specific direction of the House. The resolution provided certainty that only the views the House agreed to would be represented.

The matter was heard by the Honourable Justice Cavanough in the Supreme Court of Victoria on 9 and 10 May 2016. The court heard arguments from counsel for the Attorney-General and counsel for the President of the Legislative Council. Counsel for the Ombudsman were present but did not add to the Ombudsman's written submissions, which were neutral, advancing arguments for and against jurisdiction in the matter.

On 26 August 2016 Justice Cavanough handed down his decision that the Victorian Ombudsman has jurisdiction under section 16(2) of the Ombudsman Act 1973 to conduct an investigation pursuant to the referral from the Legislative Council.

On 22 September 2016 the acting Attorney-General announced that the government would appeal the decision of the Supreme Court in order to protect the architecture of Victoria's integrity regime. The Attorney-General then, on behalf of the state of Victoria, sought leave to appeal the judge's order. The Ombudsman and the President of the Legislative Council were automatically rendered first and second respondents to the proceedings. In response, the Legislative Council passed a further resolution directing the President to continue to act on behalf of the House in the proceedings and in any further appeals.

The Attorney-General's application for leave was heard in full concurrently with the appeal itself on 30 November 2016 before the Honourable Chief Justice Warren AC, the Honourable Justice Beach and the Honourable Justice Ferguson JJA. The Attorney-General relied on a single ground of appeal: that the trial judge erred in his determination. The government argued that the words "any matter" should be given a narrower meaning and construed in

conjunction with the statutory context of the Victorian integrity regime.

On 9 December 2016 the Court of Appeal granted leave to appeal but dismissed the substantive appeal, finding that the judge's construction of section 16(1) was correct. The government intends to appeal to the High Court of Australia.

Production of documents and suspension of Leader of the Government

On 9 March 2016 the opposition introduced a motion seeking to suspend the Leader of the Government for up to six months for failure to produce certain documents, arguing that it constituted an obstruction of a direction of the Council.

The motion followed growing dissatisfaction by, particularly, the Coalition and Greens (parties that can together form a majority in the House) with how the government had responded to orders for the production of documents.

In 2015 and early 2016, 14 orders for the production of documents were made by the Council. In response to the majority of these the government provided some of the documents requested, but opted to withhold and/or redact others on the basis of executive privilege. This practice is at odds with the standing orders, which require documents subject to claims of executive privilege to be lodged with the Clerk together with the reasons for the claim. When such documents are lodged they are made available to the sponsor of the original motion only, who may dispute the claim. Where a claim is disputed the documents are provided to an independent legal arbiter to evaluate and report on the claim.

On 25 May 2016, during further debate on the motion to suspend the Leader of the Government, the opposition moved a closure of motion to end debate and put the question. The closure of debate motion has not been used in the Council since 2003. There was reluctance to use it; other options were considered before the closure motion was decided to be the only way to end the debate. It had by then been going on for a number of weeks.

After a division the House agreed the closure motion. After a further division it agreed the substantive motion to suspend the Leader of the Government for up to six months. This motion set a precedent in suspending a member from the House for a substantial period of time.

The President made a statement about the motion expressing his concern that the matter could not be resolved by other means and his desire to see a speedy resolution to the issue.

The President made a further statement to the House clarifying his position in participating in the vote to suspend the Leader of the Government. The President has a deliberative vote at all times. He explained that as the chair of proceedings he needed to uphold the motions or directions of the House.

Given that the documents had not been provided and, more importantly, that the government had not used provisions in standing orders for an independent arbiter to evaluate the request, he felt he needed to support the suspension motion.

The current suspension may be lifted only by a further resolution if the relevant documents are lodged.

CANADA

House of Commons

New look for bills

Bills introduced in the House since January 2016 have an updated layout. These changes are aimed at making legislation more user-friendly for public audiences and persons with disabilities. It was the first time since the adoption of the Official Languages Act in 1969 that the format of federal legislation has changed significantly.

Use of voice-generating technology in the chamber

On 26 January 2016 Mauril Bélanger (Ottawa—Vanier) used text-to-speech software in the House of Commons. Mr Bélanger had been diagnosed with amyotrophic lateral sclerosis (Lou Gehrig's disease) and used voice-generating software on his tablet to introduce his private member's bill, Bill C-210, *An Act to Amend the National Anthem Act (gender)*. This was the first use of voice-generating technology in the chamber.

Before the start of the 42nd Parliament, and following his diagnosis, Mr Bélanger withdrew his candidacy for Speaker of the House of Commons. Following this, on 9 December 2015, the House adopted a special order to make Mr Bélanger honorary Chair Occupant for a day. On 9 March 2016 Mr Bélanger participated in the Speaker's parade and was in the chair during statements by members and for the beginning of oral questions. Mr Bélanger used a text-to-speech device while in the chair.

On 6 May 2016 Mr Bélanger again used a text-to-speech device during the second reading of his private member's bill. The bill passed all stages in the House.

100th anniversary of Centre Block fire

On 3 February 2016 the Speaker made a statement commemorating the 100th anniversary of the Centre Block fire. He paid tribute to the seven people who died in the fire and recognised the presence of some of their descendents in the galleries. He invited members to note the use of the wooden mace, which is customarily used when the House sits on 3 February to mark the anniversary

of the fire. The House then adopted a motion instructing the Office of the Curator to submit ideas to the Board of Internal Economy for a physical commemoration, such as a stained glass window, to be installed as a permanent reminder of the event.

Clerk Emerita

On 13 April 2016, pursuant to an order of 4 December 2015, the Speaker welcomed Audrey O'Brien, Clerk Emerita, to the House of Commons to recognise her retirement. Ms O'Brien took part in the Speaker's parade and sat at the Table during oral questions, after which statements of tribute were made by members of each party.

Casting vote by the Speaker

On 16 May 2016 the House considered report stage of Bill C-10, *An Act to amend the Air Canada Public Participation Act and to provide for certain other measures*. The recorded division resulted in a tie of 139–139. The Speaker reminded members that in such circumstances the chair votes in accordance with precedent. Accordingly, he voted to allow debate to continue, casting his vote in the affirmative. This was Speaker Regan's first casting vote, and only the 11th casting vote by a Speaker.

150th anniversary of first meeting on Parliament Hill

On 8 June 2016 the Speaker made a statement to highlight the 150th anniversary of the first meeting on Parliament Hill. On 8 June 1866 the Legislature of the Province of Canada met for the first time in the new Parliament Building in Ottawa.

Initiatives for a family-friendly House of Commons

On 15 June 2016 the Standing Committee on Procedure and House Affairs presented its 11th report, *Interim Report on Moving Toward a Modern, Efficient, Inclusive and Family-Friendly Parliament*.

The committee outlined seven recommendations, including:

- continuing the practice of holding votes immediately after question period;
- refraining from holding votes any later on Thursdays than immediately following question period;
- tabling the House calendar every year before the summer adjournment;
- the House Administration providing flexible childcare services, paid for personally by Members of Parliament;
- the House of Commons Information Services providing access to members' calendars for their staff and family members;
- examining the House of Commons bus service to ensure timeliness and

security;
- examining the possibility of amending the travel points system for members' families.

In the last year the House Administration has taken other steps towards family-friendly services to members. A dedicated family room has been introduced in Centre Block for members and their spouses with infants and young children, as has access to on-call childcare services in Ottawa, which is paid for by members using the service.

Senate

Filling of Senate vacancies

A total of 27 vacancies were filled by independent senators in 2016. All were selected using the new Senate appointment process, which aims to make the chamber less partisan and more independent. During the first phase of the new process the Independent Advisory Board, which recommends candidates to the prime minister, worked with organisations in the provinces with vacancies to identify suitable candidates. As a result, seven positions were filled in the spring. During the second phase all Canadians meeting the assessment criteria were invited to apply for a seat in the Senate. The prime minister then selected individuals from a list of candidates recommended by the board; 20 additional vacancies were filled. All new senators agreed to sit as independents.

The 27 additional senators means there are 42 non-affiliated members of the Senate, representing 40% of the 105 seats.

Independent Senators Group

In March 2016, six independent senators announced they would form a working group, the Independent Senators Group (ISG), to promote an effective and efficient Senate. As stated by their facilitator, ISG members have individual autonomy in exercising their parliamentary functions, yet understand that ensuring that the Senate functions smoothly is a shared and collective responsibility.

By the end of 2016, 33 independent senators had chosen to affiliate with the group.

In response a sessional order was agreed which facilitated the membership of independent senators of committees.

Questions to ministers

In December 2015 the Senate adopted a motion to invite ministers of the Crown who are not members of the Senate to attend question period and answer questions relating to their ministerial responsibilities. There were 20 question periods with ministers in 2016. Traditionally this accountability exercise was

limited to the Leader of the Government with respect to public affairs, a senator who is a minister with respect to that senator's ministerial responsibilities, or committee chairs about the activities of their committees.

The Senate is considering a proposal to entrench the practice of inviting ministers, as recommended by the Special Committee on Senate Modernization. The committee also recommends periodically inviting officers of Parliament to answer questions during question period, and has made various other recommendations.

New governmental positions

The Senate has been adapting to new leadership structures. When Senator Peter Harder was appointed to the Senate in March 2016 he was also designated Government Representative in the Senate—essentially filling the position of Leader of the Government in the Senate, which had been vacant since the beginning of the session. Traditionally the Government Leader was a minister who acted as leader of the senators belonging to the government party.

In early May 2016 senators Diane Bellemare and Grant Mitchell were appointed to two new positions: Legislative Deputy to the Government Representative in the Senate, whose functions are typical of a Deputy Leader, and Government Liaison, whose duties are generally the same as a whip. Together, the three are the entire representation of the government in the Senate and are responsible for facilitating government legislation.

A point of order was raised on these positions, as they are not formally recognised in the Rules of the Senate. The Speaker ruled against the point of order, noting that flexibility should be permitted in terms of how positions are styled.

Proceedings on assisted dying bill

The most debated piece of legislation in 2016 was Bill C-14, relating to medical assistance in dying. The Senate began with a pre-study while the bill was still before the House of Commons. This resulted in 10 recommendations, as well as eight more supported by a minority in the committee. Many of the recommendations were similar to those of the Special Joint Committee on Physician-Assisted Death, which had been established before the bill was introduced in Parliament.

On 31 May 2016 the bill received its first reading in the Senate. The same day a motion was passed for the Senate to resolve itself into committee of the whole the following sitting day to hear from the ministers of Justice and Health about the bill. After lengthy debate at second reading, the bill was sent to the Legal and Constitutional Affairs Committee for study. The committee did not amend the legislation; rather it opted to allow the chamber as a whole to

consider amendments proposed at third reading, permitting more senators to participate. A motion was agreed to modify the normal procedures for third reading. The limit on speaking only once was lifted, senators were able to move more than one amendment and debate was generally organised by specific themes.

The third-reading debate began on 8 June 2016 and lasted over six days. The Senate passed numerous amendments. Some of these were accepted by the House of Commons; others were rejected or modified. The Senate agreed the Commons' changes and the bill received royal assent by written declaration on 17 June 2016.

Senate powers over appropriation and taxation bills

A point of order was raised on 24 November 2016 on an amendment in a committee report on a budget implementation bill. The Speaker's ruling on 29 November 2016 clarified the authority of the Senate over appropriation and taxation bills. Although appropriation bills and bills imposing taxation must originate in the Commons, the Senate has power to amend such bills, but only by reducing the amounts therein.

Alberta Legislative Assembly

Family-friendly initiatives

The Special Standing Committee on Members' Services, Alberta's equivalent to a board of internal economy, established a sub-committee to report on family-friendly workplace practices and policies at the Assembly. The sub-committee made the following recommendations in its October 2016 report:

1. That the standing orders be amended to permit members to bring infants onto the floor of the chamber.
2. That the Legislative Assembly Act be amended to permit members to be absent from the Assembly without financial penalty for one regular spring or fall sitting due to pregnancy, child birth or childcare. This would apply within one year of the birth or coming into the care of the member's child, or in any other circumstance authorised by the Speaker.
3. That greater access to the legislature precincts be provided to the partners and children of members, and carers of members' children.
4. That the government review family-friendly infrastructure in the legislature precincts and identify priorities for improvement.
5. That the Speaker explore the possibility of creating a family room in the legislature precincts.
6. That the government examine the possibility of creating a childcare facility in the Edmonton Federal Building or elsewhere in the legislature precincts.
7. That a guide be prepared for members who are expecting children or who

are new parents to outline the facilities and resources available to them. The chair of the Members' Services Committee, Speaker Robert E. Wanner, tabled the sub-committee's final report in the Assembly on 31 October 2016.

British Columbia Legislative Assembly

Legislative Assembly Management Committee

As reported in miscellaneous notes in previous editions of *The Table*, the Legislative Assembly Management Committee continued its programme to strengthen financial management, accountability and transparency at the Legislative Assembly. Its activities in 2016 included publishing the Assembly's third annual accountability report containing audited financial statements; publishing an election transition guide for members; and introducing enhanced security measures at entrances to the Parliament Buildings.

New members

A swearing-in ceremony in the Legislative Chamber for two new opposition members, Melanie Mark and Jodie Wickens, was held on 17 February 2016. As Ms Mark is the first First Nations woman elected to the Legislative Assembly the ceremony featured traditional Nisga'a drummers and singers.

Talking stick

During the sitting on 11 May 2016 the Speaker adjourned proceedings to permit two regional First Nations Chiefs, Chief Ronald Sam of the Songhees First Nation and Chief Andy Thomas of the Esquimalt First Nation, to present the Legislative Assembly with a talking stick. Elders Elmer George and Mary Ann Thomas led members in a ceremonial prayer.

In Aboriginal tradition the talking stick represents the right to speak and to receive a respectful hearing, and emphasises the importance of listening. It is used during potlatch ceremonies on the west coast of British Columbia. The person holding the talking stick has the right to speak without interruption; no-one can leave until the speaker is finished. The talking stick is passed to others when it is their turn to speak.

The talking stick is now on display in the chamber and serves as a reminder that First Nations and reconciliation should be considered in debates and discussions in the Legislative Assembly.

Royal visit

Their Royal Highnesses the Duke and Duchess of Cambridge arrived in Victoria on 24 September 2016 for an eight-day visit to western Canada. The official welcome at the legislature was attended by an estimated 25,000 people. On 26 September 2016 their Royal Highnesses attend a second ceremony at

Government House at which the Duke of Cambridge placed a fourth ring, a Ring of Reconciliation, on the Black Rod. The Black Rod was created in 2012 to celebrate the Diamond Jubilee of Her Majesty Queen Elizabeth II. This new ring symbolises a step towards the reconciliation of all cultures in British Columbia. It is inscribed with the motto "Lets'e Mot", which means "one mind" in Halq'emeylem, one of the Salishan languages spoken on Vancouver Island.

Newfoundland and Labrador House of Assembly

Increase in number of members

The 2016 spring session saw the first sitting after the number of MHAs was reduced to 40 from 48 following a boundary review in 2015.

Reading of names of WWI fallen

The Assembly by unanimous consent varied the Order Paper Routine Business to allow MHAs at start of each sitting to read approximately 40 of the 1,600+ names of those from Newfoundland who died during World War I. 2016 was the 100th anniversary of the Battle of Beaumont Hamel, at which nearly 700 men of the Newfoundland Regiment were killed or injured.

Prince Edward Island Legislative Assembly

Referendum on electoral system

From 29 October to 7 November 2016 Prince Edward Island residents voted in a plebiscite on the electoral system.

The plebiscite was based on the work of the Special Committee on Democratic Renewal, which made recommendations to the Legislative Assembly on the form and content of a plebiscite question. The committee hosted public consultations in communities across the province on the topic and received views through a variety of formats.

From the consultations four options for change emerged. These were (i) the first-past-the-post system with additional seats for leaders of political parties which receive a certain threshold in the popular vote (suggested as 10%); (ii) a preferential voting system; (iii) mixed-member proportional representation (including open lists); and (iv) dual-member proportional representation. The committee also considered the current first-past-the-post system. The committee recommended that these five options be put to the electorate in the plebiscite, to be ranked by voters in order of preference. Elections PEI would be tasked with ensuring that voters received clear and impartial information about the plebiscite.

During the 10 days of voting three methods were used: electronic voting, telephone voting and the traditional paper ballot. It was the first time in Canada

in which electronic voting was used at provincial level. Eighty-one per cent of all votes were cast in this way. Nine per cent of ballots were recorded by telephone; the remaining 10% of voters used paper ballots on the two days allotted to this method. Another first was allowing 16 and 17 year olds to vote—the first time this has happened in a provincial vote in Canada.

The results of the plebiscite were calculated using preferential voting. There was no clear winner after the first round. The proposal for first-past-the-post plus party leaders produced least support so was excluded. Round two also produced no clear winner, resulting in preferential voting being excluded. Round three saw dual-member proportional representation dropped. Finally, on the fourth round of counting, majority support went to mixed-member proportional representation, which gained 52% of votes. The runner-up was the current system, first-past-the-post.

Turnout was considered low at 36%. In response the premier proposed that the electorate would ratify the results in a binding referendum to be held in conjunction with the next provincial general election. This response provoked considerable comment, a spike in social media activity (#HonourTheVote) and public demonstrations outside the legislative building.

A recent sitting of the legislature saw two separate motions debated on the topic. One, proposed by the Leader of the Green Party (a proponent of mixed-member proportional representation), called for the government to introduce legislation to implement that electoral system in time for the next provincial election. It was defeated. Another, moved by the premier, called for members of the Legislative Assembly to consider a specific referendum on the Democratic Renewal Act, and to include mixed-member proportional representation as one of two choices in a binding referendum, leaving it to the Legislative Assembly to determine the second choice. At the time of writing debate had yet to conclude on this motion, so it remains on the order paper.

Québec National Assembly

Motion to have inquiry commissioners heard by parliamentary committee

In 2016 a parliamentary committee chair ruled on the admissibility of a motion moved by an official opposition member asking that the committee carry out an order of initiative to hear two inquiry commissioners on public-contract awarding and management in the construction industry.

The chair declared the motion out of order.

After recalling the general principle of the separation of powers the chair pointed out that although parliamentary systems had numerous mechanisms for promoting collaboration between the executive and legislative powers, stricter separation of powers applied to the judicial branch.

The inquiry commission in question had been created under Québec's *Act*

respecting public inquiry commissions, which authorised the government to create such commissions and determine their mandate, members, budget and term. The Act provided that, in performing their duties, inquiry commissioners enjoyed the same protection and privileges as judges.

The chair summarised the jurisprudence on judicial independence. The courts had given this principle very broad scope and had ruled that executive or legislative bodies may not require judges to explain or defend their rulings nor force them to testify on the grounds for their decisions. Based on this, administrative-law experts and courts had interpreted broadly inquiry commissioners' autonomy and duty to remain neutral.

While judges and inquiry commissioners enjoyed constitutional privileges stemming from judicial independence, members enjoyed parliamentary privilege, which also had constitutional status. Legislative assemblies had these privileges, individually and collectively, to ensure that their proceedings carried on unimpeded and to maintain their authority, dignity and autonomy.

One parliamentary privilege was the power to conduct inquiries, call witnesses and demand papers. The President of the Assembly had already recognised a committee's power to demand that a minister appear before it given that ministers were accountable to the Assembly. However, this function of the legislative branch could not be transposed onto the relation between the legislative and judicial branches, due to a stricter separation between these two powers.

Since judicial independence and parliamentary privilege were similar constitutional principles, they must coexist. Courts of justice refrained from intervening in legislative assemblies' workings and interfering in their deliberations. Assemblies must respect the independence of judicial bodies and similar entities, such as inquiry commissions. Each power was entitled to have its autonomy respected.

The chair recalled that, although inquiry commissions were created by the executive, they remained independent in their role, deliberations and drawing of conclusions. Consequently, while the Assembly could hold the executive accountable, its powers over this commission were no greater than those of the executive.

CYPRUS HOUSE OF REPRESENTATIVES

An electoral threshold was introduced; following the parliamentary elections in May 2016 eight parties secured seats in the new parliament.

The plenary day session was switched to Friday from Thursday to give an extra day for parliamentary committees to meet before the plenary session.

It was agreed that an electronic voting system would be installed and used by

the beginning of 2017.

Discussion on a new building for parliament continued in 2016.

STATES OF GUERNSEY

Structure of government

In November 2015 the States of Deliberation agreed the proposals in the third report of the States' Review Committee, which recommended changes to the structure of government in Guernsey. The changes took effect on 1 May 2016. The number of elected members for Guernsey decreased from 45 to 38. The committee structure, by which the decisions of the States are implemented and proposals brought to them for consideration, was reformed. The previous ten departments were replaced with six principal committees and a number of other bodies to administer governmental functions. The scrutiny structure was reformed.

General election

A general election was held on 27 April 2016 at the end of the fixed, four-year term of the previous Assembly. The number of deputies was reduced to 38 from 45. A record number of women deputies were elected (12, compared to five in the previous Assembly). Fourteen new members were elected; four former members were returned to the Assembly; and 20 members from the previous term were re-elected. The new term began on 1 May 2016 and will end on 30 June 2020. A few weeks later a long-standing member died in office and the subsequent by-election returned another new member.

Electoral system

The States resolved on 19 February 2016 that for the 2020 general election and thereafter all deputies shall be elected on an island-wide basis (i.e. one constituency for all of Guernsey, rather than the present seven). All voters will therefore have the same number of votes as there are deputies' seats (38).

The changes will take effect if approved in an island-wide referendum. The States' Assembly & Constitution Committee was directed to report as expeditiously as possible with proposals to give effect to that, including the methodology of the election and the holding of a referendum. It aims to report to the States by the middle of 2017.

Effect of Brexit

The Bailiwick of Guernsey (in common with the Bailiwick of Jersey and the Isle of Man) has a special relationship with the European Union, as set out in protocol 3 to the United Kingdom's Treaty of Accession. For example,

Guernsey is within the EU customs union but is not bound by EU rules on free movement of persons, capital and services.

At its meeting on 29 June 2016 the States considered the implications for Guernsey of the UK's withdrawal from the European Union. It agreed to: engage with the UK on certain major areas of concern for Guernsey; seek to protect and secure the best interests of Guernsey in its trading relationship and for those resident in the Bailiwick; take all other necessary measures that may be considered appropriate.

On 8 March 2017 the States noted Her Majesty's Government's intention to issue a notice under article 50 of the Treaty on European Union and resolved to note and recognise the subsequent effect this and the withdrawal of the United Kingdom from the European Union will have on the Bailiwick's domestic legislation and on the legislative and other measures that ought to be taken in consequence. The States directed that relevant local legislation should be repealed or amended and new legislation drafted to regularise and protect the Bailiwick's position. They endorsed the view that guaranteeing the rights of EU nationals resident and economically active in Guernsey should be a priority in any negotiations with Her Majesty's Government.

INDIA

Rajya Sabha

Amendment to motion of thanks to President

Article 87(1) of the Constitution of India provides that at the beginning of the first session after each general election to the House of the People (Lok Sabha) and at the beginning of the first session of each year, the President shall address both Houses of Parliament in the Central Hall of Parliament to inform Parliament of the causes of its summons. This special address, popularly called "President's address", after being delivered is laid on the table of both Houses at a separate sitting held the same day. The President's address essentially highlights the government's policy priorities for the coming year.

The address is debated on a motion of thanks to the President. The motion is moved by the government in each House and, by tradition, is normally adopted without amendment in both Houses. In 2016, however, the motion of thanks was adopted in amended form in the Council of States (Rajya Sabha). This was the fifth time the motion of thanks had been adopted in amended form by the House (the previous occasions were 1980, 1989, 2001 and 2015). On 9 March 2016 an amendment to the motion moved by the Leader of Opposition in the Council of States was adopted by 94 votes to 63. The motion, as amended, was adopted.

Classification of bill as a financial bill

On 7 August 2015 a private member's bill, the Andhra Pradesh Reorganisation (Amendment) Bill 2015, was introduced in the Rajya Sabha. The motion for consideration of the bill was moved on 11 March 2016 and debate on the bill took place on 29 April and 5 August 2016.

On 5 August 2016, when the motion for further consideration of the bill was about to be taken up, the Minister of Finance and Minister of Corporate Affairs and Leader of the House raised an objection under rule 186(7) of the Rules of Procedure and Conduct of Business in the Rajya Sabha. The objection was that the bill was a money bill under article 110 (read with article 117) of the constitution and therefore could not be introduced in the Rajya Sabha. The Deputy Chairman of the Rajya Sabha referred the bill to the Speaker of the Lok Sabha under rule 186(8) for a decision on whether it was a money bill. He deferred discussion on further proceedings on the bill.

The Speaker of the Lok Sabha decided that it was not a money bill within the meaning of article 110(1) of the constitution. However, in conveying the decision of the Speaker, the Secretary-General of the Lok Sabha opined that the provisions of the bill engaged article 117(1) of the constitution and therefore it could be introduced only in the Lok Sabha.

In view of the observations of the Secretary-General, the advice of the Ministry of Law and Justice was sought. It observed that the bill contained provision for a special package to the state of Andhra Pradesh which involved expenditure from the Consolidated Fund of India. Accordingly, the ministry opined that the bill was a financial bill, which can be introduced only in the Lok Sabha under article 117(1) of the constitution.

In view of the above, the Deputy Chairman of Rajya Sabha ruled on 18 November 2016 that the bill was a financial bill within the meaning of article 117(1) and so could be introduced only in the Lok Sabha. In view of rule 185(3) of the Rules of Procedure and Conduct of Business in the Rajya Sabha, further discussion on the bill was terminated forthwith and it was directed that the bill be removed from the register of bills pending in the Council.

STATES OF JERSEY

On 19 January 2016 the Assembly decided to publish several transcripts of debates held *in camera*, following a request for access to the transcripts by the Assembly's Independent Jersey Care Inquiry.

On 26 September 2016 proceedings of the Assembly were webcast for the first time.

On 15 November 2016 the Assembly voted 31–13 against a proposition which would have required the replacement of the Bailiff of Jersey as presiding

officer with an elected member.

NEW ZEALAND HOUSE OF REPRESENTATIVES

20th anniversary of MMP

New Zealand marked the 20th anniversary of its mixed-member proportional Parliament (MMP) structure in October 2016. The event was attended by a delegation from the German Bundestag, on whose election system the New Zealand MMP system was modelled.

Before moving to MMP in 1996 New Zealand elected its House of Representatives using a first-past-the-post system. Following two referendums on the electoral system in the 1990s, New Zealand elected its first MMP Parliament in 1996.

In the last first-past-the-post Parliament there were four parties and 4% of seats went to members outside National and Labour. The current MMP Parliament has seven parties, with 24% of seats held by smaller parties.

Following the seven elections held under MMP there have been coalitions or confidence-and-supply arrangements to form a government. However this has resulted in only three prime ministers—including the recently sworn-in prime minister, Bill English—in the 21st century. A 2011 referendum on MMP saw 58% of voters in favour of retaining it.

New prime minister

On 5 December 2016 prime minister John Key announced his resignation as the leader of the New Zealand National Party. Mr Key had led the National Party since 2006 and became prime minister after the 2008 general election.

On 12 December 2016 Bill English and Paula Bennett were elected by National Party members of Parliament as National's new leader and deputy leader, and the country's new prime minister and deputy prime minister. Mr English was sworn in as prime minister that afternoon. He had previously served as Mr Key's deputy prime minister since 2008.

New Governor-General

Dame Patsy Reddy was sworn in as the 21st Governor-General of New Zealand on 28 September 2016. Her predecessor, Sir Jerry Mateparae, ended his five-year term in August 2016.

Dame Patsy has a legal and corporate governance background, with experience as a lawyer, Treaty of Waitangi claims negotiator and chair of the New Zealand Film Commission. Earlier in 2016 she co-led a review of New Zealand's intelligence agencies.

Dual-language legislation passed

On 3 July 2014 the Māori Language (Te Reo Māori) Bill was introduced. The bill was intended to support the protection of the Māori language (Te Reo Māori), by affirming it as an official language of New Zealand and establishing a new entity to provide leadership on the revitalisation of the language.

The bill as introduced was drafted in English. It was considered by the Māori Affairs Committee, which recommended the insertion of a complete Te Reo Māori translation of the text, transforming it to a dual-language bill. The committee also recommended inserting a provision stating that the two versions were of equal authority but, in the event of a conflict between the two, the Te Reo Māori version would prevail. Ministerial advisers arranged for the bill to be translated into Te Reo Māori and the dual-language bill was reported from select committee on 26 February 2016 as Te Pire mō Te Reo Māori/the Māori Language Bill.

As the bill was awaiting its third reading language experts who had assisted the translation further reviewed the Te Reo Māori version. They identified over 100 style and grammatical amendments to the text that they considered necessary. These amendments were too significant to be made under the Clerk's discretion; the bill instead needed to be recommitted to a committee of the whole House.

Immediately before its third reading on 14 April 2016 the minister in charge of the bill sought leave to recommit it for consideration of the tabled amendments, and for the bill then to be set down for third reading forthwith. Leave was granted, the committee of the whole House unanimously agreed the amendments, and the House proceeded to the third reading, which was completed that afternoon. The bill received royal assent on 29 April 2016 and largely came into force the following day.

Use of financial veto on bill

In New Zealand the chief mechanism protecting the financial initiative of the government is the financial veto. Members may propose bills, amendments to bills, changes to Votes or motions that have fiscal implications, but the government have the ability to issue a financial veto certificate stating that they do not concur with the proposal because it would have a more-than-minor impact on the fiscal aggregates or the composition of the Vote. The financial veto was introduced in 1996 and has been used occasionally to prevent the House passing amendments to bills or changes to Votes.

The Parental Leave and Employment Protection (6 Months' Paid Leave) Amendment Bill was a member's bill in the name of an opposition member. The bill was intended to extend the period of paid parental leave from 18 to 26 weeks. The government expressed clear opposition to the bill but, as several of

their support parties supported the bill, were unable to defeat it at any stage. The government therefore announced their intention to use the financial veto to prevent the bill being passed—the first time an entire bill had been subject to a veto.

A financial veto certificate applying to an entire bill may be issued only when the bill is awaiting its third reading. This allows the bill to be fully debated and amended as it proceeds through the legislative process.

The veto certificate on the parental leave bill was issued on 16 June 2016. It was published as a parliamentary paper. The House held the third reading debate on 29 June 2016. The member in charge of the bill moved the third reading, and the bill and the financial veto were discussed in the ensuing debate. Once the debate concluded the Speaker confirmed that no question would be put on the bill being read a third time. The motion lapsed and, as no further course of action was available, the bill was discharged.

New approach to financial scrutiny debates

In the current Parliament the New Zealand House of Representatives has trialled a new approach to several set-piece financial scrutiny debates: the estimates debate, the annual review debate and the Crown entities debate. Usually in these debates the committee of the whole House would debate each Vote, department, office of Parliament or Crown entity individually. All of these debates are time-limited.

The new approach:

- divided the debates into a number of smaller debates, each themed around a particular sector, with all Votes or entities relevant to that sector able to be debated; and
- combined the annual review debate and the Crown entity debate into one, so that all entities operating in a particular sector (regardless of the type of entity) were able to be discussed.

Each sector debate had a fixed number of calls allocated to larger parliamentary parties, ensuring that each was subject to a minimum level of debate. Supplementary calls were allocated to parliamentary parties to use as they chose in the sector debates, allowing them to focus extra time on issues of particular interest. The time allocated for these debates was extended, with a related reduction in the time allocated for other time-limited set-piece debates.

The Business Committee was central to arranging the sectoral approach. Where the new approach departed from provisions in standing orders the committee issued determinations, as it is empowered to do by standing orders. These included combining the annual review and Crown entity debates, extending the length of the debates and setting new report deadlines for select committees. The Business Committee issued determinations setting out the

structure of each debate and giving clarity on how the debates would proceed. Because the committee has senior representatives from each party and operates on the basis of near-unanimity its support for this new approach was significant in ensuring wider buy-in among members.

Report of Regulations Review Committee

The Regulations Review Committee launched its *Inquiry into Parliament's legislative response to future national emergencies* on 1 December 2016, reviewing Parliament's response to the 2010–11 Canterbury earthquake that resulted in the deaths of over 180 people. The committee found that executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself; that emergency legislation should include safeguards; and that any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one. The report made 11 recommendations to the government.

PAKISTAN

National Assembly

Establishment of Sustainable Development Goals secretariat in National Assembly

The Sustainable Development Goals (SDGs) for the 2030 Agenda were adopted by world leaders in September 2015 at an historic UN summit. The new SDGs call for action by all countries—poor, rich and middle income—to advance prosperity while protecting the planet. The 17 goals recognise that ending poverty must go hand-in-hand with building economic growth, addressing a range of social needs, tackling climate change and protecting the environment. Pakistan has prioritised the SDGs, adopting them by a unanimous resolution of parliament.

Pakistan has established a parliamentary taskforce for the SDGs. This initiative was replicated by the speakers of all provincial legislatures (i.e. Balochistan, Khyber Pakhtunkhwa, Punjab, Sindh, Azad Jammu and Kashmir, and Gilgit-Baltistan).

The principal objective of the taskforce was to improve awareness of SDGs and to consider how they would be implemented.

It was felt that these taskforces should be institutionalised. Hence on 16 February 2016 the National Assembly of Pakistan established the first-of-its-kind secretariat on SDGs in the parliament building.

The main objectives of SDGs taskforces are:

- To promote discussion through Assembly debates and questions in order to obtain information, raise awareness and hold government to account.

- To hold committee hearings to investigate provincial priorities in greater depth and give opportunities to hear from independent experts and civil society representatives.
- To convene constituency meetings and public forums to establish dialogue with members of the public.
- To engage with local and relevant authorities, civil society organisations, media and the private sector by sharing information and supporting their participation in decision making.
- To provide representation to all sectors of society by ensuring that citizens, different stakeholders and civil society groups have a voice at the national level and can participate in decision making.
- To influence the formulation of new development goals by engaging in intergovernmental negotiations and policy discussion at national and provincial level.

UNITED KINGDOM

House of Lords

Governance changes

Following the report of the Leader's Group on Governance of Domestic Committees in the House of Lords, the House agreed a series of changes to the domestic governance framework, which were intended to clarify and streamline decision-making and accountability.

The House Committee (which was the principal decision-making body on governance matters) was replaced by the House of Lords Commission. Its membership was slightly reduced and external members appointed to it for the first time. Three domestic committees (Administration and Works; Information; Refreshment) were replaced with a Services Committee. A new Finance Committee was created to advise the commission. These two new committees would no longer be chaired by the Chairman of Committees. Instead he (renamed as the Senior Deputy Speaker) would focus on procedural matters, through his continued chairmanships of the Privileges and Conduct, Procedure and Selection committees.

Cessation of membership of non-attenders

A miscellaneous note in volume 83 (2015) of *The Table* summarised the changes enacted in the House of Lords Reform Act 2014. Section 2 of that Act applied for the first time to session 2015–16. It provides that any member who does not attend the House in a session lasting six months or longer ceases to be a member at the end of that session (unless the House resolves to the contrary due to special circumstances). Accordingly, four members left the House in

May 2016 due to non-attendance in session 2015–16.

Scottish Parliament

Scotland Act 2016

The Scottish Parliament gave its legislative consent to the Scotland Bill on 16 March 2016. The bill received royal assent on 23 March 2016. The Scotland Act 2016 ("the 2016 Act") gives further powers to the Scottish Parliament. It devolved further tax powers, including power to set the rates and bands for income tax above the personal allowance, to be commenced in April 2017.

Please see the miscellaneous note in volume 84 (2016) of *The Table* for more detail on the powers which were devolved.

Taxation

The Scotland Act 2012 allowed the Scottish Parliament to introduce a Scottish Rate of Income Tax (SRIT). The UK government deducted 10p in the pound from basic, higher and additional rates of income tax and the Scottish Parliament had power to levy a Scottish rate across these three bands. SRIT came into force on 1 April 2016. However, given the new tax powers devolved by the 2016 Act (see above), SRIT will last only one year.

Scottish Parliament election 2016

The Scottish Parliament election held on 5 May 2016 resulted in the Scottish National Party being the largest party with 63 MSPs, two short of an overall majority. The Conservatives were second with 31 MSPs, pushing Labour into third with 24. The Scottish Green Party, with six MSPs, overtook the Liberal Democrats, who remain on five.

For the first time 16 and 17 year-olds were able to vote in the Scottish Parliament election.

Fifty-one new members were elected. Twenty-four members announced they would step down before the election, including the Presiding Officer Tricia Marwick, the Presiding Officer during session 3, Alex Fergusson, and the former First Minister Alex Salmond. Twenty-six members lost their seats. After the election women MSPs continue to make up 35% of total MSPs. Nineteen MSPs have served continuously since the first Scottish Parliament election in 1999.

Following the election the Scottish Parliament has a new Presiding Officer and two new Deputy Presiding Officers.

For the first time the Scottish Parliament took responsibility for inducting members in their parliamentary work, with a full programme of events in the two weeks after the election. The programme included allocating to each new member an "orientation guide" from Scottish Parliament staff and running

a three-day programme on various aspects of parliamentary procedure and practice. Practical information was given on employing staff, setting up a local office and securing accommodation.

Gender balance on Scottish Parliamentary Corporate Body and Parliamentary Bureau

Following the Scottish Parliament elections in 2016 an all-male Parliamentary Bureau was appointed and an all-male Scottish Parliamentary Corporate Body was elected. The Presiding Officer subsequently wrote to the Standards, Procedures and Public Appointments Committee on behalf of the two bodies asking the committee to consider amending the standing orders to provide that "specific regard is given to gender balance" when both bodies are established.

The committee proposed changing the standing orders to place a new requirement on party leaders to consult each other and have regard to gender balance before nominating members to the Parliamentary Bureau. The rules would require members intending to make a nomination to the Scottish Parliamentary Corporate Body to have regard to gender balance before making such a nomination.

Parliamentary Commission

On 26 October 2016 the independent Commission on Parliamentary Reform was established by the Presiding Officer to consider how the Scottish Parliament can engage better with the people of Scotland and how its work can be improved to deliver better scrutiny. The commission is due to report in June 2017.

Interests of Members of the Scottish Parliament (Amendment) Act 2016

The Interests of Members of the Scottish Parliament (Amendment) Act 2016 received royal assent on 21 January 2016. The bill amended the Interests of Members of the Scottish Parliament Act 2006 to combine the separate processes of members declaring their financial interests in accordance with the Scottish Parliament's members' interests regime and the reporting of political donations and loans to the Electoral Commission. Other changes to the 2006 Act included broadening the range of sanctions that may be imposed on members who breach the disclosure requirements and addressing the recommendation of the Council of Europe GRECO (Group of States against Corruption) evaluation report to reduce the threshold for exemption from registration of, for example, remuneration, stocks and shares, or gifts.

Lobbying (Scotland) Act 2016

The Lobbying (Scotland) Act 2016 received royal assent on 14 April 2016. The purpose of the Act is to increase public transparency of contacts between

organisations and elected members by establishing a register containing details of lobbying by paid consultants and in-house lobbyists who engage directly (orally and in person) with MSPs and Scottish ministers. It was envisaged that a "register of lobbyists" would be fully operational within 18 to 24 months. Work on the register is under way. The public procurement process to develop an online register has also started.

National Assembly for Wales

Assembly recall

The last plenary meeting of the Fourth Assembly was expected to be on 16 March 2016, in advance of the Easter recess and dissolution on 6 April 2016. However, following Tata Steel's announcement of plans to sell its UK business, the Assembly was recalled on 4 April 2016 for the First Minister to make a statement, which lasted an unprecedented three and a half hours. Due to a planned IT re-fit of the Senedd chamber the meeting was held in Siambr Hywel—the chamber used by the Assembly pre-2006, which is now the Assembly's dedicated youth debating chamber.

The chair of the Assembly's Enterprise and Business Committee convened the committee the day after the First Minister's statement, and called on industry representatives, union representatives, TATA Steel Port Talbot Power Plant and the Minister for Economy, Science and Transport to give evidence.

Election of Presiding and Deputy Presiding Officers

Following the Assembly election on 5 May 2016 the Fifth Assembly met for the first time on 11 May 2016 to elect a new Presiding Officer and Deputy Presiding Officer. The outgoing Presiding Officer (Dame Rosemary Butler) chaired the meeting despite no longer being an Assembly Member, as provided for under section 25(3) of the Government of Wales Act 2006 (the Presiding Officer holds office until the conclusion of the next election of a Presiding Officer) and in standing orders.

Two members were nominated for the position of Presiding Officer. They were invited to address the Assembly. A secret ballot was held. Elin Jones, the Plaid Cymru member for Ceredigion since 1999, was elected. The other candidate was Lord Elis-Thomas, also a Plaid Cymru AM since 1999, who had been the Assembly's first Presiding Officer from 1999 to 2011.

Since her election Elin Jones has used the Welsh title Llywydd, rather than Presiding Officer.

Labour AM Ann Jones was elected Deputy Presiding Officer. She has been an Assembly Member since 1999.

Election of First Minister

The Assembly is required to nominate a First Minister within 28 days of an Assembly election. The Llywydd may invite the Assembly to agree that nominations take place. If any member objects an electronic vote is called. Nomination proceedings take place only if a majority of members voting agree. If only one nomination is made the Llywydd must declare that person to be the nominee. If there is more than one nomination an election is conducted by roll call, whereby the Llywydd invites each member in alphabetical order to vote for a candidate.

During the first plenary of the Fifth Assembly it became clear that more than one nomination for First Minister was expected, and that the result could be close.

The Llywydd duly invited the Assembly to resolve to consider nominations. There was no objection to this proposal, so she proceeded to invite nominations. Carwyn Jones, who had been First Minister since December 2009, was nominated, as was Leanne Wood, leader of Plaid Cymru. A vote by roll-call was therefore required.

All Labour members and Kirsty Williams (Liberal Democrat) voted for Carwyn Jones while all Plaid Cymru, Conservative and UKIP members supported Leanne Wood, resulting in a tie at 29 votes each. The Llywydd immediately suspended the meeting for discussions to take place. When it became clear that holding another roll-call—as standing orders require in the event of a tied vote—would result in the same outcome, she adjourned the meeting and announced that members would be informed of the date of the next meeting.

Over subsequent days the Llywydd was kept informed of the progress of discussions between the party groups (primarily Labour and Plaid). On 17 May 2016 she informed members that the next plenary would be held the following day.

It became clear that an agreement had been reached which would see Leanne Wood withdraw her candidacy with a view to Carwyn Jones being nominated unopposed. At the same time UKIP let it be known that if Leanne Wood's nomination were withdrawn they would want to make a nomination of their own. Standing orders are silent on whether a nomination can be withdrawn, who would withdraw it (the nominator or the nominee) and whether new nominations could be invited at this stage.

The Llywydd decided that as the nomination process had been adjourned, and so would be continued, there was no scope for new nominations. She decided that a previously nominated candidate had to be allowed to withdraw if they no longer wished to be First Minister, and that could happen by means of the member who nominated the candidate withdrawing the nomination.

As a result Carwyn Jones was the only nominee, and so was declared nominated as First Minister and invited to address the Assembly.

Since then the Business Committee has agreed to review the standing orders relating to early business in view of the events of May 2016 (other ambiguities and inconsistencies were identified around the election of the Llywydd and nomination of the Counsel General) and will consider whether any changes are needed.

Election of committee chairs

In March 2014 members raised questions about the previous procedure whereby party groups nominated their chairs. The procedure had been in place since the beginning of the Fourth Assembly and provided that party groups would nominate a member to chair a committee, with the Business Committee then tabling a motion containing that name, to be ratified in plenary.

The issue was discussed by the Assembly's Business Committee in 2015 when the Fourth Assembly Chairs' Forum recommended directly electing committee chairs. The committee, in its legacy report, did not reach a majority view but recommended that its successor consider new models. The new Business Committee responded to the recommendation by reconsidering proposals for electing committee chairs; changes to standing orders were subsequently agreed.

The new procedure draws on the model introduced in the House of Commons in 2010, with adaptations. The distribution of chairs among political groups is agreed by the whole Assembly on a motion tabled by the Business Committee. Individual chairs are then nominated by members of the relevant party group. Unopposed nominations automatically take the chair. If there is opposition or multiple nominations the election is conducted by secret ballot of the whole Assembly. Of the 12 committee chairs, seven were elected unopposed and five were contested.

Wales Bill

On 7 June 2016 the Wales Bill was introduced in the House of Commons by the Secretary of State for Wales, Alun Cairns. It followed the draft bill published in October 2015. Please see the miscellaneous note in volume 84 (2016) of *The Table* for details on the draft bill and reaction to it.

To help inform scrutiny of the Wales Bill by the House of Lords Constitution Committee, the Llywydd of the National Assembly wrote to Welsh peers drawing their attention to amendments she had published during previous scrutiny stages. The Llywydd also published new amendments addressing the additional restrictions to the requirements for UK government consent. Many of these points were covered in debate although only UK government

amendments were accepted.

The Assembly's Constitutional and Legislative Affairs (CLA) Committee undertook scrutiny of the bill and reported on 6 October 2016. The committee's report included amendments it wanted to see made to the bill. Some of these had previously been published by the Llywydd or the Welsh Government; others were drawn up by the committee.

The amendments sought to:

- enhance clarity on the circumstances in which Parliament would legislate on devolved matters without the Assembly's consent;
- remove some restrictions in the legislative competence tests;
- seek closer alignment of legislative and executive competence;
- change consequential provisions;
- clarify the definition of Welsh law; and
- give the Assembly power to consolidate legislation relating to the Welsh devolution settlement in both English and Welsh.

Many of these amendments were subsequently tabled by peers during committee stage in the House of Lords, although none were successful. However, there were commitments by the UK government to consider the issues raised in the amendments at report stage.

The CLA committee met the House of Lords Constitution Committee on 10 October 2016 for a wide-ranging discussion on the Wales Bill. The Constitution Committee's report on the bill reflected the CLA committee's main findings. The Wales Bill received royal assent on 31 January 2017.

New plenary procedures

The Business Committee has introduced new opportunities for members to take part in plenary proceedings in the Fifth Assembly. The changes followed a recommendation by the previous Assembly's Business Committee to introduce more variety in the use of Assembly time in plenary. Some arrangements for existing opportunities have been modified to make them more accessible to members. The main changes are summarised here.

Committee statements—before the 2016 summer recess the Llywydd wrote to committee chairs encouraging them to make statements on their committee's work. These might be on the launch of an inquiry, a progress report during an inquiry or to set out their work priorities.

The statements are allocated 30 minutes, including 10 minutes for the chair to make the statement followed by questions to the chair.

90-second statements—on Wednesdays members who have submitted a request may make short personal statements that are brief, factual and not subject to debate. They may be on any subject. Five minutes in total are allocated; as the name suggests, statements must last no longer than 90 seconds. Thus three

members (selected by the Llywydd) make statements each week.

To request a statement members must notify plenary clerks by midday on the Wednesday and briefly summarise the topic. The successful members are notified of the Llywydd's decision before the start of plenary that day.

This procedure has been adapted from practice elsewhere, including in Australia and Canada.

Debates on members' legislative proposals—once every half term on a Wednesday a 30-minute slot is allocated to debate an individual member's legislative proposals. Members table motions for consideration by the Business Committee, which selects the motion for debate a week before the debate is scheduled.

To be considered a motion must invite the Assembly to "take note" of the proposal for legislation. Motions may include proposals for any type of new legislation within the Assembly's legislative competence, including bills, statutory instruments, orders in council and new devolved taxes. The Assembly will only "note" the proposal; debates do not directly lead to the introduction of new legislation.

Capacity of the Assembly

Following the Wales Bill devolving power to the Assembly to amend its number of members and its electoral system, the Assembly Commission considered the capacity of the Assembly. It reviewed the previous commission's report, *The Future of the Assembly: ensuring its capacity to deliver for Wales*, which supported increasing the size of the Assembly.

The commission agreed that the case for a larger Assembly was more compelling than ever and that work to explore the issues further should take place on a cross-party basis, drawing on neutral, expert advice.

Changing the name of the Assembly

The Wales Bill gave the Assembly power to change its name. In July 2016 the Assembly debated the issue and agreed that the name should reflect its constitutional status as a national parliament. A public consultation was launched on 8 December 2016 asking which name would best reflect the role of the Assembly: "Parliament", "Senedd" or "Assembly". The commission will consider responses to the consultation after it closes in March 2017.

ZAMBIA NATIONAL ASSEMBLY

Amendments to constitution

In 2016 the Constitution of the Republic of Zambia was amended extensively. The amendments affected the composition, functions and procedures of the

National Assembly.

Some of the major amendments were:

- An increase in the number of elective seats from 150 to 156.
- The introduction of a minimum academic qualification of a grade 12 certificate or its equivalent for members of Parliament.
- The vice-president will no longer be an elected member of Parliament but will be elected as the running mate to the president and appointed Leader of Government Business in the House.
- The House now has two deputy speakers elected by members of Parliament. The First Deputy Speaker is elected from outside the House while the Second Deputy Speaker is elected from among members. The deputy speakers should be of different genders and belong to different political parties.
- In order to be Leader of the Opposition there no longer needs to be a minimum number of members of the individual's group. The largest opposition party is entitled to elect a Leader of the Opposition from among members of the opposition.
- The president is required to address the National Assembly at least twice a year (up from once, during the official opening of a session).
- The National Assembly may now censure a minister for misconduct or poor performance.
- The Speaker now sets the dates of sittings. Previously they were set by the president.
- Parliament is required to approve international agreements before they are ratified or acceded to by the executive.
- Parliament is required to approve public debt before it is contracted.
- The position of deputy/junior ministers has been abolished.
- The Parliamentary Service and the Parliamentary Service Commission are established in the constitution so the staff of the National Assembly now fall under the commission.

COMPARATIVE STUDY: SUB JUDICE RULES

This year's comparative study asked, "What arrangements are there in your chamber/parliament for preventing cases which are before the courts (i.e. which are *sub judice*) from being raised in debate in your chamber/parliament? How is any *sub judice* rule enforced? Are there exceptions to the rule?"

AUSTRALIA

House of Representatives

In its desire to prevent debate from possibly influencing juries or prejudicing the position of parties and witnesses in court proceedings, the Australian House of Representatives observes the *sub judice* convention. The House has no standing order on *sub judice*; it is guided by practice. Regard has been had to practice in the UK House of Commons, as declared in resolutions of that House in 1963, 1972 and 2001. The basic features of the practice of the House of Representatives are summarised in House of Representatives Practice (6th edition), as follows:

- The application of the *sub judice* convention is subject to the discretion of the chair at all times. The chair should always have regard to the basic rights and interests of members in being able to discuss matters of concern. Regard should be had to the interests of persons who may be involved in court proceedings and to the separation of responsibilities between Parliament and the judiciary.
- As a general rule, matters before the criminal courts should not be referred to from the time a person is charged until a sentence, if any, has been announced; the restrictions again apply if an appeal is lodged and remain until the appeal is decided.
- As a general rule, matters before civil courts should not be referred to from the time they are set down for trial or otherwise brought before the court; the restriction similarly applies from the time an appeal is lodged until the appeal is decided.
- In making decisions on whether the convention should apply in a particular case, the chair should have regard to the likelihood of prejudice to proceedings being caused as a result of references in the House.
- Matters before royal commissions or similar bodies which are concerned with the conduct of particular persons should not be referred to in proceedings if, in the opinion of the chair, there is a likelihood of prejudice resulting.
- Matters before royal commissions or similar bodies dealing with broader issues of national importance may be referred to in proceedings unless,

in the opinion of the chair, there are circumstances which would justify restricting reference.

The *sub judice* convention can be invoked in respect of committee inquiries, where *sub judice* considerations may influence a committee's approach to seeking particular evidence or persuade it to take evidence in private.

A significant practical difficulty which sometimes faces the chair is a lack of knowledge of a particular court proceeding or at least details of its state of progress. Often the chair must use his or her judgement on the reliability of the information given; for example, the chair has accepted a minister's assurance that a matter was not before a court.

Senate

The *sub judice* convention exists in the Senate as a self-imposed restriction on debate, whereby debate is avoided if it could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for it to discuss a matter of public interest. The convention is not in standing orders, but is applied by the chair and the Senate according to the circumstances of each case.

Odgers' Australian Senate Practice (14th edition, pp 259–66) explains that the concept of prejudice involves an hypothesis that debate on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before it. Mere reference to a matter before a court would not present a danger of prejudice, but canvassing or prejudging the issues before the court would. *Odgers'* further notes that the danger of prejudice is considered greater where a jury or a magistrate is involved, based on the assessment that judges are unlikely to be influenced by parliamentary debate. Although it was once the tendency for the chair to restrain debate in the Senate on any matter before a court, this practice changed in the 1960s and 1970s to restrain debate only in cases where it was judged that it would present an actual danger of prejudice.

The *sub judice* convention has evolved to include the following three principles:

- there should be an assessment of whether there is a real danger of prejudice;
- the danger of prejudice must be weighed against the public interest in the matters under discussion; and
- the danger of prejudice is greater when the matter is before a magistrate or jury.

The *sub judice* convention does not apply to matters before royal commissions on the basis that a royal commission is not a court, its proceedings are not judicial proceedings, it does not try cases and it is unlikely that a royal commissioner would be influenced by parliamentary debate. It has been recognised that coronial inquests, although administrative inquiries and not

judicial proceedings and therefore not strictly within the ambit of the *sub judice* convention, are capable of being prejudiced by parliamentary debate. Chairs have therefore discouraged senators from canvassing issues before a coroner.

The convention applies to committee proceedings. If, however, a committee has been directed by the Senate to inquire into a particular matter, the *sub judice* convention cannot be invoked to prevent the inquiry.

Australian Capital Territory Legislative Assembly

On 6 March 2008 the Legislative Assembly passed the following resolution:

"Subject to the discretion of the chair, and to the right of the Assembly to legislate on any matter or to discuss any matter, the Assembly in all its proceedings (including proceedings of committees of the Assembly) shall apply the following rules on matters *sub judice*:

(1) Cases in which proceedings are active in the courts shall not be referred to in any motion, debate or question.

(a) (i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued.

(ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.

(b) (i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.

(ii) Any application made for the purposes of any civil proceedings shall be treated as a distinct proceeding.

(c) Appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.

(d) For the purposes of this resolution matters before a coroner's court shall be treated as matters within paragraph (1)(a).

But where a ministerial decision is in question, or in the opinion of the Speaker a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

(2) Specific matters which the Assembly has expressly referred to any judicial body for decision and report shall not be referred to in any motion, debate or question, from the time when the resolution of the Assembly is passed until the report is laid before the Assembly.

(3) This resolution has effect unless amended or repealed by this or any subsequent Assembly."

To date the convention has applied in the Assembly to matters before the courts,

both in the territory and elsewhere in Australia and, in limited circumstances, to boards of inquiry.

Sub judice matters have arisen in the Assembly in connection with boards of inquiry conducted pursuant to the Inquiries Act 1991.

The *sub judice* convention has been invoked in the Assembly to ensure that the decisions of courts are not impeded or prejudiced. In 1991 the Speaker ruled that disclosure of certain documents to the Assembly, and their subsequent publication elsewhere, could prejudice a party in proceedings before a court (elsewhere in Australia). This confirmed an earlier ruling that the documents were not to be tabled nor their contents disclosed in the Assembly.

In other cases the *sub judice* convention has been invoked due to a perceived danger of prejudicing the outcome of matters before the courts, for example:

- the Speaker has directed the Clerk to withdraw two parts of a question placed on notice that may have prejudiced a coronial inquiry;
- a matter of public importance submitted for discussion was ruled out of order because there were proceedings before the Supreme Court;
- members were asked not to stray into areas that may discredit witnesses or influence proceedings before the coroner;
- a question on matters that may be of interest to a coroner was disallowed.

New South Wales Legislative Assembly

While the New South Wales Legislative Assembly follows the convention that matters under adjudication by the courts should not be raised in debate in such a way as to prejudice court proceedings, the application of the *sub judice* rule is not subject to a statute, standing order or a set rule. Rather, it is founded on precedents set by rulings of the chair.

The *sub judice* rule applies to debates, questions and notices of motions.

The *sub judice* rule is founded on the following principles:

- The House voluntarily restricts debate on *sub judice* matters so as not to influence the outcome of a court's deliberations and to protect the interests of litigants or other parties before the courts.
- The convention is stricter in relation to criminal matters than in civil cases, and to cases heard by juries rather than judges.
- The chair alone to determine whether a matter is *sub judice*.

If the chair determines that a matter is *sub judice* he or she may use the authority as chair to direct a member not to address the matter.

Chairs have, on occasion, allowed members to speak about *sub judice* matters where they have determined that the matters are of sufficient public interest to be the subject of debate in the House. For example, in 2006 and 2007 numerous questions about criminal charges facing Milton Orkopoulos, a former government minister, were allowed by the Speaker.

New South Wales Legislative Council

The President is the final arbiter on *sub judice* issues and has absolute discretion in making rulings to prevent or allow discussion. The issue for the chair is whether a motion, debate or question might prejudice proceedings before a court. The chair rules on the side of further discussion unless it is clear that to do otherwise could create prejudice. Even then the chair may determine that the public interest in the matter outweighs possible prejudice.

A landmark ruling in the Legislative Council on *sub judice* in 1990 continues to carries weight. Following a notice of motion for the appointment of a select committee on power lines, a point of order was taken that certain paragraphs of the notice were *sub judice*, in that there were proceedings in the Land and Environment Court on issues raised in the notice. President Johnston ruled various paragraphs of the notice out of order. He set out the following guidelines on whether a matter is *sub judice*:

- The convention is much stricter in relation to criminal matters, applying from the moment a charge is made. In civil cases it applies from the time the case has been set down for trial or otherwise brought before the court.
- Because some time may elapse before a civil matter comes before a court, the additional test of "real and substantial danger of prejudice to the trial of the case" may apply.
- Once a matter is before a civil court or a criminal charge has been made the chair must weigh two competing interests. While the House should never be inhibited from discussing matters of public interest, unless there are strong overriding reasons, there is the need to ensure that proceedings in the courts and the integrity of the judicial process are not prejudiced by debate in the House.
- The chair should be guided in the first instance by a presumption for discussion rather than against it. If the interests of individuals who are to appear before a court may be prejudiced, the chair should intervene and warn the member to temper their remarks.
- The House should not act as an alternative forum, especially when Parliament has handed certain powers and functions to a body. To canvass issues which are being tried in a court may have the effect of interfering with the course of justice and prejudicing proceedings.
- The convention applies equally to committee proceedings.
- Because a matter is before a court it does not follow that every aspect of it must be *sub judice* and beyond the limits of permissible debate.
- The chair should not automatically exclude discussion in the House on matters of public interest which are already being freely ventilated in the media.
- The chair should take into account that there are limits to the extent to

which debate in the House will be seen as affecting court proceedings.

The general rule is that the *sub judice* convention does not apply to inquiries by executive-appointed bodies. However, it does apply where Parliament has commissioned a body to investigate a matter, or has expressly referred a matter to an existing body such as a royal commission or a standing commission of inquiry such as the Independent Commission Against Corruption.

Northern Territory Legislative Assembly

On 26 October 2016 the Minister for Territory Families tabled a report on children in custody and spoke about its contents in the Assembly. The member for Araluen raised a point of order about the minister's remarks prejudicing a royal commission which was under way. Speaker Purick noted this extract from *House of Representatives Practice*:

> "Matters before royal commissions or similar bodies dealing with broader issues of national importance should be able to be referred to in proceedings unless, in the opinion of the chair, there are circumstances which would justify the [*sub judice*] convention being invoked to restrict reference in the House."

No specific standing order of the Northern Territory Assembly applies. However from time to time the Assembly restricts itself under the convention that, subject to the right of members to speak and the Assembly to legislate on any matter, matters awaiting adjudication in a court should not be raised in debate, motions or questions.

The Speaker advised members that the convention originates from parliament wanting to prevent comment and debate from being seen to influence juries and from prejudicing parties and witnesses in court proceedings.

Queensland Legislative Assembly

Standing order 233 provides:

"*Sub judice* rule

(1) In general, members should exercise care to avoid saying inside the House that which would be regarded as contempt of court outside the House and could jeopardise court proceedings.

(2) Members should not refer in the House to matters awaiting or under adjudication in all courts exercising a criminal jurisdiction (including in motions, debate or questions) from the moment the charge is made against the relevant person. This standing order shall cease to have effect when the verdict and sentence have been announced or judgment given, but shall again have effect should a court of criminal appeal order a new trial.

(3) Members should not refer in the House to civil cases in courts of law

where a jury is to be empanelled (including in motions, debate or questions) within the period of four weeks preceding the date fixed for trial. (Not from the time a writ is issued.)

(4) The *sub judice* rule does not apply to civil proceedings other than those referred to in (3).

(5) The *sub judice* rule does not apply to the proceedings of royal commissions and similar commissions and tribunals.

(6) The *sub judice* rule does not apply to *in camera* committee proceedings. However, committees should ensure that any evidence taken *in camera* is not published until after the criminal or civil proceedings are finalised, unless the committee believes that there is an overwhelming public interest in the release of the evidence.

(7) The *sub judice* rule is always subject to the right of the House to consider and legislate on any matter."

The standing order applies to all proceedings (e.g. debates, motions, petitions, tabled papers and questions); there have been Speaker rulings on each of these matters.

South Australia House of Assembly

In the South Australian House of Assembly the *sub judice* rule is established by practice and precedent. It is not in standing orders nor a resolution of the House. If there is a question that the *sub judice* rule is being transgressed the Speaker rules on the matter with reference to past Speakers' rulings, the texts of *Erskine May*, *House of Representatives Practice*, etc.

The current Speaker of the House of Assembly, Speaker Atkinson, stated on 28 September 2016 that he takes the view that in a civil case (in South Australia civil cases are heard by a judge alone) the *sub judice* rule does not apply because there is no threat of prejudice from what is said in Parliament to the deliberations of a judge.

Tasmania House of Assembly

The House of Assembly adheres to the House of Commons rule, as is standard practice in Australian parliaments, in relation to *sub judice*. The practice of the House is that criminal cases are *sub judice* from the time charges are laid, and civil matters once a date has been set for trial.

Exceptions may be allowed at the presiding officer's discretion. She may rule that the matter is not *sub judice* if the rights of those before the court will not be adversely affected by discussions in the chamber.

Victoria Legislative Assembly

The Legislative Assembly follows *sub judice* practice in the House of Commons.

Its application in Victoria is detailed in a 1979 Standing Orders Committee report.

Following the 2009 Black Saturday bushfires, a natural disaster killing 173 people, *sub judice* practice as it applied to quasi-judicial bodies came into sharp focus, as a coronial inquest and a royal commission were established to inquire into the tragedy. Speaker Lindell ruled in early 2010 that matters before the coroners' court should be subject to the *sub judice* rule, unless there is a pressing need for debate on policy matters relating to an inquest. In the same year the Speaker ruled that general discussion on matters before royal commissions was allowed; however the House should be conscious of the possibility of prejudicing or appearing to prejudice the interests of specific persons.

Western Australia Legislative Council

In the Western Australian Legislative Council *sub judice* is covered by standing order 52:

> "Subject always to the right of the Council to debate any matter it deems appropriate, a matter before any court of record may not be referred to in any motion, debate or question if it appears to the President that there is a real and substantial danger of prejudice to the adjudication of the case."

The *sub judice* convention requires:

> (a) an assessment by the President of the risk of a particular parliamentary discussion or inquiry prejudicing proceedings before a court; and
>
> (b) the danger of prejudice to be balanced against the benefit flowing from the right of the House and its committees to discuss and inquire into the matter.

Only when the risk outweighs the benefit does the House or committee decide whether voluntarily to forego its right to discuss and inquire.

The *sub judice* standing order is not intended to constrain a member from making reference to a matter simply because it is before a court—the President must form the view that there is a genuine and serious prospect of the proceeding interfering with the outcome of the court process before acting under the standing order.

Committees can observe the *sub judice* convention by holding certain hearings in private and keeping evidence of court actions private.

The convention does not apply to proceedings of permanent or ad hoc commissions of inquiry (however described), or judicial or quasi-judicial proceedings in a court or tribunal that is not a court of record.

The President's rulings have indicated that a matter before a judge alone, rather than a judge and jury, is less likely to be prejudiced by debate in the House.

On several occasions, most recently in 2015, the clerk has declined to certify

petitions as compliant with the standing orders where the petition relates to a matter before the State Administrative Tribunal.

CANADA

House of Commons

The House of Commons applies the *sub judice* convention to debate, statements and question period. It is accepted practice that, in the interests of justice and fair play, certain restrictions should be placed on the freedom of members to refer to matters awaiting judicial decisions. Though loosely defined, the interpretation of this convention is left to the Speaker.

It is a convention; no rule exists to prevent Parliament from discussing a matter which is *sub judice*. It is a voluntary restraint by the House to protect an accused person or other party to a court action or judicial inquiry from suffering prejudice from public discussion of the issue. While precedents exist for the guidance of the chair, no attempt has been made to codify the practice in the House of Commons.

The *sub judice* convention preserves and maintains the separation and mutual respect between the legislature and the judiciary. The convention ensures that a balance is struck between the need for a separate, impartial judiciary and free speech.

Role of the Speaker

Since the *sub judice* convention is not codified and is voluntary, the jurisdiction of the Speaker in difficult to outline. The Speaker's discretionary authority over matters *sub judice* derives from his role as guardian of free speech in the House. The chair must balance the rights of the House with the rights and interests of the citizen undergoing trial. The Speaker intervenes only where it appears likely that to do otherwise would be harmful to specific individuals. Determining when a comment will tend to influence is speculative—it cannot be done until after the remarks have been made.

Practice has evolved so that the Speaker decides what jurisdiction the chair has over matters *sub judice*. In 1977 the first report of the Special Committee on the Rights and Immunities of Members recommended that the convention should be invoked with discretion. Where there was doubt in the mind of the chair a presumption should exist in favour of allowing debate and against applying the convention. A member who thinks there is a risk of prejudice by referring to a case or inquiry should refrain from raising the matter. Furthermore, a member who calls for the suppression of discussion of a matter because of *sub judice* should demonstrate to the chair that he or she has reasonable grounds for fearing that prejudice might result. Since the presentation of the report

Speakers have followed these guidelines while using discretion.

It was the committee's view that the responsibility of the chair, particularly during question period, should be minimal in regard to the *sub judice* convention; the responsibility should principally rest on the member asking the question and the minister answering it. Should a question touch on a matter *sub judice* it is likely that the minister will have more information on the matter than the Speaker; the minister might be better able to judge whether answering the question might cause prejudice. In that situation the minister could refuse to answer the question, bearing in mind that refusal to answer a question is his or her prerogative. From the precedents, this appears to be the approach the chair has taken. The Speaker has interrupted only if he or she has felt the *sub judice* convention was being breached.

Senate

The Senate addresses *sub judice* on an ad hoc basis, when a point of order is raised. *Senate Procedure in Practice* provides:

> "The *sub judice* convention has been generally applied in criminal cases before judgment has been rendered and during any appeal. With respect to civil cases, no clear practice has emerged. Generally, however, the convention is limited in application to bodies designated by statute as "courts of record." Because the *sub judice* convention has not been codified and is voluntary, the Speaker's jurisdiction over the matter is not entirely clear. The need to protect free speech must be balanced against the rights of the person undergoing trial."

Alberta Legislative Assembly

All jurisdictions in Canada apply some form of the *sub judice* principle, whether set out in standing orders or observed by convention. In Alberta, *sub judice* is a rule codified in the standing orders:

> "Member called to order
>
> 23. A member will be called to order by the Speaker if, in the Speaker's opinion, that member …
>
> (g) refers to any matter pending in a court or before a judge for judicial determination
>
> (i) of a criminal nature from the time charges have been laid until passing of sentence, including any appeals and the expiry of appeal periods from the time of judgment, or
>
> (ii) of a civil nature that has been set down for a trial or notice of motion filed, as in an injunction proceeding, until judgment or from the date of filing a notice of appeal until judgment by an appellate court,

> where there is probability of prejudice to any party but where there is any doubt as to prejudice, the rule should be in favour of the debate."

The challenge in applying the *sub judice* rule in practice is that when enforced too strictly the rule can prevent members from raising issues for a significant period of time, particularly in the case of civil proceedings. As a result the Speaker must use discretion to balance the right of members freely to debate issues in the Assembly with the need to respect the integrity and jurisdiction of the courts.

In Alberta the *sub judice* rule is generally applied differently for criminal and civil cases, with the former often attracting a more rigorous application due to the significant potential to prejudice a person charged with a criminal offence and because that person's liberty is at stake.

Under standing order 23(g) the Speaker has discretion to apply the *sub judice* rule to allow members to debate and raise issues freely in the Assembly while recognising the potential prejudice to a person if such debate is permitted.

British Columbia Legislative Assembly

In the Legislative Assembly of British Columbia the *sub judice* convention exists to protect the separation between the legislative and judicial branches of government. Parliament voluntarily imposes this convention on itself in order to ensure that it will not interfere in a judicial proceeding. *Sub judice* rules are not provided for in statute nor in the Legislative Assembly's standing orders. Its application is instead governed by precedent and is at the discretion of the Speaker in order to address specific circumstances and new developments.

Criminal matters are considered *sub judice* from the time a charge is laid to the passing of a sentence, acquittal, finding, order or decision putting an end to the proceedings. (Between sentencing and filing a notice of appeal, a matter is not *sub judice* , subject to the discretion of the Speaker.) Civil matters are *sub judice* from the time a matter is set down for trial (or a notice of motion is filed, as in an injunction proceeding) until judgment by the court.

If the Speaker determines that the *sub judice* convention is at risk of being breached, the Speaker may intervene. The Speaker's *sub judice* decisions are usually made quickly in order to restrict further discussion which could prejudice a judicial proceeding. Standing order 9 provides that no debate shall be permitted on any Speaker's decision, and no decision shall be subject to an appeal to the House.

In 1988 the Speaker ruled that *sub judice* matters cannot be raised through the use of an application or motion under standing order 35 seeking to adjourn the proceedings of House in order to discuss a matter of urgent public importance. A subsequent Speaker's decision in 1994 confirmed this ruling.

The convention has applied to a question of privilege and alleged contempt

of Parliament. In a 1990 decision the Speaker explained that "in addition to the alleged matters of contempt placed before the chair, there have been allegations of breach of the Criminal Code, the Radiocommunication Act, and contravention of the Privacy Act. As a consequence, the chair is very concerned that any ruling by the chair, at this time, might have the effect of breaching the spirit and intent of the *sub judice* rule, although perhaps not offending that rule as it is usually applied ... in order to safeguard the rights of those who might be prejudiced by this House pursuing its own remedies, while at the same time other processes are under way, I propose to withhold any further consideration of the issues for the time being."

In 2000 the Speaker clarified that the convention does not apply to inquiries regarding legal costs incurred by parties before the courts, while recognising that confidentiality or solicitor–client privilege may be a basis for restricting debate.

The *sub judice* convention does not apply to debates on legislation, as the right of Parliament to legislate must not be limited.

Practice in British Columbia has been to restrict debate on issues before an administrative tribunal, a royal commission or other forms of public inquiry.

In the most recent decision on *sub judice*, the Speaker determined in 2010 that matters under investigation by the police, while not *sub judice* in a strict sense, have not, by precedent, been discussed in the House

The *sub judice* convention applies to proceedings of parliamentary committees.

Manitoba Legislative Assembly

There is no explicit rule preventing *sub judice* matters from being raised, but there is a voluntary restraint.

There are several criteria for determining if the *sub judice* convention applies:

- Is the matter before the House the same one that is before the courts?
- Will a discussion of the matter by legislators be harmful to individuals?
- Is the matter at the trial stage?
- Does the fact that a member is being personally sued affect whether the *sub judice* convention applies?

Successive Manitoba Speakers have ruled that responsibility for applying the *sub judice* convention is with the member asking the question. Members should be aware that discussion of the matter in the House could affect a trial and should therefore exercise caution in asking a question, while a minister could choose not to answer the question.

Newfoundland and Labrador House of Assembly

The Speaker and the Table are generally aware of *sub judice* cases, but practice has been for the Government House Leader and/or the minister questioned on

an issue to invoke the rule.

Ontario Legislative Assembly

When attempting to prevent cases before the courts from being raised in debate, the Legislative Assembly of Ontario is guided by the *sub judice* convention and a standing order.

Speakers' rulings have described the *sub judice* convention as "a voluntary restriction on the part of a legislative body to refrain from discussing matters that are before a judicial or quasi-judicial body."

Under standing order 23 the Speaker must call a member to order if during the course of a debate the member:

"(g) refers to any matter that is the subject of a proceeding,

(i) that is pending in a court or before a judge for judicial determination; ... where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding."

Neither the *sub judice* convention nor the *sub judice* rule apply to debate on legislation. The Assembly's ability to propose and debate legislation remains paramount.

Speakers have traditionally adopted the practice of minimal responsibility and have rarely interfered to enforce the *sub judice* convention during question period. This is because it is impossible for the Speaker to know which cases are at which stage in every instance; the minister involved is in a better position to judge whether engaging in the discussion risks causing prejudice. The minister may refuse to answer the question on ground of *sub judice*, as happens.

With regard to motions that will result in an opinion of the House, the Speaker will exercise discretion and apply the *sub judice* convention only when it is absolutely clear that doing otherwise would unfairly influence a judicial proceeding. There is a long-standing practice that the Speaker would interfere only when he or she is entirely satisfied, as standing order 23(g) says, "that further reference would create a real and substantial danger of prejudice to the proceeding."

It is therefore rare for motions to be ruled out of order on *sub judice* grounds. Those which are usually identify individuals or aspects of an ongoing criminal case, or pronounce on the case itself or a preferred outcome. Motions which in general terms raise issues before the courts are less likely to be ruled out of order.

Prince Edward Island Legislative Assembly

In Prince Edward Island there are no formal rules preventing cases before the courts from being raised in debate in the legislative chamber or in committee meetings. The *sub judice* convention is a voluntary restraint that members place

on themselves; presiding officers have seldom had to rule on the propriety of such matters.

The most-recent recorded ruling dates from 1983, when a Speaker ruling to restrict debate resulted in the withdrawal from the House of all opposition members.

Québec National Assembly

Standing order 35(3) states that no member speaking shall "refer to any matter that is under adjudication before a court of law or a quasi-judicial body, or that is the subject of an inquiry, where such reference may be prejudicial to the interests of any person or party".

In criminal and penal matters the *sub judice* rule in standing order 35(3) is applied strictly, as prejudice is deemed likely to occur. This strict application must be upheld, regardless of the circumstances, because failure to do so could cause a stay in proceedings, as happened in Québec in 1982 in the *Vermette* case. The chair, while inviting parliamentarians to be cautious, has allowed oral questions related to a criminal case to be addressed to a minister when the questions concerned the government's conduct and not the trial itself.

Outside criminal and penal matters the rule is applied less strictly. Members may make general reference to a civil suit or quasi-judicial case but may not comment on the heart of the dispute nor say anything that could cause prejudice of any sort. In such situations the chair should allow the debate, remind members of the content of the *sub judice* rule, ask that they avoid making potentially prejudicial remarks and apply the rule cautiously. The chair always has discretion in applying the *sub judice* rule.

The rule is also applied flexibly as regards inquiry commissions.

The *sub judice* rule continues to apply until the judicial or quasi- judicial proceeding or inquiry commission is over.

Standing order 82 provides that a minister must decline to answer an oral question if the answer would contravene the *sub judice* rule. Jurisprudence has established that it is not the chair's place to decide whether the minister should decline to answer: the decision belongs to the minister alone.

The *sub judice* rule does not preclude the Assembly from legislating on any given matter.

The Assembly is not prevented from considering a case before a court if the case is of vital importance to the country or for Parliament to run smoothly.

Saskatchewan Legislative Assembly

The Legislative Assembly of Saskatchewan does not have a standing order to restrict debate on *sub judice* matters. Rather, the *sub judice* convention exists as a voluntary restriction of free speech by members in order to protect an

individual's right to a fair trial and to preserve the independence of the judicial arm of government; it should not be used merely as a political tool to stifle debate.

As stated in *Beauchesne's Parliamentary Rules and Forms*, "members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of record." Statements which reflect on the decision of a court or which cast imputations on any judicial proceedings are also out of order. The *sub judice* convention applies to any motion, debate on a motion or parliamentary question, but the rule does not apply to bills because the legislature's power to legislate must not be restricted.

The convention applies from the time a date has been set for trial, or notice of appeal has been given, until a verdict or judgment has been reached. It is applied fairly strictly in criminal cases. In civil cases the Speaker will check the status of a case, its specific issues and what stage it is at before ruling based on the circumstances of the case. Rulings in 1978, 1985 and 1990 have stated:

> "The filing of a statement of claim in a court is an essential part of beginning an action in the courts.
>
> However, while the matter is at this stage, no judicial decision is being made and it is possible that no further steps may be taken to bring the case to trial or that this may not be done for months or years. It therefore would appear to be overly restrictive of a member's right of free speech to prohibit all references to the matter at this time."

Sub judice may apply to matters before judicial inquiries, tribunals, arbitration boards or royal commissions, in order to protect the proceedings from prejudice and avoid the perception that the Legislative Assembly is an alternate forum for judging the matter. Saskatchewan has applied the convention fairly strictly to quasi-judicial bodies; however the subject matter of such proceedings may deal with matters of public policy which should be allowed in debate, as Speaker Snedker ruled in 1967. The Speaker must use discretion in these instances to judge references to such matters on a case-by-case basis.

Rule 20(3) of the *Rules and Procedures of the Legislative Assembly of Saskatchewan* states, "a minister of the Crown may decline to answer or may take notice of a question". This is consistent with practice stated in *Beauchesne's*:

> "A minister may decline to answer a question without stating the reason for his refusal, and insistence on an answer is out of order, with no debate being allowed. A refusal to answer cannot be raised as a question of privilege, nor is it regular to comment upon such a refusal. A member may put a question but has no right to insist upon an answer."

The clerks have advised Speakers not to make unsolicited interventions unless members' ambiguity over what could or should not be discussed unduly hampers the ability of the Assembly to proceed with its business. Members may

then choose to raise a point of order, in which case the onus is on the member to say why a matter is *sub judice* and on other members to argue why it isn't. The chair may then defer ruling until the exact status of the matter in the courts and the possible prejudicial impact of its debate have been determined.

Yukon Legislative Assembly

Standing order 19 provides, "A member shall be called to order by the Speaker if that member … (f) refers to any matter that is pending in a court or before a judge for judicial determination where any person may be prejudiced in such matter by the reference". Rule 11 of the Guidelines for Oral Question Period (which are an addendum to the standing orders) states, "A question is out of order if it deals with a matter that is before a court. In civil matters, however, this restriction will not apply unless and until the matter is at trial."

These provisions are rarely invoked in the Yukon Legislative Assembly. Enforcing them can be difficult, as the presiding officer is not always aware of the existence of a legal matter or whether it is before a court at the time the question is asked. Even when the presiding officer is aware of the matter, it can be difficult to assess whether "any person may be prejudiced … by the reference". As a result, presiding officers tend to take a cautious approach to the *sub judice* convention, relying on annotation 509 of the sixth edition of *Beauchesne's Parliamentary Rules and Forms*:

> "the responsibility of the Speaker during the question period should be minimal as regards the *sub judice* convention … the responsibility should principally rest upon the member who asks the question and the minister to whom it is addressed. However, the Speaker should remain the final arbiter in the matter but should exercise discretion only in exceptional cases. In doubtful cases, the Speaker should rule in favour of debate and against the convention."

This approach is usually taken by presiding officers, not just during question period. The approach is supported by rule 10: "A minister may decline to answer a question without stating the reason for his or her refusal. Insistence on an answer is out of order. A refusal to answer cannot be raised as the basis of a question of privilege."

In 1987 the Speaker ruled that questions which had been asked about a civil matter were in order because it had not yet reached trial stage; however, the questions engaged rule 5—that it is not in order for members to ask for a legal opinion from a minister.

CYPRUS HOUSE OF REPRESENTATIVES

The *sub judice* rule is enforced by the courts only, due to the strict separation of powers in the Cyprus constitution.

Cases that are in the courts are not placed on committees' agendas for discussion until completion of the case by the court.

GUERNSEY STATES OF DELIBERATION

There is no specific rule preventing cases before the courts (i.e. which are *sub judice*) from being raised in debate. However, there is a long-standing convention that they will not be. In practice, if a member introduced such a matter, whether by accident or design, they would be informed that they and other members could not discuss it further by the presiding officer or a law officer. Failure to observe such a ruling would probably constitute a conduct issue for determination under the Code of Conduct.

In addition, under the Rules of Procedure the presiding officer has power to decline to allow any question to be put, or rule that a question need not be answered, on the ground of public interest. This could be invoked in relation to a question raised in debate or put forward for written reply which relates to an undetermined criminal matter.

INDIA

Lok Sabha

Freedom of speech on the floor of the House is the essence of parliamentary democracy. Certain limited restrictions on this freedom have been self-imposed. One such restriction is that discussion on matters pending adjudication before courts of law should be avoided on the floor of the House, so that the courts function uninfluenced by anything said outside the ambit of trial in dealing with such matters.

Rule 188 of the Rules of Procedure and Conduct of Business in Lok Sabha provides,

> "No motion which seeks to raise discussion on a matter pending before any statutory tribunal or statutory authority performing any judicial or quasi-judicial functions or any commission or court of enquiry appointed to enquire into or investigate, any matter shall ordinarily be permitted to be moved".

However, the proviso to this rule states, "the Speaker may, in own discretion, allow such matter being raised in the House as is concerned with the procedure or subject or stage of enquiry if the Speaker is satisfied that it is not likely to prejudice the consideration of such matter by the statutory tribunal, statutory authority, commission or court of enquiry".

It is a well-established rule that a matter is not *sub judice* until legal proceedings have started. The question whether a particular matter is *sub judice* is decided by the Speaker on the merits of each case. A matter does not become *sub judice* if

a writ petition for admission is pending before a court.

Under the rules of Lok Sabha, any matter which is under adjudication by a court of law having jurisdiction in any part of India cannot be raised in the House in any form such as questions, adjournment motions, motions, resolutions and cut motions. An adjournment motion, though admitted, may not be proceeded with at the appointed hour if by that time the subject matter thereof has become *sub judice*.

A question on a subject under police investigation is not disallowed on *sub judice* grounds. However, questions on matters under police investigation have been discouraged; members in possession of particular and reliable information about a matter under police investigation have been advised to pass that information to the minister concerned.

As the legislature is the sole judge of its privileges the *sub judice* rule does not apply to matters of privilege nor matters which concern the disciplinary jurisdiction of the House over its own members.

The *sub judice* rule cannot stand in the way of legislation. If the *sub judice* rule were to apply to legislation it would not only make legislatures subordinate to the courts in that matter but would make enactments impossible because at any one time numerous cases concerning a large number of statutes await adjudication in one court or the other. Parliament's main function to make laws would thus come to a standstill. Legislatures are sovereign in law-making and there is no bar on their work in the field of legislation. Members should, however, refrain from referring to the facts of a case pending before a court when a bill is under discussion in the House.

Where a member insists on referring to a matter which is *sub judice* in spite of the chair asking him not to, the chair may ask him to discontinue his speech forthwith. The Speaker may also observe that the member should not have referred to a matter which was *sub judice*. Both the statements would then be on record, but the Speaker cannot and should not order expunction of such words.

There have been a few instances when *sub judice* matters have been discussed on the floor of the House.

Rajya Sabha

The Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha) contain specific provisions for preventing cases pending before the courts (i.e. which are *sub judice*) from being discussed or raised in the House. Any matter which is under adjudication by a court of law having jurisdiction in any part of India may not be referred to while asking questions, moving a resolution or motion, or making Special Mention. A member speaking in the House shall not refer to any matter of fact on which a judicial decision is pending. The *sub judice* rule does not apply to bills. The question whether a

particular matter is *sub judice* is decided by the chairman of the Rajya Sabha on the facts and circumstances of each case.

Delhi Legislative Assembly

Under rule 31 of the *Rules of Procedure and Conduct of Business* of the Legislative Assembly of the National Capital Territory of Delhi, "The right to ask a question shall be governed by the following conditions: … (ix) it shall not ask for information on a matter which is under adjudication by a court of law having jurisdiction in any part of India."

Rule 93 states, "In order that a resolution may be admissible … (v) it shall not relate to any matter which is under adjudication by a court of law having jurisdiction in any part of India".

Rule 111 provides, "No motion which seeks to raise discussion on a matter pending before any statutory tribunal or statutory authority performing any judicial or quasi-judicial functions of any commission or court of inquiry appointed to inquire into or investigate any matter shall be permitted to be moved: provided that the Speaker may in his discretion allow such matter to be raised in the House as is concerned with the procedure or scope or stage of inquiry, if the Speaker is satisfied that it is not likely to prejudice the consideration of such matter by the tribunal, statutory authority, commission or court of inquiry."

Uttar Pradesh Legislative Assembly

Under rule 59 of the *Rules of Procedure and Conduct of Business* of the Uttar Pradesh Legislative Assembly, "No motion which seeks to raise discussion on a matter pending before any statutory tribunal or statutory commission or court of inquiry appointed to inquire into or investigate a matter shall ordinarily be permitted to be moved: provided that the Speaker may in his discretion allow such matter to be raised in the House as is concerned with the procedure or scope or stage of inquiry, if the Speaker is satisfied that it is not likely to prejudice the consideration of such matter by the tribunal, statutory authority, commission or court of inquiry."

STATES OF JERSEY

Under standing order 107, "The presiding officer may direct that members shall not refer to matters relevant to any proceedings pending in any court".

Standing Order 10(10) provides, "A question shall not refer to a case pending in any court of law in such a way as might prejudice the case".

The *sub judice* rule in Jersey is more relaxed than in the UK. In practice a considerable degree of latitude has been permitted to members seeking to raise matters which are the subject of civil proceedings on the ground that proceedings

in the Assembly are unlikely to sway the judiciary and Jurats, particularly if court proceedings are likely to occur some time after the relevant meeting of the Assembly. A stricter line would normally be expected on criminal matters or if the court proceedings were imminent. In practice *sub judice* is likely to apply only in relation to the Jersey courts and, possibly, the Judicial Committee of the Privy Council—not literally to any court.

NEW ZEALAND HOUSE OF REPRESENTATIVES

Standing orders prohibit reference in debate to any matters awaiting or under adjudication in a court from the time the case has been set down for trial or otherwise brought before the court, subject to the discretion of the Speaker.[1] It applies to such references in any motion or question to a minister.

The House's *sub judice* rule takes effect for criminal cases from when a charge is made and for other cases from the time proceedings are initiated by filing the appropriate document in the registry or office of the court. The restraint ends when the verdict and sentence are announced or when judgment is given. (It also ceases if the Attorney-General directs that summary proceedings be stayed, in which circumstance there is no matter awaiting adjudication by a court.[2]) If notice of appeal is given, the restraint re-applies from the time of the notice until the appeal has been decided.

Preliminary inquiries by the police following a complaint to them cannot be excluded from comment if a legal action has not been instituted, but as soon as legal proceedings begin the rule applies.[3] Individual members cannot waive the application of the rule to legal proceedings in which they are involved.[4]

The *sub judice* rule applies only to matters before a New Zealand court as defined in the standing orders.[5]

Members are not banned from traversing matters that are before a tribunal or body that is not included in the definition of a New Zealand court.

The House reserves to itself the right to legislate on any matter.[6] Notwithstanding the *sub judice* rule, a bill dealing expressly with litigation before

1 SOs 115 and 116(1).

2 Criminal Procedure Act 2011, section 176(1).

3 (1975) 400 NZPD 3437 Whitehead.

4 (1997) 564 NZPD 5239 Kidd.

5 SO 3(1). Previously the standing orders linked the *sub judice* rule with any "court of record". This term was not defined in standing orders, requiring reference to several statutory provisions that established various courts as courts of record. The Privileges Committee considered this unhelpful and recommended that the relevant courts be listed in the standing orders (Privileges Committee, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders* (28 May 2009) [2008–2011] AJHR I.17A at 18).

6 SO 115.

a court may be introduced and proceeded with.

The *sub judice* rule is subject to the discretion of the Speaker. To enable the Speaker to exercise this discretion effectively, a member who intends to refer to a matter awaiting adjudication in a court must give written notice to the Speaker of this intention.[7] The Speaker has regard to the member's written notice in determining whether to exercise this discretion and balances the privilege of free speech against the public interest in maintaining confidence in the judicial resolution of disputes, and takes into account the constitutional relationship of mutual respect between the legislature and judiciary, and the risk of something said in debate prejudicing a matter awaiting or under adjudication.[8]

If members wish to refer to a matter that is suppressed by a court order they must give written notice to the Speaker seeking the exercise of the Speaker's discretion. To fail to do so knowingly may be considered a contempt.[9] Members have judged such a transgression so seriously that it has been suggested that the Speaker report the member's conduct to the House immediately and refer it to the Privileges Committee as a question of privilege.[10] The Speaker has indicated to the House that where members have not given any such notice, the *sub judice* rule will be interpreted strictly in debate.[11] Further, documents tabled in the House will not (unless ordered by the House to be published) be circulated by the Clerk of the House in contravention of an order of the court.[12]

PAKISTAN

Punjab Provincial Assembly

Any matter which is *sub judice* may not be raised in the House. This is recognised in the Rules of Procedure of the Provincial Assembly, which provide that questions, motions and resolutions are inadmissible if they relate to a matter which is *sub judice*. There is no exception to this rule.

7 SO 115(2); Standing Orders Committee, *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 26, implementing recommendations from Privileges Committee, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders* (28 May 2009) [2008–2011] AJHR I.17A.

8 SO 115(3).

9 SO 410(y); (21 March 2012) 678 NZPD 1159 Smith.

10 Standing Orders Committee, *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 25–26.

11 (10 February 2015) 703 NZPD 1370 Carter.

12 (1994) 539 NZPD 470 Tapsell.

House of Commons

The House of Commons has long had a self-denying ordinance that members should not refer in parliamentary proceedings to cases which are currently "under adjudication" by the courts. This rule is designed to avoid prejudicing a fair trial, or a successful prosecution, through comments made in the House, or any impression that the House is seeking to influence court decisions. It preserves the principle of comity, as described by a government minister in 2001: "A fundamental feature of our constitution is that Parliament and the courts each keep to their appropriate functions. It is for Parliament to make the law; it is for the courts to interpret it."[13]

The practice of the House in relation to *sub judice* has developed from a series of Speakers' rulings dating back to the 1880s. The House's first formal *sub judice* resolution was agreed in 1963. The current resolution was agreed in 2001. Following a recommendation of the 1999 Joint Committee on Parliamentary Privilege, the current resolution is in the same terms as that agreed by the House of Lords.

There are two important qualifications in the *sub judice* resolution. One is that the rule is subject to the discretion of the chair. The second is that the resolution is subject to the right of the House to legislate on any matter.

When the resolution applies

The rule does not apply to proceedings on legislation, including delegated legislation, whether in committee or on the floor of the House (although it does apply to motions for leave to introduce 10-minute rule bills).

Where a ministerial decision is in question (through judicial review) the rule does not apply.

Subject to the discretion of the chair (see below), the rule applies to UK courts including: criminal courts, civil courts, family courts, courts of appeal, coroners' courts (inquests), fatal accident inquiries, courts martial and judicial bodies to which the House has expressly referred a specific matter.

The rule does not apply to the European Court of Justice, the European Court of Human Rights, the International Court of Justice or other international courts and tribunals. Nor does it apply to royal commissions, public inquiries set up by the government (even if conducted by judges) or to other tribunals set up under statute.

[13] HC Deb, 15 November 2001, cols 1012–14.

Powers of the chair

The chair has discretion to waive the application of the rule when he or she thinks fit. In particular, the resolution makes clear that reference may be made to a case if the chair considers that it concerns issues of national importance, such as the economy, public order or the essential services. Members identifying an issue which might breach the resolution are required to ask the Speaker to exercise his discretion: each case is considered on its merits.

Proceedings outside the chamber

The resolution applies in formal proceedings outside the chamber: in Westminster Hall, non-legislative general committees (grand committees) and select committees. Chairs of select committees who are asked to exercise their discretion in the committee should where possible consult the Speaker in advance, to avoid possible difficulties for the Speaker and deputies subsequently. Where time does not allow for the Speaker to be consulted committees may take evidence in private in order to avoid, or defer, the publication of material which might breach the *sub judice* resolution. Committees have suspended inquiries in progress because a witness has been charged with criminal offences related to the subject-matter of the inquiry.[14]

Standing orders have been amended to reinforce the powers of the chair in dealing with matters *sub judice*. In 2006 the Procedure Committee considered concerns which had been expressed that the length of proceedings in coroners' courts were causing difficulties for parliamentary debate on important issues. The committee concluded that the Speaker's powers of discretion might be exercised in some circumstances to allow issues active before coroners' courts to be referred to, enabling discussion of issues in broad terms while avoiding the details of the particular case. It recommended that, to encourage the exercise of this discretion, the chair should have greater powers to control debate in such instances.

On 1 November 2006 the House approved standing order 42A and a consequential amendment to standing order 89(3) to provide for the Speaker, or the chair in Westminster Hall, to direct a member to resume their seat if they breach the *sub judice* resolution. Use of this provision when the *sub judice* resolution has been waived may ensure that members debating an issue linked to court proceedings do not stray so far into the specifics of the case as to present a substantial risk of prejudice to those proceedings.

[14] *Erskine May* (24th edition), p 813; see First Report of the Committee on Privileges, session 2016–17, *Conduct of witnesses before a select committee* (HC 662), paragraph 11 *ff*.

Difficulties in applying the sub judice resolution

Since the first formal resolution was agreed in 1963 a series of steps have been taken to clarify the application of the *sub judice* rule. A recurrent concern has been that the length of some legal proceedings may inhibit discussion in Parliament for considerable periods of time. The current resolution, agreed in 2001, specifies what is meant by a case being active, either in the criminal courts or in civil proceedings. In particular pre-trial applications in the civil courts (for example, for injunctions) are now treated as distinct proceedings: once such a pre-trial issue has been settled the *sub judice* rule ceases to apply until the case becomes active once more.

There have been concerns about the application of the rule to different types of tribunal. Section 19 of the Contempt of Court Act 1981 defines "court" as including "any tribunal or body exercising the judicial power of the state". The 2004–05 Procedure Committee noted this definition, but cited the Bar Council which described "this as a 'very uncertain area': for example valuation courts have been held not to be included, but employment tribunals are".[15] Since the current resolution was passed in 2001 the Tribunals, Courts and Enforcement Act 2007 has created a tiered structure, comprising the First-tier Tribunal (the lowest tier), the Upper Tribunal and "other tribunals". There is a right of appeal from the decisions of tribunals in the "other" category to the Upper Tribunal, from which it may be inferred that they belong in the lowest tier. There is a further level of appeal from the Upper Tribunal to the Court of Appeal (or, in Scotland, the Inner House of the Court of Session).

Since the coming into force of the 2007 Act the practice of the Table Office has been to interpret the *sub judice* resolution as applying to the Upper Tribunal but not to the other two classes of tribunal. The Upper Tribunal is appellate in character; it is defined in the 2007 Act as a "superior court of record" and has "the same powers, rights, privileges and authority as the High Court".[16] Lower-tier tribunals lack this status and have therefore been deemed not to be courts. However, it could equally be argued that they have as much the character of courts as magistrates' and county courts, which are undoubtedly within the scope of the resolution.

The rule does not apply to certain other bodies which Parliament has given determinative powers of a quasi-judicial kind—perhaps most notably the Independent Police Complaints Commission.

In practice it can be difficult for the Table Office to get timely information about whether cases are *sub judice*. The language used in the resolution does

[15] HC (2004–05) 125, para 30.
[16] Sections 3(5) and 25(1).

not always readily correspond to the terminology used for stages of court proceedings in different courts and tribunals in different parts of the United Kingdom. Clerks often have to rely on the word of members about whether a case they wish to refer to is *sub judice*. Unless a case is specifically referred to in an application for debate or motion it may not be apparent that a member is thinking of raising it.

There are also difficult judgements for the chair—and for clerks supporting them—in enforcing the resolution. Members may raise cases unexpectedly, and sometimes only in passing. In these circumstances it may be unclear if the matter is *sub judice*. It can be a matter of judgement whether calling the member to order will merely serve to highlight what has been said, potentially increasing the risk to a fair trial. On the other hand, intervening, even too late, helps to remind members of the importance of the rule and demonstrates to the courts that the House takes it seriously.

House of Lords

The House of Lords has agreed that practice governing *sub judice* should be the same in both Houses of Parliament. It would undermine the principles of comity between Parliament and the courts, and of non-prejudice of judicial proceedings, if one House were to permit reference to a case and the other not. Accordingly, the Lords has passed a resolution in the same terms as the Commons' 2001 resolution (see above).

The main difference between the two Houses' resolutions concerns the role of the Lord Speaker. Applications to him to waive the rule should be made with at least 24 hours' notice. The exercise of his discretion should not be challenged in the House (to do otherwise would risk the *sub judice* case concerned being debated). As the House is self-regulating the Lord Speaker has no power to control debate or ask a member to resume his or her seat, as Mr Speaker does in the Commons. Instead a member who raises a case in breach of the *sub judice* resolution would normally be advised as such by the Leader of the House or a government whip.

Scottish Parliament

Rule 7.5.1 of the standing orders provides, "A member may not in the proceedings of the Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer." When reaching a view the Presiding Officer has regard to the extent to which any contribution to parliamentary proceedings is likely to prejudice the outcome of the case.

The members concerned are advised of the Presiding Officer's ruling and any restrictions that would apply to their contributions. The clerks advise the

Presiding Officer during proceedings.

National Assembly for Wales

Standing orders 13.15 to 13.17 relate to *sub judice* and relations with the judiciary:

> "13.15 Subject to the right of the Assembly to legislate on any matter or to discuss subordinate legislation, a member must not raise or pursue in plenary meetings any matter which relates to active proceedings (as defined by Schedule 1 to the Contempt of Court Act 1981), or where the Children's Commissioner for Wales, the Commissioner for Older People in Wales, or the Public Services Ombudsman for Wales has decided to conduct an examination of a case, until the time when judgment has been given or a report has been made by either Commissioner or Ombudsman, unless the Presiding Officer is satisfied that:
>
> (i) the matter is clearly related to a matter of general public importance or a ministerial decision is in question;
>
> (ii) the matter does not relate to a case which is to be heard, or is being heard, before a criminal court or before a jury or to a case which is to be heard, or is being heard, in family proceedings; and
>
> (iii) the member does not, in his or her comments, create a real and substantial risk of prejudice to the proceedings of a court either generally or in respect of a particular case.
>
> 13.16 Unless the matter is the subject of a substantive motion, members must not in plenary meetings make criticisms of the conduct of judges of the courts of the United Kingdom in the discharge of their judicial office (in standing order 13.16 "judge" includes persons holding the position of judge, whether full-time or part-time).
>
> 13.17 The Assembly must not discuss individual judicial appointments."

Decisions to allow debates on matters before the courts have been dealt with on a case-by-case basis. There have been three instances in the last three years where topics subject to *sub judice* rules have been raised for debate in plenary.

In 2015 a motion was tabled naming a constituent and therefore potentially identifying a child when there was a court injunction prohibiting the "broadcasting" of any facts of the case that could lead to identification of the child involved. The injunction was stated to be binding on anyone who was aware of it. As Assembly proceedings are broadcast on Senedd TV, it was advised that the injunction should be regarded as applying to discussion in the Assembly. In the event the motion was withdrawn by the member. Following the withdrawal members were advised to seek advice from Legal Services before tabling a motion identifying an individual (directly or indirectly) or, if not possible before tabling the motion, before the debate takes place. The

Table Office would continue to be mindful of this when accepting motions for debate. Members were also reminded that consent should be sought for lawful disclosure of confidential or personal data, and that it would need to be clear that the consent covered disclosure in public Assembly proceedings.

In November 2016 the Counsel General made a statement on "Intervention in Appeals to the Supreme Court on Article 50 and EU Exit" (on the application of *Miller and Dos Santos v Secretary of State for Exiting the European Union*). The Llywydd circulated advice to all members before the statement stating that the rule of law and the independence of the judiciary were fundamental constitutional principles. So was freedom of speech. As Llywydd, she would always seek to balance those two principles appropriately and fairly. Accordingly, members would be free to express their views on the Supreme Court judgment and its implications but they must do so in a manner that avoided disrespect to the judiciary or the law. While members would be free to disagree with and criticise the judgment, she would call to order anyone who criticised the judges themselves or questioned their motives. She would not tolerate any inappropriate language concerning their decision, where that language would inevitably reflect on the judges as authors of that decision.

ZAMBIA NATIONAL ASSEMBLY

Discussion of a matter which is *sub judice* is out of order. It has been held that a matter is not *sub judice* until legal proceedings have actually started.

The rule is not absolute. For instance, it does not apply to matters within the exclusive jurisdiction of the House, on which the court has no jurisdiction. The rule is applied at the Speaker's discretion, meaning that the question whether a particular matter is *sub judice* is decided by the Speaker on the merits of each case.

PRIVILEGE

AUSTRALIA

House of Representatives

Former member guilty of contempt

The Privileges and Members' Interests Committee, in a report presented on 17 March 2016, recommended that the House find a former member guilty of contempt for deliberately misleading the House in a statement on 21 May 2012.

On 4 May 2016 the chair of the Privileges and Members' Interests Committee moved a motion inviting the House to agree with the committee's recommendation and reprimanding the former member for his conduct. The motion was debated and carried on the voices.

Before considering this matter the House resolved to vary the procedure for dealing with matters of contempt in this case. The usual seven sitting days' notice required for a motion making a finding of contempt was reduced to two. This enabled the matter, which had been ongoing for almost four years over two parliaments, to be resolved before the anticipated dissolution of both Houses.

Ruling sought under Australian Federal Police Guideline for Execution of Search Warrants

On 23 August 2016 the Speaker was notified by the Australian Federal Police that they intended to execute a search warrant on the Department of Parliamentary Services at Parliament House the next day in relation to an investigation into the unauthorised disclosure of Commonwealth information.

In a statement on 13 September 2016 the Speaker informed members that he understood the search warrant was executed on 24 August 2016 and a range of material was seized. The member for Blaxland (Mr Clare) had claimed that material that had been seized was protected by parliamentary privilege. This material was therefore held securely in the office of the Clerk of the House. The Speaker stated that the member for Blaxland was seeking a ruling from the House on his claim for parliamentary privilege, as provided for under the Australian Federal Police Guideline for Execution of Search Warrants. It would now be for the House to determine its position on the documents. This was the first occasion on which a ruling had been sought from the House under the AFP Guideline for Execution of Search Warrants. The Speaker would consult on how the matter should be handled.

Having done so the Speaker made a further statement on 11 October 2016. He presented for information a paper prepared by the Clerk's Office on the process to determine claims of privilege in such cases. The paper proposed that

the House Committee of Privileges and Members' Interests should consider the claim and make a recommendation to the House on it.

The Speaker proposed to give precedence to a motion to refer the matter to the Privileges and Members' Interests Committee. Accordingly the Manager of Opposition Business moved the motion, which was carried on the voices.

On 28 November 2016 the chair of the Privileges and Members' Interests Committee presented the committee's report. It found that the material seized under the search warrant was held by the member for Blaxland in connection with his parliamentary responsibilities and so related to "proceedings in Parliament" as defined in the Parliamentary Privileges Act 1987. As a result the material was subject to parliamentary privilege and need not be produced under the search warrant. The committee recommended that the House should uphold the claim of privilege, the AFP should be advised of the House's ruling and the seized material should be returned by the Clerk to the member for Blaxland.

On 1 December 2016 the chair of the Privileges and Members' Interests Committee moved a motion to this effect. The motion was seconded by the deputy chair of the committee, was not debated and was carried on the voices.

Senate

Surveillance of senator in Nauru

On 10 November 2015 the Senate referred to the Privileges Committee an inquiry into whether false or misleading evidence was given to the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, with regard to the surveillance of a senator on a visit to Nauru and a disturbance at the regional processing centre.

On 4 May 2016 the Privileges Committee presented its report. While the committee recommended that no contempt should be found, it expressed concerns about witnesses informing themselves about their obligations to committees and correcting evidence in a timely manner.

Although it was not specifically asked to consider whether surveillance of a senator in such circumstances might be a contempt, the Privileges Committee made several observations about the propriety of observing senators going about their business and the potential for contempt in these circumstances: "It is not difficult to imagine circumstances in which the covert surveillance of a senator may amount to a contempt, and the committee would caution any person against such conduct."[1] The committee noted that the fact the surveillance in question occurred in a foreign country would present significant

[1] Privileges Committee, 162nd report, 4 May 2016, p 26.

difficulties were it to become subject to an investigation, given the restriction of parliamentary privilege to the jurisdiction of the Commonwealth of Australia.

The Senate adopted the committee's findings and recommendations.

Execution of search warrants on office of senator and home of opposition staff member

The Australian Federal Police (AFP) executed search warrants on the office of a senator and the home of an opposition staff member during the campaign for the July 2016 election. The warrants were in connection with an inquiry into leaked documents from the National Broadband Network Company Ltd. A second search warrant was executed on the Department of Parliamentary Services a few days before the opening of Parliament, when the AFP searched computer servers as part of the same inquiry. In accordance with the relevant protocols on AFP searches the senator concerned, Senator Conroy (who ceased to be a senator on 30 September 2016), made a claim of parliamentary privilege over the seized material and, as there was no President in office, asked the Clerk to place the matter before the Senate for determination when it reconvened.

On 30 August 2016 the President made a statement about the matter, tabled a background paper by the Clerk and offered to facilitate consultations on a way forward. In the meantime the Leader of the Opposition in the Senate gave notice of a motion to refer the matter to the Privileges Committee. The motion proposed that the committee consider the claim, including if necessary by seeking agreement from the Senate on the appointment of a third-party arbiter to examine the documents.

Senator Conroy also raised as matters of privilege possible improper interference, or attempted improper interference, with the free performance of his duties as a senator arising from the search warrant; and adverse action taken against persons in connection with the provision of information to Senator Conroy. On 31 August 2016 the President granted precedence to a notice of motion and the reference to the Privileges Committee was agreed the next day.

The committee presented an interim report on 1 December 2016 on the documents seized from Senator Conroy's office. The Senate adopted the committee's recommendations that it be empowered to examine the material in the Clerk's custody and to appoint persons with specialised knowledge for the purposes of the inquiry, with the approval of the President. The committee noted that the House of Representatives had agreed a recommendation of its Privileges and Members' Interests Committee that it uphold the claim of privilege made by a member in relation to documents seized on 24 August 2016 (which were identical to documents seized on that date in relation to Senator Conroy but which represented only part of the claim made by Senator Conroy).

The Privileges Committee's 164th report, presented on 28 March 2017, addressed the status of documents seized during the execution of the search warrants and whether the execution of the search warrants amounted to an improper interference with Senator Conroy in the free performance of his duties as a senator. The committee recommended that the Senate adopt its conclusion that the seized documents fell within the definition of proceedings in parliament and therefore warranted protection because of their connection to parliamentary business. The committee concluded that an improper interference with Senator Conroy had occurred but it refrained from making a finding of contempt.

The committee recommended that the Senate note the need for remedial action on the national guideline for the execution of search warrants where parliamentary privilege may be involved. The committee intends to address this and related matters further.

Queensland Legislative Assembly

Unauthorised disclosures of committee proceedings

In 2016 the Ethics Committee tabled three reports on unauthorised disclosure of committee proceedings. The proceedings related to the Parliamentary Crime and Corruption Committee (PCCC), the Agriculture and Environment Committee and the Transportation and Utilities Committee. Given the increasing incidences of this nature, the committee wrote to all members to remind them that committee proceedings are confidential until the committee reports those proceedings to the House or otherwise orders their release or publication.

Unauthorised disclosures of committee proceedings: Parliamentary Crime and Corruption Committee

The Ethics Committee found that there had been four cases of unauthorised disclosure related to an email sent by a member of the PCCC (member for Warrego) on 12 July 2015 to the members and secretariat of the PCCC. The subject of the email concerned documents the member for Warrego had found in the PCCC safe sent to her electorate office. (Matters relating to committee documents found in the safe were reported in volume 84 (2016) of *The Table*.)

Case 1: when sending her email the member for Warrego included the premier's generic and electorate office email addresses as recipients. Hence the first matter was alleged unauthorised disclosure of PCCC proceedings by the member for Warrego to the premier and her staff that may have accessed the email.

Case 2: on 13 and 14 July 2015 media articles reported the contents of the email. Hence the second matter concerned unauthorised disclosure of the PCCC's proceedings to outside sources by persons unknown.

Case 3: following the referral of these matters to the Ethics Committee by the PCCC, it was found that there had been another unauthorised disclosure of the PCCC's proceedings. A letter sent by the member for Bundamba to the Clerk of the Parliament on 14 July 2015 (as a result of the member for Warrego's email of 12 July 2015) was referred to in a media article on 22 August 2015. Hence the third matter was unauthorised disclosure of the PCCC's proceedings to outside sources by persons unknown.

Case 4: the fourth matter was identified during the Ethics Committee's investigation into the unauthorised release of the member for Warrego's email of 12 July 2015 to the media. The committee discovered that the member for Warrego had involved the Chief of Staff to the Leader of the Opposition in preparing her email of 12 July 2015, resulting in the fourth alleged unauthorised disclosure of PCCC proceedings.

The Ethics Committee reported on 17 February 2016. In cases 2 and 3 the committee found that, in the absence of any evidence as to who was responsible for the unauthorised disclosure of the email of 12 July and the letter of 14 July to outside sources, it was unable to reach a conclusive finding.

However, the committee expressed concern at the unauthorised disclosures of PCCC proceedings, noting that they represented a serious breach of the rules on confidentiality of committee proceedings as laid down in standing rules and orders. The committee urged the PCCC to review its practices and procedures to prevent future unauthorised disclosure.

In cases 1 and 4 the committee recommended a finding of contempt be made against the member for Warrego.

The committee also recommended a finding of contempt against the member for deliberately misleading the PCCC and the Ethics Committee by not disclosing the assistance provided by the Chief of Staff to the Leader of the Opposition in preparing the email of 12 July 2015.

The committee noted that the findings of contempt for unauthorised disclosure of committee proceedings in cases 1 and 4, on their own, would normally have resulted in a recommended penalty at the lower end of the scale. However, the committee considered that the findings of contempt for deliberately misleading the PCCC and the Ethics Committee were serious and compounded the original errors of unauthorised disclosure. Accordingly, the committee's recommended penalty would take account of the cumulative effect of the findings of contempt.

The committee unanimously recommended that the House suspend the member for Warrego from all committees for six months from the date the committee's recommendation was considered by the House. The committee noted that this recommendation if accepted involved a financial impost on the member in foregoing the additional salary payable to members who undertake

committee duties.

Furthermore, the committee unanimously recommended that, given the gravity of deliberately misleading the two committees and the member's lack of respect for the rules of the PCCC and for the role the Ethics Committee, the member for Warrego be admonished for that conduct and that the Speaker on behalf of the House deliver the admonishment to the member standing in her place.

The committee stated its view that the member for Warrego should not be appointed to the PCCC for the remainder of the 55th Parliament.

Before the House considered the motion on the penalty the member for Warrego resigned from the PCCC and another committee, and apologised unreservedly to the House, PCCC, Ethics Committee and officers of the Parliament. The motion was agreed on 18 February 2016 and the member admonished by the Speaker.

Unauthorised disclosures of committee proceedings: Agriculture and Environment Committee

The Ethics Committee found that a member of the Agriculture and Environment Committee (AEC) made an unauthorised disclosure of the committee's proceedings by providing its draft report recommendations on the Environmental Protection (Chain of Responsibility) Amendment Bill 2016 to officers of the Queensland Resources Council. A document presented to the AEC with draft report recommendations contained tracked changes made by Queensland Resources Council officers.

The committee report was tabled on 17 June 2016. It recommended the member be charged with contempt for the unauthorised disclosure. In considering the penalty the committee took into account the member's submission that the breach did not appear to have significantly affected the AEC's reporting process, his early admission of the breach and the apology he had already made to the House and the committee.

On 17 June 2016 the House agreed a motion based on the committee recommendations and the member made an unqualified apology for the contempt.

Unauthorised disclosures of committee proceedings: Transportation and Utilities Committee

Answers to estimates questions on notice were emailed to the Transportation and Utilities Committee (TUC) by a minister. Before the TUC had authorised publication of the answers the minister's office received an email enquiry from a journalist about the answers, attaching a copy of them.

The committee reported on 13 October 2016. It found that there had been

an unauthorised disclosure of committee proceedings contrary to standing order 211, which amounted to an improper interference with the authority of the TUC and the Assembly. However, because the answers were due to be, and were, published the following morning, and because the disclosure appeared to be an isolated occurrence, the committee considered that the unauthorised disclosure did not substantially interfere with the work of the TUC and dismissed the matter as it did not warrant further attention by the committee.

Victoria Legislative Council

On 6 December 2016 the Standing Committee on the Economy and Infrastructure presented a report on the Domestic Animals Amendment (Puppy Farms and Pet Shops) Bill 2016 (including appendices, extracts from proceedings and minority reports, together with transcripts of evidence). During a debate to take note of the report a government member made reference to a non-government member leaking the report to a news source, which then published commentary on the outcome of the committee's deliberations before the report had been tabled. The President wrote to the chair of the committee seeking an explanation in his position as chair, in order to clarify how the report was given to the media ahead of tabling in Parliament. The committee is investigating this matter.

Western Australia Legislative Council

In November 2016 the Legislative Council's Procedure and Privilege Committee tabled report 44, A *Matter of Privilege Raised by Hon Sue Ellery*. The report found that two senior ministerial officers had committed contempts of the Legislative Council. The contempts were each of them deliberately constructing an incomplete, misleading and false answer to a parliamentary question. The committee found that the conduct substantially interfered with parliament's information-gathering and accountability functions.

Background

On 22 February 2014 the then Treasurer and Minister for Transport, Troy Buswell MLA, attended a friend's wedding. Sometime after 11 pm he drove home, in the course of which damage was done to the government vehicle that he was driving, several parked vehicles and the front gate to his driveway.

The following morning Mr Buswell phoned his chief of staff, Rachael Turnseck. Ms Turnseck spent several hours that day at Mr Buswell's house, when she arranged for the minister's family to take him to Busselton. Mr Buswell then took a week's personal leave. Ms Turnseck did not inform the premier, his staff nor any staff in her office of the damage to Mr Buswell's vehicle before 9 March 2014.

On 10 March 2014 the media reported the events of the night of 22–23 February 2014. Later that day, the premier of Western Australia, Colin Barnett MLA, announced that Mr Buswell had resigned as Treasurer and Minister for Transport.

Questions in parliament

On 12 March 2014 Sue Ellery MLC asked a series of questions without notice to the Leader of the House representing the premier in the Legislative Council. Drafts of the questions had been provided to the Department of Premier and Cabinet before 11 am that day, as required by the agreed procedure. The key question and answer were:

> "176. Hon SUE ELLERY to the Leader of the House representing the premier:
>
> (1) Has the premier or anyone from his office asked the former Treasurer's chief of staff, Ms Rachael Turnseck, whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the premier, his chief of staff and Ms Narelle Cant; and, if not, why not?
>
> (2) Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the premier, his chief of staff and Ms Narell Cant; and, if so, with whom and when?
>
> Hon PETER COLLIER replied:
>
> (1) No. The concern of the premier and his office has been the welfare of the former Treasurer.
>
> (2) Prior to the former Treasurer's resignation, no."

On 16 March 2016 the premier tabled in the Legislative Assembly the Corruption and Crime Commission ("the CCC") report on *Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon. Troy Buswell that Occurred on 23 February 2014*. In consequence the Leader of the Government in the Legislative Council tabled a corrected answer to a question without notice:

> "Question without Notice 176 — Correction of Answer
>
> HON PETER COLLIER (North Metropolitan — Leader of the House): In a response provided by me, in my capacity as Leader of the House representing the premier, to Question without Notice 176, answered on 12 March 2014, it has recently become apparent that incorrect information was provided in the answer. Part (1) of the answer remains unchanged. The corrected answer to part (2) of the question is—
>
> (2) Yes, with two members of Mr Buswell's family, and with Mr Buswell's then electorate officer."

That corrected answer and the CCC report provided the impetus for the matter of privilege raised by Sue Ellery.

After a full investigation the committee found both public officers in contempt and recommended that they unreservedly apologise in writing to the Legislative Council for providing incomplete and misleading information which rendered part 2 of the answer false in a material particular. A written apology was subsequently received from both individuals.

The Corruption and Crime Commission

The committee turned its attention to the CCC and the question of whether that body had impinged on the powers and privileges of the Legislative Council in its investigation and report.

The committee found that Legislative Council Question without Notice 176, the draft answers and associated preparatory email exchanges between public officers constructing the answers were proceedings in parliament within the meaning of article 9 of the Bill of Rights 1688 (UK). The CCC should have known that using such materials to form an opinion on the conduct of a public officer would breach the immunity provided by article 9.

The committee concluded that, notwithstanding this breach by the CCC, on this occasion its actions did not substantially obstruct, or tend to obstruct, the Council, its committees, members or others involved in parliamentary proceedings in the performance of their functions. The action by the CCC assisted the committee with its inquiry and its findings of fact on Ms Turnseck accord with those of the committee. However, the committee noted that the immunity provided by article 9 is absolute and it is irrelevant whether the opinion formed or findings of fact by the CCC accord with those of this committee or the Legislative Council. The committee considered that the CCC investigation should not be treated as a precedent, and transgression by the CCC of parliamentary privilege must be avoided in future.

The committee recommended that a memorandum of understanding be developed between the Houses of the Parliament of Western Australia and the CCC to ensure that:

(a) in forming an opinion of misconduct against a public officer the CCC does not breach the privileges of the Parliament;

(b) conduct of public officers which constitutes a contempt or breach of privilege of the Houses of Parliament is dealt with by the relevant House of Parliament under the powers provided to the Houses by the Parliamentary Privileges Act 1891; and

(c) the CCC, where practicable, provides evidence in its custody, control or power to assist a House of Parliament to investigate and determine offences of contempt or breach of privilege.

Work on the memorandum of understanding is ongoing.

CANADA

House of Commons

Premature disclosure of contents of bill

On 14 April 2016 Andrew Scheer (Regina—Qu'Appelle) rose on a question of privilege regarding the premature disclosure of Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*. Mr Scheer alleged that details of the bill were reported in the media before its introduction in the House, constituting a clear breach of members' privileges. In response Andrew Leslie (Chief Government Whip) stated that no one had been authorised to disclose the details of the bill before its introduction and apologised on behalf of the government.

On 19 April 2016 the Speaker delivered his ruling. He concluded that, since the House's indisputable right of first access to legislative information had not been respected and this had impeded members in performing their parliamentary functions, the incident constituted a *prima facie* question of privilege. The matter was referred to the Standing Committee on Procedure and House Affairs, which has yet to report on it.

Physical molestation of member

On 18 May 2016, on the expiry of the bells for a vote on a time-allocation motion for Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, Peter Julian (New Westminster—Burnaby) rose on a point of order regarding the use of physical force in the House. This aroise after Justin Trudeau (prime minister) crossed the floor to take Gordon Brown (Chief Opposition Whip) by the arm to facilitate the holding of a vote, at the same time making physical contact with Ruth-Ellen Brosseau (Berthier—Maskinongé). The prime minister explained that he believed that Mr Brown had been deliberately impeded by members who had not yet taken their seats and apologised for his actions.

Following the vote Peter Van Loan (York—Simcoe) rose on a question of privilege, alleging that Ms Brosseau's privileges had been interfered with as the incident had caused her to leave the House and miss the vote. The prime minister rose again to apologise.

The Speaker delivered his ruling immediately. Although he acknowledged the prime minister's apology, he ruled the matter to be a *prima facie* case of privilege. The House later agreed to refer the matter to the Standing Committee on Procedure and House Affairs.

On 31 May 2016 the Standing Committee considered the matter; having received a statement from Ms Brosseau accepting the prime minister's apology, the committee decided to take no further action.

Alberta Legislative Assembly

On 6 June 2016 Nathan Cooper, member of the Legislative Assembly and Official Opposition House Leader, raised a question of privilege, arguing that the government of Alberta presupposed a decision of the Assembly when it advertised details of the effects of Bill 20, *The Climate Leadership Implementation Act*, on the radio and on its website. Mr Cooper argued that the advertisement and the website discussed the bill as if it were already passed into law.

After hearing and reflecting on arguments on the matter, Speaker Robert Wanner ruled on 1 November 2016 on whether the government had committed a contempt. The Speaker found that, while the government have the right to communicate their policies and programmes to the public, the advertisement and the website contained statements that presented the carbon levy and associated rebates as a fact when both were contingent on the passage of Bill 20. He therefore ruled that there was a contempt of the Assembly. Following the ruling the Minister of Economic Development and Trade and Deputy Government House Leader, Darren Bilous, apologised for any affront to the dignity of the Assembly, and the matter came to a close.

Manitoba Legislative Assembly

On 18 June 2016 Mr Fletcher (member for Assiniboia) raised a matter of privilege regarding the lack of physical accessibility in the chamber. Mr Fletcher, who is quadriplegic, noted that the physical layout of the chamber prevented him from accessing the floor of the chamber and thereby from performing his duties as a member. He was aware of the planned project to improve accessibility in the chamber and opined that this project would not solve the issue at hand but would be hugely expensive and would destroy the aesthetics of the chamber. He equated this lack of access to obstruction and cited a number of rulings from Canadian House of Commons Speakers. He asked that a solution be found by the fall and proposed that a ramp be installed or that the floor be raised.

In her 3 October 2016 ruling, Speaker Driedger made clear that she was dealing strictly with the technical aspects of whether there was a *prima facie* case of privilege; she was not ruling on accessibility in the chamber. The heart of the matter was whether the configuration of the chamber prevented the member from performing his parliamentary duties. Citing procedural authorities, the Speaker said that individual members took part in the proceedings by speaking in debate, moving motions, raising points of order or matters of privilege, or presenting a petition or a report from a committee. In a technical sense the member could participate in such proceedings: he had a desk where he could speak and be recognised from, and he had been provided with a touch-screen monitor to signal to the Speaker his intention to participate in debate or to attract the attention of table officers and other staff. Although the member was

not able to consult others from the floor of the chamber, he could consult them from his seat and from other points in the chamber. Parliamentary duties did not require a member to be on the floor of the chamber to participate in the activities noted above and reasonable attempts had been made to accommodate the member, while other renovation projects are in place for the future. She ruled that in a technical sense there was no *prima facie* matter of privilege.

Speaker Driedger went on to describe the efforts that have been under way since 2015 to provide accessibility to the floor of the chamber, in consultation with experts and government departments. She committed to finding a solution that would allow all persons to access the floor of the chamber in a dignified and discreet manner.

Prince Edward Island Legislative Assembly

The Prince Edward Island Legislative Assembly dealt with one significant case of breach of privilege in 2016. It began with correspondence sent to the chair of the Standing Committee on Rules, Regulations, Private Bills and Privileges from the Leader of the Official Opposition, concerning the propriety of the Speaker attending political events when the House was not sitting. His letter stated, "the attendance at numerous Liberal caucus events by the current Speaker [the Honourable Francies (Buck) Watts] could lead to his impartiality being called into question." The letter was dated 15 April 2016 and was received by the chair early the following week. It became clear, however, that the contents of the letter had been leaked to the media beforehand. The chair first learned of the correspondence when she was contacted by the Acting Director of Communications, Executive Council Office, seeking clarification in response to a media inquiry.

Over the next week local print and broadcast media reported the matter and speculated on a possible motion of non-confidence in the Speaker based on purported partiality.

A newspaper report on 19 April 2016 stated, "Sources have told *The Guardian* [one of the province's two daily newspapers] that several of Watts' recent rulings have led to some discussion among some of the MLAs about a possible motion of non-confidence against the Speaker."

The next day the newspaper's chief political reporter, and vice-president of the Legislative Assembly Press Gallery, tweeted from the chamber, in response to a Speaker's ruling, that "One has to wonder if Speaker is also trying to show he is willing to censure govt [sic] after opposition raised concerns over him to rules cmtt [sic]."

Later that week an editorial in the same newspaper stated, "The opposition … suggests there might be an element of partisanship as a rationale behind this crackdown [efforts by the Speaker to maintain decorum in the chamber]. As

proof, they note that the Speaker goes to caucus meetings and party functions jeopardising his position of neutrality", and "The opposition is even discussing a possible motion of non-confidence against the Speaker." This was the second public report of a possible motion of non-confidence and was of great concern to the Office of the Speaker and the Office of the Clerk. Prince Edward Island has never had a motion of non-confidence in a Speaker; the potential for such a motion prompted considerable research, consultation and planning.

After several days of public speculation the Speaker determined that he would address the matter as a breach of privilege. His statement to the Legislative Assembly was delivered on 26 April 2016. It referred to the letter from the Leader of the Opposition to the chair of the Standing Committee on Rules, Regulations, Private Bills and Privileges questioning whether his actions could lead to his impartiality being called into question, as well as media reports about a potential motion of non-confidence by unnamed members. He said:

> "Honourable members, this series of events is beyond the rough and tumble of robust parliamentary debate and reporting. Reflections of this nature on the Speaker and assertions of partisanship are very serious and serve, unless addressed, to undermine the authority and conduct of not only the office of the Speaker but of all proceedings of this Legislature Assembly and, ultimately, of you as members. I … see the letter sent to the Rules Committee by the Leader of the Opposition and subsequent public/media reflections on the impartiality of the Speaker, and suggestions of non-confidence, as a clear form of intimidation and thus a *prima facie* breach of privilege that cannot be allowed to be advanced unquestioned. To do so undermines the very authority of House itself, diminishes its proceedings and brings disrepute to this honourable institution … For this reason honourable members, I am requesting that some honourable member of this House move a motion … that this matter be referred to the Standing Committee on Rules, Regulations, Private Bills and Privileges for full review, including any suggested impropriety on my part that may reflect unfavourably on the office of the Speaker or the well-established customs and practices that attach to this office or the Legislative Assembly. To allow these allegations, and suggestions of partiality and potential non-confidence among 'some' members to stand unaddressed would be contrary to the pledge I made you on being elected Speaker to protect your rights and privileges so you may continue to conduct your important parliamentary work on behalf of all Prince Edward Islanders. I do not take this unprecedented step lightly. The integrity of House proceedings, and the respect for the Legislative Assembly and the office of the Speaker, must be protected and maintained. This is not about me as your Speaker but rather about you as members and the conduct of the business of this House."

The House unanimously supported the referral of the matter to the Standing

Committee on Rules, Regulations, Private Bills and Privileges.

The Standing Committee met on 6 May 2016 to consider the privilege matter, the request from the Speaker to review "any suggested impropriety" and the correspondence from the Leader of the Official Opposition. The meeting was contentious, with the entire official opposition caucus in attendance and a number of attempts to divert attention from the substantive work of the Standing Committee to procedural matters. After some time the Standing Committee moved *in camera* to deal with the issues referred to it by the House.

After consideration the Standing Committee agreed with the Speaker's finding of a *prima facie* breach of privilege. The committee found that the manner in which the Leader of the Official Opposition's letter was interpreted by the media, and subsequent reporting on the subject, including suggestions that "recent rulings have led to some discussion among some of the MLAs about a possible motion of non-confidence against the Speaker", was irresponsible and unsubstantiated.

The committee accepted the Speaker's finding that the privilege matter resided in the accusation that the Speaker was motivated by partisan interests in presiding over debates in the Legislative Assembly. It determined that this was not the case. Unprofessional and uninformed media comments that imputed partisan motives for Speaker's rulings added to this speculation and were condemned by the committee.

The committee reported that the official opposition confirmed that it had full and unqualified support for the Speaker. The committee also received confirmation that no members of the official opposition were contemplating a non-confidence motion in the Speaker and that the letter from the Leader of the Official Opposition did not intend to call into question the Speaker's impartiality. Rather, the intention was to ask the committee for guidance on partisan political activity by Speakers, not specifically the present Speaker.

The media representatives who received the leaked letter from the Leader of the Official Opposition, and who reported the musings of "some members" on a possible motion of non-confidence in the Speaker, felt that this was an unfair characterisation—one that was apparently supported by the official opposition. A number of published opinion pieces, televised panel discussions and social media posts in the following days confirmed that the collective view of the media was that blame was attached to them for reasons of expediency.

As requested by the Speaker, the Standing Committee reviewed the Speaker's conduct since being elected Speaker on 3 June 2015. It found no examples of impropriety that would reflect unfavourably on the office of Speaker nor the well-established customs and practices that attach to the office.

On the request from the Leader of the Opposition that guidelines be established to protect the Speaker from allegations of partiality, the Standing

Committee found:

> "Every Canadian jurisdiction, including Prince Edward Island, has a well-established custom and practice that the Speaker refrain from participation in partisan political activity to the degree deemed appropriate for that particular jurisdiction. The current Speaker of the Legislative Assembly has, as have all Speakers past, adhered to Prince Edward Island customs in that regard. However, to further protect the current and future Speakers the Standing Committee recommended an extension to the time period that Speakers should abstain from all partisan political activity, including attendance to party caucus meetings, for a period of 60 days prior to the commencement of sessions of the Legislative Assembly, during the legislative session, and for a period of 30 days after the conclusion of sessions of the Legislative Assembly."

The Standing Committee's report was adopted unanimously. It was accompanied by a standing ovation by all members in support of the Speaker.

Québec National Assembly

Misleading the House (false document)

In a notice sent to the President the Official Opposition House Leader alleged that the premier acted in contempt of Parliament by tabling a falsified report before the Assembly while answering a question from the Leader of the Official Opposition during oral questions and answers. The report in question had been drafted by a former Director at the Ministère des Transports, de la Mobilité durable et de l'Électrification des transports.

The Official Opposition House Leader based his allegations on the testimony given a few days earlier by the report's author before a parliamentary committee. The author had stated that the report tabled by the premier was not the same as the one she had drafted.

In the chair's opinion the facts invoked did not, *prima facie*, constitute a contempt of parliament.

The section of the *Act respecting the National Assembly* cited by the Official Opposition House Leader provides that "forging, falsifying or altering, with intent to deceive, any document of the Assembly, a committee or a subcommittee or any document tabled or presented before it" constitutes a breach of the Assembly's privileges. Although there is little jurisprudence covering such situations, the chair had previously recognised that these terms mean counterfeiting or fabricating something to the detriment of the person who alone had the right to produce or reproduce it and presenting a document or thing that is not in its original state.

As for the expression "with intent to deceive", the chair linked the notion to "having knowingly misled the House", which jurisprudence has addressed

on many occasions. In both cases it must be proven that the act was intentional. Parliamentary jurisprudence has on numerous occasions upheld the fundamental principle that a member must be taken at his or her word. This presumption in a member's favour can be overturned only if the member misleads the Assembly and then recognises that he or she did so deliberately, thereby acting in contempt of Parliament.

In the present case the point of privilege was supported by the testimony of the report's author, given before the Committee on Public Administration, in which she explained, under oath, how the document seemed to have been falsified. She showed the committee the differences between the document she had produced and the document the premier had tabled. At no point during her testimony did she link the premier to the document. It was further shown that the Deputy Minister's office had transmitted the contentious document to the premier's office minutes before the latter tabled it in the Assembly.

In light of this, nothing led the chair to believe that the premier had intentionally presented, forged, falsified or altered a document with the intent to deceive the National Assembly. Nothing in the facts submitted allowed the chair to conclude that the premier intended to mislead the Assembly when he tabled the document.

Misleading the House (false testimony)

In a notice sent to the chair a member of the official opposition alleged that the former Minister of Transport, Sustainable Mobility and Transport Electrification had deliberately misled the House by stating that he did not know about the sale of shares in a Québec company held by a government corporation and that he had not authorised the government corporation to sell the shares.

In the chair's opinion the facts invoked did not, *prima facie*, constitute a contempt of Parliament.

The chair said it was responsible for analysing the circumstances of this point of privilege even if the minister had since resigned from his ministerial duties. A point of privilege concerning a minister did not lapse with his or her resignation.

The chair recalled the fundamental principle that a member must be taken at his or her word. As parliamentary debate was often characterised by diverging, even irreconcilable, viewpoints, it was imperative that the truth of parliamentarians' statements be presumed. It was prohibited to accuse a member of lying in the Assembly.

When the chair is asked to rule on a point of privilege on the ground that a member deliberately misled the House, the chair must seek the presence of two elements—an intention to mislead and an admission of having done so knowingly. In the absence of such an admission the chair must, at the very least, be faced with two clearly contradictory statements by the same member in

parliamentary debates. Differing interpretations of a situation by several people cannot give rise to a contempt.

In this case the former minister had definitely stated several times in the House that he had not given permission for nor authorised the sale of the Québec company's shares, alleging that it was not up to him to do so.

Having examined the evidence, nothing pointed to the conclusion that, in a statement in the Assembly, the former minister subsequently changed his version of the facts. Absent the former minister's admission that he misled the House and absent contradictory statements by him on the subject, the chair could not conclude *prima facie* that the former minister deliberately misled the House.

The former minister was alleged to have made statements denying knowledge of the sale to the media (i.e. outside of parliamentary deliberations). However, his former chief of staff said in testimony to a parliamentary committee under oath that he had raised the matter of the sale of the company's shares with the former minister. Although this may have been a case of two contradictory versions of the same facts, none of the documents submitted showed that the former minister said anything in parliamentary proceedings about knowing of the sale of shares by the government corporation. Consequently, he could not have misled the House by making a false statement in it.

Saskatchewan Legislative Assembly

On 1 June 2016 details of the provincial budget were made public before its presentation to the Assembly later that afternoon.

As is common practice in Saskatchewan, on the morning of 1 June, before the afternoon tabling of estimates and the budget in the Assembly, the government held a technical briefing on the budget for opposition members and members of the press. These briefings are routinely held as a courtesy to allow the opposition caucus and the media time to prepare an informed response. Embargoed documents are signed by attendees as a promise not to disclose information before the formal presentation of the information to the Legislative Assembly.

Following the government's embargoed briefing, the opposition New Democratic Party caucus held their own embargoed press conference. All journalists present were asked to sign in and confirm they understood that the information provided was embargoed. Then the opposition Finance critic, Cathy Sproule, approved the distribution of a news release to the 27 media outlets that had signed the embargo document, but the email was accidentally sent to 250 recipients, including members of the public.

That afternoon at various points three opposition representatives apologised to the Assembly for breaking the embargo.

Later that day the Government House Leader raised the leak as a matter of privilege.

On 2 June 2016 Speaker Tochor ruled that a *prima facie* case had been established. He invited the Government House Leader, as the member who had raised the case, to move the following question of privilege motion:

> "That the early release of embargoed budget information by the member from Saskatoon Nutana and the opposition caucus clearly constitutes contempt of the Legislative Assembly of Saskatchewan by preventing all members from exercising their duties and responsibilities as members of the Legislative Assembly; and further
>
> That this matter be referred to the Standing Committee on Privileges for a full investigation and a report with a remedy to be tabled in the Legislative Assembly."

The Government House Leader and the Opposition House Leader spoke for a few minutes each on the motion before the question was put. The Assembly agreed to the motion on division.

During meetings of the Standing Committee on Privileges to consider the matter the government and opposition representatives agreed that budget secrecy was a matter of convention and so while breach may be a contempt it was not a breach of parliamentary privilege.

On 14 June 2016 the Standing Committee on Privileges reported to the Assembly. It recommended that no sanctions should be applied with respect to the 2017–18 budget document and technical briefings, but that only one opposition MLA should receive the information. That individual would be personally responsible for ensuring the embargo agreement is honoured. If any further embargoed materials were prematurely released by opposition members it would be prohibited from receiving embargoed materials and attending embargoed events for the remainder of the 28th legislature.

The report was adopted by the Assembly, on division.

INDIA

Lok Sabha

Privilege notices from several members were received in July 2016 against Shri Bhagwant Mann MP for unauthorised video recording and live-streaming on social media of the security arrangements of the Parliament House estate. An ad hoc committee was constituted by the Speaker on 25 July 2016 to consider the matter. The committee recommended in its report presented to the Speaker and laid on the Table on 8 December 2016 that Shri Bhagwant Mann MP be suspended from sittings of the House for the remainder of the 10th session. A motion to this effect was agreed by the House the next day.

Delhi Legislative Assembly

On 24 November 2016 the Speaker expressed concern that replies to starred and unstarred questions pertaining to the Ministers of Social Welfare and Delhi Jal Board had not been received in time. Taking the sense of the House, he referred the matter to the Committee of Privileges.

The Assembly secretariat informed the committee that the government departments concerned had not submitted the replies to the secretariat one day in advance, as a result of which members could not be provided with copies of the replies.

The heads of the defaulting departments were asked to appear before the committee. In their appearances they expressed regret for the delays and assured the committee that such lapses would not recur.

In view of the apologies the committee recommended that the officers be pardoned with a warning not to allow a repetition. The House adopted the report.

Kerala Legislative Assembly

A member of the Kerala Legislative Assembly issued a notice of privilege against an officer of the Indian Administrative Service alleging that the officer misbehaved towards him. The notice was referred to the Committee on Privileges and Ethics. The case is pending before the committee.

STATES OF JERSEY

In May 2016 the Privileges and Procedures Committee determined an appeal about a summons for papers issued by the Corporate Services Scrutiny Panel against the States of Jersey Development Company (which is wholly owned by the States). The committee upheld the summons, subject to certain modifications. The case was the first of its kind brought under the States of Jersey Powers, Privileges and Immunities) (Scrutiny Panels, PAC and PPC) (Jersey) Regulations 2006.

UNITED KINGDOM

House of Commons

In 2016 the Committee of Privileges reported on two significant cases.

Misleading a committee

The committee's first report of session 2016–17 reported on a case that was referred to the committee in May 2012. The House referred a report on News International and phone-hacking from the Culture, Media and Sport Committee (CMS) to the Privileges Committee. CMS had concluded that

three individuals and a corporation had misled the committee during successive inquiries into privacy and phone-hacking. The Committee of Privileges was unable to report on this case until 14 September 2016 due to associated criminal investigations, which resulted in the committee suspending its inquiry twice. The Privileges Committee found two of the three individuals in contempt of the House for answering falsely about their knowledge of evidence that other News International employees had been involved in phone-hacking and other wrongdoing.

On the committee's recommendation, a motion on the floor of the House formally to admonish them was agreed on 27 October 2016. The corporation and the third individual were found not to have committed a contempt.

The case raised questions about the House's ability to exercise and enforce its powers of sanction in relation to select committees and contempts. As part of the same motion of 27 October 2016 the House referred this matter to the Committee of Privileges for further consideration.

Unauthorised disclosure of committee report

The committee reported on a case arising from the unauthorised disclosure of a draft report from the Committee of Public Accounts (PAC) on 15 September 2016. The disclosure had taken place in 2013 but was not drawn to the attention of PAC until June 2015. A member had passed a copy of the committee's draft report on regulating consumer credit to a pay-day loan company. An employee of the company replied with comments and suggested amendments, which were later incorporated in the draft report. The matter was automatically referred by PAC to the Privileges Committee in October 2015. In November 2015 the latter committee asked the Parliamentary Commissioner for Standards to investigate the matter further. The Privileges Committee received the commissioner's memorandum in July 2016. The committee found that the member had committed a contempt of the House and that his actions constituted substantial interference in the work of the committee. While there were significant mitigating factors, the committee recommended that the member apologise to the House by means of a personal statement and that he be suspended from the service of the House for two sitting days. The House agreed the recommendation.

ZAMBIA NATIONAL ASSEMBLY

Fifty-four Members of Parliament from the opposition United Party for National Development boycotted the official opening of the House by the President on 30 September 2016. This was in protest against the results of the 11 August 2016 presidential election, which their party had disputed and

consequently petitioned.

Following a complaint by the chief whip and a member of the public, the matter was referred to the Committee on Privileges, Absences and Support Services for consideration. The members argued that they were exercising their freedom of expression and that boycotts were a permissible way of expressing themselves. The committee, however, observed that while boycotts were permissible, the official opening of the House was a solemn, auspicious and revered occasion that required the attendance of all members; any misconduct by members on this day was impermissible. The committee noted that in other Commonwealth jurisdictions, such as India, members had been punished for misconducting themselves or walking out during the presidential address.

The committee found the 54 members in breach of parliamentary privilege and ordered that they be reprimanded. The members were accordingly reprimanded and rendered an apology to the House.

STANDING ORDERS

AUSTRALIA

House of Representatives

Infants cared for by members allowed into chamber

In its December 2015 report the House of Representatives Standing Committee on Procedure recommended that the House amend standing orders to allow members to bring their infants into the chamber and Federation Chamber to breastfeed or bottle feed and at other times, when needed. This would be in addition to provisions for proxy voting for nursing mothers, as agreed in 2008.

On 2 February 2016 the Leader of the House presented the government's response, which supported the committee's recommendation to amend standing order 257 to provide that "a visitor does not include an infant being cared for by a member". Accordingly, standing order 257 was amended, with the opposition in support of the motion.

Amendments in the 45th Parliament

In the early weeks of the 45th Parliament (opened on 30 August 2016) several amendments to the standing orders were made by the House. They included:

- changes to the set meeting and adjournment times—the House now meets at 9.30 am on Wednesdays and Thursdays (previously 9 am) and adjourns at 8 pm on Mondays and Tuesdays (previously 9.30 pm), with consequential changes to the meeting and adjournment times of the Federation Chamber;
- changes to the Federation Chamber's indicative order of business to provide for additional government business and/or committee and delegation business time on Tuesdays and Wednesdays;
- an additional period of committee and delegation business and private members' business in the Federation Chamber on Monday evenings (previously government business);
- the establishment of an e-petitioning system for the House of Representatives;
- an increase in the time limit (from 30 to 45 seconds) for questions without notice by non-aligned members;
- removal of the requirement for standing orders to be suspended in order for a division to be retaken in the event of confusion, error or misadventure;
- amendments to the provisions for automatic adjournment of the House;
- moving the grievance debate in the Federation Chamber from Monday to Tuesday.

In addition, technical amendments to the standing orders which had been suggested by the Procedure Committee in the 44th Parliament were made.

Senate

Three standing orders were amended, one procedural order of continuing effect was agreed and another revoked in 2016.

Ministerial statements

On 11 November 2015 the Senate adopted a temporary order to provide for senators to speak to ministerial statements as of right. The order was renewed on 31 August 2016. The order created a right for a minister to deliver a ministerial statement and for a senator to move without notice to take note of the statement, with 10 minutes per speaker for up to 30 minutes. This temporary order was permanently incorporated into standing order 169 on 8 November 2016.

Caring for infants in chamber

The Senate amended standing order 175 so as to allow, at the discretion of the President, a senator to care for an infant briefly in the Senate chamber. The standing order already allowed a senator to breastfeed in the chamber; this further exemption to the rule excluding visitors from those parts of the chamber reserved for senators and Senate officers was proposed as an alternative to allowing proxy voting for senators nursing infants during a division. This latter proposal was considered to be unconstitutional by the Procedure Committee.

Scrutiny of bills

In an attempt to encourage timely responses from ministers, the Scrutiny of Bills Committee proposed a temporary order for 12 months to allow senators to ask ministers for explanations for failure to respond to the committee, together with the right to move motions without notice relating to the explanation or failure to provide one, or to the consideration of the bill in question. The rationale for the order is that when the committee writes to a minister it expects a response in time for the committee to consider it and report to the Senate while the bill is still before the Parliament.

Meetings with former ministers

Apparently sparked by concerns about former ministers being potentially involved in government relations roles, a new order of continuing effect requires Senate ministers to table information before each round of estimates about meetings between former ministers and current ministers, agency heads or deputy heads.

Photography in chamber

Photography in the chambers has been an issue for the respective presiding officers, who also have joint responsibility for the rules on media activity in

the parliamentary precincts. In 2002 the Senate agreed an order permitting photographs to be taken at any time, but only of the senator with the call. This was seen as a loosening of the rules. As times changed the order itself became restrictive. The Procedure Committee recommended its removal in 2014 but the recommendation did not proceed when it received a mixed reaction.

The order was finally revoked on 13 October 2016. The President and Speaker then issued revised media rules under section 6 of the Parliamentary Precincts Act 1988. The media are no longer restricted to photographing only senators with the call and are able to photograph activity in the chamber more generally, although restrictions apply to photographing documents and visitors' galleries.

Australian Capital Territory Legislative Assembly

Co-sponsorship of bills

On 10 March 2016 the Assembly amended standing orders to enable co-sponsored bills to be introduced in the Assembly. The amendments mean that if more than one MLA wishes to introduce a bill they may sign the presented copy of the bill, each speak for 20 minutes when the bill is introduced, each close the debate on the motion "That the bill be agreed to in principle" for 15 minutes, and each speak when the bill is in the detail stage.

To date no bill introduced into the Assembly has been co-sponsored.

Amendments to standing orders for 9th Assembly

On 13 December 2016 the Speaker presented a report from the Standing Committee on Administration and Procedure recommending several changes to the standing orders. Amongst the most significant were:

- a separate questions on notice paper would be prepared each week (previously questions on notice were listed on each sitting day's notice paper);
- one fewer supplementary question without notice would be asked, with the time limit for answers reduced to two minutes (meaning there will be 51 questions without notice asked on any given day, with the opposition asking 36, the crossbench 3 and government MLAs 15);
- in the third year of an Assembly term the Standing Committee on Administration and Procedure will be required to report on the operation of the standing orders and continuing resolutions of the Assembly;
- notices of motion for private members' business, Assembly business and executive members' business may be delivered to the Clerk outside a sitting of the Assembly but before 12 noon on the Monday of the sitting week in which it is proposed to be moved. This should provide greater clarity about the forthcoming business.

New South Wales Legislative Assembly

Changes to Routine of Business

On 23 March 2016 the Legislative Assembly agreed to changes to the sessional order setting out the House's weekly Routine of Business, with consequential changes to other sessional orders.

The changes were intended to make the conduct of business in the House less constrained by fixed times and to be more flexible. The changes re-scheduled and, in some cases, extended the time available for government business.

They also increased the time provided for Community Recognition Statements, a popular means for members to make brief statements about events, organisations or people in their constituencies.

On the same day the House agreed to changes to fine-tune the standing orders in certain areas.

New South Wales Legislative Council

Young children accompanying members into the House

In early 2016 the President referred to the Procedure Committee an inquiry into young children accompanying members into the House. The committee tabled its report on 20 October 2016 after examining whether to relax the prohibition on visitors entering the floor of the chamber so that members with responsibility for caring for young children may fully participate in the business of the House.

The committee recommended that the House should vary the standing orders to provide the President with discretion to count the vote of a member caring for a child and seated in the President's gallery in a division. On 9 November 2016 the House agreed to a new sessional order implementing this recommendation. The President said that members need to advise the chair each time they want to utilise the provision.

Northern Territory Legislative Assembly

The Assembly adopted three new standing orders.

Speaking in a language other than English

New standing order 23A allows a member to speak in any language other than English so long as an oral and a written translation is provided in English by the same member immediately before the speech. The member must also make the original-language text available for incorporation in the parliamentary record alongside the English-language text. No allocation of additional speaking time is provided for translation purposes.

Proxy voting

New standing order 132A allows members to cast a proxy vote in a division when they are not present. To do this a member must pre-register by advising the Speaker in writing that they have responsibility for nursing an infant on Assembly meeting days. A pre-registered member may then give their vote in writing to the clerk at the Table for any division, using an approved form. A vote may be on a blanket form or on an individual form; if the former is received it overrides any attempt at individual proxy voting for the period covered by the blanket form. A blanket form advises the Assembly that the member is voting with either the government or the opposition in every division during the period covered by the blanket form.

Chamber access for members only

New standing order 245 provides that the Speaker may exercise discretion to allow parents nursing young infants to bring them onto the floor the chamber during Assembly meetings. Otherwise only members are allowed on the floor; the Speaker's permission is required for a visitor to enter.

Queensland Legislative Assembly

Publication and release of committee submissions

On 14 June 2016 the Legislative Assembly amended standing order 211 to allow a committee to authorise a submission to it to be published any time after receiving it. If a submission has not already been authorised to be published, it is deemed to be so (subject to a resolution to the contrary) after the committee has heard oral evidence from the submitter. The amendment also provides that the person who made the submission may publish it more widely, thus removing the possibility of contempt proceedings for such publication.

Debate on petitions

On 1 November 2016 the Legislative Assembly passed sessional order 2A to allow for time to debate petitions signed by 10,000 or more persons. It provides that every such petition shall be set down on the notice paper for debate unless the Committee of the Legislative Assembly determines that it is frivolous or vexatious; that a debate on the same subject has already taken place in the same session; that it would anticipate debate on another order on the notice paper; or that it should be combined with other petitions.

Time is set aside for motions to take note of petitions each Thursday; they are debated in the order in which they are placed on the notice paper. Sixteen minutes are allowed for each debate: the mover and the member following may speak for five minutes each, and two other members for three minutes each.

South Australia House of Assembly

On 9 March 2016 the House adopted a sessional order to allow parliamentary secretaries to act on behalf of ministers.

Under section 67A of the Constitution Act (SA) the Governor on the advice of Executive Council may appoint up to two parliamentary secretaries. Since 1996, when provision was first made for appointing parliamentary secretaries, the House of Assembly's standing orders had not acknowledged nor provided responsibilities to parliamentary secretaries.

On 9 March 2016 the House of Assembly suspended standing orders to enable parliamentary secretaries to act on behalf of ministers; reference to ministers in standing and sessional orders were taken to include reference to parliamentary secretaries, subject to exceptions preventing parliamentary secretaries from answering questions during question time or in estimates hearings.

The government anticipated that parliamentary secretaries would use the new power to pilot through the House legislation in which they have particular expertise. The opposition opposed the change because, they argued, parliamentary secretaries are not privy to the progress of a bill through Cabinet, nor do they have an intimate understanding of the machinery of the bill—therefore they are not best placed to be in charge of the bill. The sessional order allows parliamentary secretaries to be assisted by advisers seated in the area on the floor of the House set aside for that purpose.

To date the sessional order has been used sparingly.

Tasmania House of Assembly

Following recommendations by the Standing Orders Committee in its *Report on the Recognition for Members who are Mothers of Infant Children*, the House of Assembly amended standing orders to provide:

- an exemption to the prohibition on members bringing strangers into the chamber whilst it is sitting to allow "a female member feeding, or otherwise caring for, their infant child (who is under 12 months of age) who is not disrupting the proceedings of the House"; and
- an exemption to the prohibition on a member being absent without leave, to provide that "a member shall be entitled, without a vote of the House, to 12 weeks' maternity leave of absence, such leave to be taken in a consecutive period from the date its commencement is notified to the Speaker in writing".

Victoria Legislative Council

On 31 August 2016 the Council agreed new sessional orders to run until the end of the session. The sessional orders altered the hours of meeting for Tuesday

sittings, from 2 to 10 pm, to 12 noon to 6.30 pm, and introduced time limits for general business on Wednesdays: 60 minutes for sponsors and main party speakers, 45 minutes for other lead speakers and 15 minutes for remaining speakers.

Previously the adjournment debate at would start at 10 pm on Tuesday; with the potential for two declared extensions under standing order 4.08 it meant the adjournment debate might begin at midnight. The change to a 6.30 pm start for the adjournment debate (8.30 pm with two declared extensions) was considered more family friendly and more aligned with the sitting times of the Legislative Assembly.

The introduction of time limits for general business reduces the opportunities for filibustering in contentious debates, which had become common in general business.

Western Australia Legislative Council

The temporary orders on sitting hours, speaking times and Consideration of Committee Reports were made permanent at the end of 2016. Please see volume 84 (2016) of *The Table* for more detail on the changes (p 159).

CANADA

House of Commons

Debate on standing orders and procedure

On 6 October 2016 the House debated its standing orders and the procedure of the House and its committees. Under standing order 51(1) the House is required to review its standing orders between the 60th and 90th sittings days of the first session of a new Parliament. Members discussed a range of possible amendments to the standing orders, including modifying the timing of votes, the House of Commons calendar and sitting schedule, and reforms to procedures for question period and committees. The matter was deemed to have been permanently referred to the Standing Committee on Procedure and House Affairs.

Senate

The Senate adopted a report from the Standing Committee on Rules, Procedures and the Rights of Parliament that recommended a change to rule 14–7(1) so that broadcasting is no longer limited to audio format.

The rules committee presented another report in 2016, which recommended changes to the rules on the structure of the order paper and the notice paper. The report is awaiting debate.

Newfoundland and Labrador House of Assembly

The most significant amendments to standing orders in 2016 were:

- The quorum was reduced to 10 including the Speaker, from 14 excluding the Speaker.
- For 2017 on a trial basis, a fixed calendar that includes constituency weeks was introduced.
- For 2017 on a trial basis, an extra 2½ hours of debate on government orders and motions would be allowed on Wednesday mornings.
- For 2017 on a trial basis, the Speaker adjourns the House at end of the day. Where a motion has been passed to extend the day, the Speaker adjourns at midnight (unless a closure has been called). Previously, except on Wednesdays, the Government House Leader called for an adjournment. The House could continue after 5.30 pm when no adjournment was called. The change effectively means that a filibuster on a bill can continue over several separate days, but would be interrupted by an adjournment.

Saskatchewan Legislative Assembly

Due to the provincial election on 4 April 2016 a sessional order was adopted to divide the first session of the 28th legislature into three sitting periods and to outline the rules regarding the disposal of bills and estimates for the session. The sessional order mirrors the regular rules of the parliamentary calendar for considering and disposing of business.

CYPRUS HOUSE OF REPRESENTATIVES

An eight-member ad hoc committee on the rules of procedure of the House has been established to deal with gaps in the rules that have been identified over the years, and to address outdated rules. It is chaired by the President of the House.

Rules on MPs' declarations of financial interests were amended and a motion/reference on incompatibility was directed to the Supreme Court for its opinion.

GUERNSEY STATES OF DELIBERATION

The Rules of Procedure of the States of Deliberation were amalgamated with the Rules for Committees of the States and redrafted. The new set took effect on 1 May 2016. The major changes were:

- a new process for submitting items for consideration, including the States themselves now deciding when most items will be debated;
- more frequent meetings, with dates determined by the States themselves;
- the need for members to provide declarations of unspent convictions;
- changes necessitated by the new structure of government and committees;
- the submission process was moved from the responsibility of the senior

political committee, in liaison with the presiding officer, to the responsibility of the clerk.

PAKISTAN

Punjab Provincial Assembly

On 17 February 2016 the Provincial Assembly approved amendments to its rules of procedure. They included a requirement on the government to provide a calendar of sittings to the Speaker at the beginning of each parliamentary year; and the introduction of a "zero hour" as the last 30 minutes of each sitting. During this time matters of urgent public importance relating to the government and requiring action by the Assembly may be considered.

UNITED KINGDOM

House of Commons

Select committees

Significant changes were made to the Public Business Standing Orders in 2016 in response to changes in the machinery of government following the EU referendum. The House's departmental select committees scrutinise the work of individual government departments: their remits reflect those of departments.

On 11 October 2016 the House responded to the restructuring of government departments by abolishing the Energy and Climate Change Committee (appointed under standing order 152) and transferring its responsibilities to the Business, Innovation and Skills Committee. This became the Business, Energy and Industrial Strategy Committee, scrutinising the similarly renamed government department. On the same day new select committees were created to scrutinise the new Department for International Trade and the new Department for Exiting the European Union.

The Committee on Exiting the European Union was established by a temporary standing order, reflecting the government's intention that the process of exiting the European Union would be completed by 2020.

The Committee on Exiting the European Union is unusual in that the standing order provides for a maximum membership of 21, including the chair, as opposed to 11 for most other departmental select committees. The committee has powers to seek the assistance of Speaker's Counsel and to appoint legal advisers, as well as more customary specialist advisers, to support its work. Also on 11 October 2016 a resolution formally allocated the chairmanship of the Committee on Exiting the European Union to the official opposition. The chairmanship of the International Trade Committee was formally allocated to the Scottish National Party, the second largest opposition party, which had

previously held the chairmanship of the abolished Energy and Climate Change Committee.

Welsh language

The House passed a new resolution on the use of the Welsh language in formal proceedings. While the main language of proceedings in the UK Parliament is English, the House has since 1996 permitted proceedings which take place in Wales, either in the Welsh Grand Committee or in select committees, to be conducted in Welsh with English interpretation. Under the Welsh Language Act 1993 the Welsh language has equality with the English language in the conduct of public business in Wales.

In the current Parliament some members had asked for a limited extension of the House's arrangements to enable the Welsh language to be used in the Welsh Grand Committee when it sits in Westminster, as well as in Wales. Following a report from the Procedure Committee in December 2016 on the practical arrangements involved, the House voted to approve the change on 1 March 2017.

ZAMBIA NATIONAL ASSEMBLY

The standing orders were comprehensively amended. This was largely due to changes necessitated by the amendment of the constitution. Amendments to the standing orders included:

- replacing sessional committees with standing committees which last for the life of the Parliament;
- removing the Speaker's casting vote in the event of a tie: if in future there is a tie, the question is lost;
- removing the requirement for a motion to be debated before a private member's bill may be introduced;
- introducing a procedure for parliamentary approval of international agreements before they are ratified or acceded to by the executive;
- introducing a procedure for censuring ministers;
- introducing a simpler process for the public to petition Parliament;
- introducing rules for broadcasting parliamentary proceedings;
- permitting the use of electronic devices in the chamber.

SITTING DAYS

Figures are for full sittings of each legislature in 2016. Sittings in that year only are shown. An asterisk indicates that sittings were interrupted by an election in 2016.

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec	TOTAL
Aus HR*	0	12	6	2	4	0	0	2	5	8	11	1	51
Aus Senate*													42
Aus Australian Capital Territory*	0	6	3	3	3	3	0	6	0	1	0	3	28
Aus New South Wales LA	0	3	9	0	7	5	0	9	6	6	6	0	51
Aus New South Wales LC	0	3	9	0	7	5	0	6	6	6	6	0	48
Aus Northern Territory*	0	6	3	6	3	1	0	0	0	6	5	1	31
Aus Queensland LA	0	6	3	3	6	4	0	5	4	3	8	1	43
Aus South Australia HA	0	6	6	3	6	6	5	1	6	3	8	1	51
Aus Tasmania HA	0	0	6	6	7	5	0	6	6	6	3	0	45
Aus Victoria LA	0	6	6	4	5	6	0	5	4	6	6	3	51
Aus Victoria LC	0	6	6	3	6	6	0	5	4	6	6	3	51
Aus Western Australia LC	0	6	6	3	6	6	0	6	9	6	9	0	57
Can HC	5	14	9	10	17	13	0	0	10	16	17	11	122
Can Senate	3	9	6	6	10	15	0	0	3	9	12	10	83
Can Alberta LA	0	0	7	12	17	4	0	0	0	1	14	7	62
Can British Columbia LA	0	12	11	12	12	0	4	0	0	0	0	0	51
Can Manitoba LA													87
Newfoundland and Labrador HA	0	0	7	10	17	4	0	0	0	0	11	7	56
Can Ontario LA	0	8	11	12	14	6	0	0	10	13	14	5	93
Can Prince Edward Island LA	0	0	0	16	8	0	0	0	0	0	10	9	43
Can Québec NA	0	9	9	12	10	8	0	0	6	9	14	7	84

Can Saskatchewan LA*	0	0	0	0	8	18	0	0	0	7	18	0	51
Can Yukon LA*	0	0	0	13	15	0	0	0	0	0	0	0	28
Cyprus HR*	2	5	5	2	0	4	4	0	3	3	4	5	37
Guernsey*	3	4	8	0	4	3	1	0	2	3	6	3	37
India LS	0	6	11	5	8	0	10	10	0	0	11	17	78
India RS	0	5	11	5	10	0	10	10	0	0	11	10	72
India Delhi LA	0	0	5	0	0	3	0	4	2	0	1	0	15
India Kerala LA	0	11	0	0	0	7	8	0	5	16	7	0	54
India Rajasthan LA	0	1	19	3	0	0	0	0	2	0	0	0	25
India Uttar Pradesh LA	1	10	4	0	0	0	0	6	1	0	0	2	24
Jersey	2	2	2	2	4	3	1	0	7	1	5	4	33
New Zealand HR	0	6	12	6	10	11	3	9	5	6	11	6	85
Pakistan NA													148
Pakistan Punjab Lahore PA	1	20	2	11	15	11	0	8	2	7	5	3	85
UK HC	17	15	17	12	13	12	12	0	8	15	19	13	153
UK Lords	13	14	15	13	13	13	13	0	9	14	17	14	148
UK Scottish Parliament*	12	9	11	0	6	11	0	0	12	6	14	10	91
UK NA Wales*	6	6	6	1	3	7	4	0	6	6	10	4	59
Zambia NA													82

UNPARLIAMENTARY EXPRESSIONS

AUSTRALIA

House of Representatives

It never ceases to amaze me how people who speak in this House speak without any reflection, intelligence or thoughtfulness whatsoever, and the last speaker was a good example of that.	24 February
It is always a privilege to follow the bleater from Bendigo	2 March
What a divided, disgusting, useless bunch you are!	2 March
God, you sound like a raving parrot! Have you ever thought about having any manners?	3 March
I heard, thank you, moron.	15 March
You don't use banks, Bill. You use brown paper bags.	18 April
I am trying to get Buffoon over here to listen.	18 April
Declare who you're sponsored by.	19 April
Can't we do better than this Labor–Liberal policy of not drowning but burning?	4 May
No wonder everyone over there thinks you're a grub!	11 October
You're a dill	12 October
Just by us all being in the room with you, makes us more stupid because we have to listen to you. You are that demeaning to this parliament. You mislead this parliament with your stupid ideology.	12 October
I suppose stupid is as stupid does.	12 October
The Leader of the Opposition … is one of the few Australians that support these bikies so vehemently.	18 October
Bikie Bill Shorten	19 October
What a joke you are!	19 October
Because they are boofheads!	19 October
So what we have now is that the Labor party is playing one game, and it is political bastardry.	24 November
I tell you what, Mr Speaker: don't trust a word that Bill Shorten says. Don't trust a word that this Leader of the Opposition says. He is a con—	29 November
You're an idiot!	29 November
The difficulty is that it goes beyond that for this Leader of the Opposition because he is also … signing other deals and he is consorting, as it turns out, through his CFMEU links, with criminals and thugs—people that have been convicted of criminal offences.	30 November
No wonder you got sacked by the Queensland police.	30 November

Australian Capital Territory Legislative Assembly

Fabricating numbers	17 February
Hollow man	5 May
Intimidation and coercion … you know a lot about that. That's your core business	3 May
King of shonky deals	5 May

How much did you get	5 May
Grubby	7 June
Sneaky Simon	7 June
Fool	3 August
Morals are in the alley	9 August
Not sure what he was drinking at the time ... but obviously it was something stronger ... than $3 sparkling water from a city restaurant	9 August
Look at his nose	10 August

New South Wales Legislative Assembly

They [*the Nationals members*] are Liberals in tan pants	17 February
Don't be cruel to humans	23 February
The member … is running xenophobic campaigns	23 March
The member looks like a goose because she has been running around making silly claims and telling bare-faced lies to the community.	1 June
Would they [*the government*] really forego their supposed core beliefs because of xenophobia?	22 June
These crooks in the government	20 September
You are a fool and you are corrupt	15 November

New South Wales Legislative Council

Paying the premier	15 March
I notice that the [*member*] is laughing and smirking	15 March
Loose with the truth	11 May
Not that [*member's name*] would care	11 May
Smart arse	10 August
Twisted influence	21 September
You are a grub	22 September

Queensland Legislative Assembly

We have a Treasurer who is a goose … an absolute goose	17 February
I referred to the Leader of the Opposition as the Eeyore of Queensland politics.	17 February
I am not going to stand in this place and be lectured to by a political refugee from the Senate who would walk the plank for his own members of parliament.	18 February
Gutlessness	23 February
Our own premier was back here kicking North Queenslanders in the guts	23 February
They do not like the stench that is coming from the Leader of the Opposition and his office.	24 February
Treated us all like mushrooms—kept us all in the dark and fed us crap.	17 March
They will give him the finger, that is what will happen.	17 March
She told great big fat fibs right into my face and the industry knows she is telling falsehoods.	20 April
We had the screeching of the member for Ashgrove across the chamber in her usual banshee fashion.	30 August
"Toe Cutter Tim" on the Treasury bench	13 September

What a bunch of low rent low flyers!	15 September
We have the same old “Neanderthal Nicholls”	13 October
If he were smart, he would have done that first, but he is not smart.	13 October
In the end I think he is just a stalker	2 November
She has not realised that she does not have a brain; that is the real problem	2 November
Screeching banshee	3 November
Sit down you idiot.	3 November
They do not give a damn about	30 November
Once again, he has his grubby hands on their money	30 November
I was asked to sit down and give you the opportunity to jump because you were sooking.	30 November

South Australia House of Assembly

Dolt	23 February
Coward	14 April
Animals	9 June
Google boy	4 August
Botox boy	27 September
Goose	29 September

Victoria Legislative Assembly

Bloody awful	10 February
Cattle chorus	31 August

Victoria Legislative Council

First-class idiot	25 February
Nazis are in town	8 March
Dodgy Dan	8 June
Shit	8 June
Fuck off	8 June
Daniel Andrews is a bully	18 August
Grubby question	1 September

Canada

House of Commons

There is a saying in my neighbourhood, “You lie to your friends; I’ll lie to my friends; let’s not lie to each other.”	9 March
What the hell are they waiting for?	17 May
They do not know what the hell they are talking about	6 June
Will the minister improve his assistance plan to meet the needs of cheese producers, or is he going to recite the same old government bullshit? [*translation; original spoken in French*]	21 November

Manitoba Legislative Assembly

Members opposite do not have a hot, frigging clue what they’re talking about	25 February
The phoniness of the Leader of the Opposition	3 March
Why is this minister deliberately misleading Manitobans?	7 March

A flood of lies from that member	14 March
This is total falsehood, total fabrication, total nose stretcher	20 October

Prince Edward Island Legislative Assembly

Puppets	13 April
BS	13 April
Sly	15 April
Creative accounting	15 April
Smoke and mirrors	15 April
Rosy up the deficit figure	15 April
Skew	15 April
Weak association to the truth	15 April
Quack quack	27 April
A pig in a poke	28 April
Gypped	28 April
Frigged	28 April
Hell	1 December

Québec National Assembly

Mudslinging	24 February
Conceal [*documents*]	15 March
Gross ignorance	16 March
Arrogance	16 March
Contemptuous [*words*]	16 March
Corrupt [*politician*]	23 March
Mean-spirited	24 March
Pontius Pilate [*speaking of the premier*]	24 March
Hide [*this information*]	5 April
The king of sophistry	14 April
Truth [*you should tell the*]	19 April
Innocent [*don't act*]	12 May
Gérald Tremblay syndrome	19 May
Cover-up	1 June
False documents [*table*]	1 June
Petty politics [*play*]	8 June
Odour of corruption [*speaking of a political party*]	8 June
Did everything to not know and to make sure the population didn't know [*speaking of the premier*]	9 June
Try to confuse everyone	9 June
It's either negligence or its collusion	9 June
Innocent	10 June
Odour of corruption	20 September
Betrayal	28 September
Small icon in his brain that stopped working	6 October
Negligence … gross	6 October

Prince consort of craftiness	20 October
Manipulation of the facts	26 October
Minister is spinning a tale	3 November
Demagoguery	10 November
Petty	16 November
Nonsense	16 November
Fraud	29 November
Accomplice	2 December

Saskatchewan Legislative Assembly

Someone opposite wants me to shut up	20 October
They're making it up as they go along	3 November
They're making this up in their pretended mind	3 November
Scandal-plagued former minister	3 November
Junior minister	3 November
Old grim reaper	3 November

India

Lok Sabha

Rape	24 February
Culprit	24 February
Flattery	25 February
There can be no bigger thief and traitor than politicians	2 March
Loot	2 March
Crime	2 March
Corruption	2 March
This temple of democracy has become a hub of corrupt people	10 March
Bastardy	11 March
Hooliganism	2 May
Gimmick	5 May
Thief	9 May
Disgusting	10 May
Naxalism	10 May
Slap	19 July
Traitor	20 July
… of the chair itself. Do not reveal this. Please chair, do not hide everything [*aspersion on the chair*]	21 July
Lunacy	26 July
Rogues	3 August
A speck in the beard of a thief	4 August
We have seen great Speakers here [*aspersion on the chair*]	8 August
Will you act arbitrarily? [*aspersion on the chair*]	8 August
If you won't pay attention to us, how would the House function? [*aspersion on the chair*]	8 August

You have put headphones on ears, just remove them and listen to us [*aspersion on the chair*]	8 August
What refrain you from calling them [*aspersion on the chair*]]	8 August
You are here to run the House, your arbitrary act will not do [*aspersion on the chair*]	8 August
Callousness	10 August
Shame	10 August
Bullying	11 August
Insulted	11 August
How can you extend the time without asking the House? No, you have to ask the House [*aspersion on the chair*]	11 August
How can you do that without the sense of the House? [*aspersion on the chair*]	11 August
You never allow me. You do not allow me to speak. You do not allow me to ask questions … What is the point of my sitting here? ... I have some core competence, I can ask questions [*aspersion on the chair*]	12 August
Scandal	1 December
Commission agent	14 December

Rajya Sabha

Got murdered	24 February
Provoked	24 February
Bastard	25 February
Bossing around/bullying	25 February
This is most undemocratic, autocratic act of the chair	26 February
Drama	26 February
It was virtually a murder	26 February
Demon/devil	3 March
Murder of the constitution	3 March
Dogs	3 March
Fool	3 March
Having worn bangles, it remained inactive	3 March
Ghost	4 March
A rabidly intolerant [*state*]	8 March
This government should be ashamed; if it is not so, I will not compel it to feel the same	9 March
Criminal conspiracy	10 March
Notorious	11 March
A weak, helpless and spineless government	15 March
Match fixing	16 March
Shame	16 March
Satanic voices	16 March
Goons	16 March
Blood bath	16 March
Ramrodded through	16 March

The Table 2017

Loot	16 March
Punitive	26 April
Vindictive	26 April
Doctored	26 April
Corrupt	28 April
Thieves	2 May
The criminal outcries against the crime	4 May
A guilty mind is always suspicious	4 May
You are a diabolical man	4 May
Sick mentality	4 May
Nonsense	5 May
Discriminate	9 May
This shows collusion between the government and the food mafia.	10 May
Hooliganism	10 May
Conspiracy	10 May
Connivance	11 May
Scams	21 July
Betrayed	25 July
Smuggle in	25 July
Dacoity	2 August
Outrageous	4 August
Devil quoting scriptures	4 August
Thief blaming the cop	4 August
Agents	4 August
Butchered the democracy	4 August
Mute spectator	8 August
Buffoonery	8 August
Double standard	8 August
Mischievous	9 August
Cheating	16 November
Sycophant	18 November
Weak prime minister	18 November
Government of enemies	18 November
Intimidation	22 November
Dictatorship	22 November
Hired people	23 November
This too may be a conspiracy	1 December
This dictatorship is unacceptable	1 December
To show the enmity	1 December
The chair has been insulted	1 December
Blot	1 December

Rajasthan Legislative Assembly

By counting the condoms of JNU, you have got blackened your face too. Curse on you. You are condom counting-people. This is condoms-counting government.	1 March
Only the weak worry about the paths … and hawks are not captured by Bulbuls. There is more in it further.	1 March
Your tongue should be thrown after cutting it.	2 March
You should die of shame. Spread riots. Instigate Hindu–Muslim riots.	3 March
These Congressmen are in the form of demons.	4 March
Who has deserted his wife, one who could not be of his wife, how could he be of the country? … She the poor soul went to Vaishno Devi, folded hands before the God and Modi ji did not take her to the prime minister's house ... Modi ji deserted his wife … Rahul ji	4 March
Committed rudeness … rudeness … manners	9 March
Rude of the high order	9 March
Hon'ble Deputy Speaker, sir, he is such a senior member. What is this language of his! Whom would he sandpaper? He has already been sandpapered. From Parliament to here in Legislative Assembly; and from Legislative Assembly went to UIT … He was made chairman of the UIT. His upliftment has already been done. Now why are you singing paeans? Outside you speak bad … You said that you would sandpaper in the drains, so you have been sent to drains.	10 March
Rahul Gandhi would hammer down Modiji's band. Rahul Gandhi would hammer down Modiji's band in two and a half years.	14 March
You should drown yourself in handful of water because of shame.	14 March
Moves hands–legs in such a manner as an acrobat in circus does. Acrobats do like this. Like a circus, behaves himself like an acrobat.	14 March
Poor soul [*of a minister*]	15 March
Who used to lift Rahul Gandhi's shoes? Your chief minister used to clean Rajiv Gandhi's shoes … he lifted shoes. Feel ashamed.	16 March
Wishes to speak and he has no liberty. Wasn't allowed to speak at all. Ghanshyam ji was not allowed to speak at all.	16 March
Create trouble	17 March
Hon'ble Speaker, sir, hon'ble minister cannot change the committee formed by the Congress. I can say with certainty.	21 March
Are the worms squirming?	22 March
Hon'ble Speaker, sir, criminals escaped under his nose. He could not do anything and only telling tales.	22 March
He behaves like in a circus … speaks incessantly.	22 March
Why did you take umbrage?	22 March
Neither male, nor female. The situation falling between the two—that has become the fate of hon'ble Parliamentary Affairs Minister.	22 March
Sister-in-law, our sister-in-law [*of a minister*]	29 March
Legislative Assembly Speaker is doing bullying with us.	30 March

Who asked you to speak? Sit. Sit down. You sit down. Clueless. You talk nonsense. You sit down. Who asked you to intervene? Sit down. Unwarranted. Sit. … Wearing petticoat and upper wear, like people collecting money wandering from village to village. Who asked you to interject in-between? How did he speak in-between? … Who asked you to speak in the middle? You get up in-between every now and then.	1 April
By the way you worry so much about Rahul Gandhi ji. At least you do one thing. Get him married, dear. At least lineage will continue. So at least in India … you all crocodile type … you all are shedding crocodile tears for your leader. At least do this good work.	1 April
You bring Modiji's wife, we will get the marriage of Rahul Gandhiji's done. We request you, we make a commitment with you … we make a commitment with you that you …	1 April
The government bringing this black law … down with the government, murdering the farmers … the government snatching the farmers' land …	4 April

Uttar Pradesh Legislative Assembly

Rioter	9 February
It was "Harijan"	8 March

States of Jersey

Get off your backside	20 January
Taking the proverbial	24 May
He couldn't find his arse with both hands [*translation; original spoken in Jèrriais*]	28 September
Drawn on the back of a fag packet	28 September
Knicker elastic	30 September
Sending [*minister*] to the knackers' yard	30 September
Nobble	29 November

NEW ZEALAND HOUSE OF REPRESENTATIVES

Open to actual corruption	17 February
His party's redneck policies of anti-immigration	18 February
Female members from the opposition always talk the loudest while a female member of the government is on her feet.	1 March
He is completely unfit to judge	13 April
Frugal with the truth	7 June
It may be out of order but it's still true	28 June
It would prefer to mislead the New Zealand public	28 June
One of the less rational people in this House	9 August
Lies, damned lies and statistics	17 August
Not having the intestinal fortitude to do it itself	17 August
Petulant and puerile	6 September
Groucho Marx	6 September
Gangsta lookalike	21 September
No honour	21 September

How much did these questions cost?	11 October
Boy	10 November
Sarcasm doesn't become you, sir	30 November
At least I was never fired by Russell McVeagh after six months	7 December

UNITED KINGDOM

National Assembly for Wales

You lot	25 January
Mob	26 January
Absolutely disgusting [*of another member's contribution*]	2 March
Doesn't give a damn about our countryside [*of the Welsh Government*]	9 March
Concubines [*of two female members*]	18 May
Joyless Watson [*of Assembly Member Joyce Watson*]	28 September

BOOKS ON PARLIAMENT IN 2016

AUSTRALIA

Odgers' Australian Senate Practice: as revised by Harry Evans (14th edition), by Rosemary Laing (ed.), Department of the Senate.

The Biographical Dictionary of the Australian Senate (volume 4), by Geoffrey Browne, Kay Walsh, Joel Bateman and Hari Gupta (eds), Department of the Senate.

I seek leave to continue my remarks …: forgotten stories from the Australian Senate, by Brien Hallett, Department of the Senate.

CANADA

Dynasties and Interludes: Past and Present in Canadian Electoral Politics, by Lawrence Leduc, UBC Press.

The Canadian Regime: An Introduction to Parliamentary Government in Canada (6th edition), by Patrick Malcomson, Richard Myers, Gerald Baier and Thomas Bateman, University of Toronto Press.

The Canadian Federal Election of 2015, by Jon Pammet and Christopher Dornan, Dundurn.

Sharp Wits & Busy Pens: 150 Years of Canada's Parliamentary Press Gallery, by Josh Wingrove and Hélène Buzzetti (eds), Hill Times Books.

"The Parliament of Quebec: the quest for self-government, autonomy, and self-determination", by François Rocher and Marie-Christine Gilbert, in *The parliaments of autonomous nations*, by Guy Laforest and André Lecours (eds), McGill-Queen's University Press (pp 125–63).

CYPRUS

To Kypriako Nomothetiko Symvoulio, 1878–1931, by Christos Kyriakides, Cyprus House of Representatives), €20, ISBN 9789963390489.

This book covers the Cypriot Legislative Council (1878–1931), which functioned before the establishment of the Cyprus House of Representatives in the 1960s. It covers the Council's establishment, functions and parliamentary conflicts, and examines constitutional freedoms critically, as they were limited and came under a lot of scrutiny.

INDIA

Practice and Procedure of Parliament (with particular reference to the Lok Sabha Secretariat), by M.N. Kaul and S.L. Shakdhar, do, Rs. 4,500/-, ISBN 8120004396.

Contains revised and updated information on parliamentary practice and procedure with rulings, observations and directions by the chair. Also throws

light on the aspects of the functioning of parliament and its committees.

Law of Contempt of Court and of Legislature, by Tek Chand and Harbanslal Sarin, Universal Law Publishing, Rs. 1,195/-, ISBN 9789351438861.

Public Accounts Committee in India: Issues and Challenges, by Digvijai Nath Pandey, Regal Publications, Rs. 600/-, ISBN 9788184845730.

Parliamentary privilege of freedom of speech, by Santi Swaroop Singh, Classical Publishing Co., Rs. 2,500/-, ISBN 9788170547563.

Provides a comparative analysis of the parliamentary privilege of freedom of speech in India, Britain and America.

Future of parliamentary democracy in India, by S.N. Singh et al (eds), Jnanda Prakashan, Rs. 200/-, ISBN 9788171396788.

The Indian Parliament: beyond the seal and signature of democracy, by Devender Singh, LexisNexis, Rs. 625/-, ISBN 9789350357293.

Parliamentary Privileges: Law and Practice, by Ram Jethmalani and D.S. Chopra, Thomson Reuters, Rs. 2,500/-.

The Legislature and the Judiciary: Judicial Pronouncements on Parliament and State Legislatures, by Upendra Baxi, Orient Black Swan Pvt. Ltd, Rs.1650/- (English) and Rs.1095/- (Hindi).

Our Parliament: An introduction to the Parliament of India, by Subhash Kashyap, NBT, Rs. 145/-.

UNITED KINGDOM

Parliamentary sovereignty in the UK constitution: process, politics and democracy, by Michael Gordon, Hart Publishing, £55, ISBN 9781849464659.

Parliament: legislation and accountability, by Alexander Horne and Andrew Le Sueur (eds), Hart Publishing, ISBN 9781509906451.

Brendan Keith, a clerk of the House of Lords from 1973 to 2017 and latterly Registrar of Lords' Interests, writes:

The Parliament referred to in this book's title is the Parliament at Westminster. The book is not a study of parliaments in general. It is the work of a group of "insiders" and "outsiders"—that is, of people who work or have worked as clerks or other parliamentary officials or legislative drafters, and of academics in the fields of law or political science. The book has a helpful foreword by Lord Lisvane, perhaps the ultimate "insider" because he is a former Clerk of the House of Commons (as Sir Robert Rogers) and is now a member of the House of Lords. Lord Lisvane comments that the particular combination of authors gives to the book what his farmer neighbours would call "hybrid vigour". This tells us something important about the book and perhaps something about the idiom of farmers in Herefordshire, where Lord Lisvane lives.

The book contains an introductory chapter followed by 12 essays. The five essays in part 1 deal with Parliament's role in the scrutiny of legislation. The

seven essays in part 2 deal with Parliament's role in holding the government to account. The editors describe these two roles as Parliament's "principal and overlapping responsibilities".

For the typical citizen, law-making is the defining function of Parliament. For the typical clerk, much of their professional life will be devoted to the legislative process. It is in the passage of legislation that the trickiest procedural questions arise. It is no coincidence that about a quarter of *Erskine May* is taken up with legislation. So readers from the Society of Clerks at the Table will probably turn first to the essays in part 1 on the scrutiny of legislation.

The essays in part 2 are at first sight a mixed bag. They deal with the regulation of lobbyists; with reform of certain House of Commons procedures such as election of select committee chairs and the establishment of a Backbench Business Committee; with "robot government" (i.e. when computers rather than humans decide issues in accordance with legislation); and with Parliament's role in relation to national security, international treaties, the European Convention on Human Rights and Euroscepticism. What the part 2 essays have in common with each other is that they deal with new and interesting ways of Parliament scrutinising particular areas of executive action. What they have in common with part 1 is that the scrutiny of legislation is in practice a subset of the broader function of holding the government to account.

In an essay entitled "What is the Parliamentary Scrutiny of Legislation for?" Sir Stephen Laws poses fundamental questions: what is parliamentary scrutiny of legislation supposed to achieve and how does one measure its success? Sir Stephen is a former First Parliamentary Counsel and head of the Office of the Parliamentary Counsel, which drafts all government primary legislation introduced to the Westminster Parliament. His insights are therefore especially significant. He suggests that the answers to the two questions depend on setting aside the textbook definition of Parliament as the nation's legislature and acknowledging the reality that Parliament's role in legislation is reactive, not proactive.

He suggests that what Parliament actually does is not to initiate legislation but to respond to fully drafted legislative proposals put forward by the government. The "myth of parliamentary authorship" of legislation has, he argues, blinded us to the fact that "the role of Parliament cannot include the collective authorship of legislative instruments"; Parliament should instead be treated "as a critic of legislation". He explains that, although occasionally an individual MP may be held accountable for how he or she dealt with a particular point of legislative detail of particular interest to his or her constituents, MPs are not in any practical way held individually and directly accountable to their constituents for the technical quality of legislation. Their main influence on legislation is through their political influence on the government.

Sir Stephen suggests that an important function of Parliament in relation to legislation is "to provide political legitimacy for the implementation of what usually begins as a partisan proposal". It follows that the constitutional processes for passing legislation should succeed in turning something politically contentious into something that enjoys greater public acceptance. This is the merit of public involvement in legislation, whether it is consultation on a draft bill, described by Jessica Mulley and Helen Kinghorn in chapter 3, or evidence-taking by parliamentary committees scrutinising a bill, as discussed in the contributions of Lord Norton of Louth, Richard Kelly and Lucinda Maer. These procedures help to ensure greater public acceptance of the resulting Act of Parliament, even if it was always unlikely that the government would agree to any significant changes to the bill that became the Act.

Commentators often refer approvingly to the "line-by-line" scrutiny of legislation in each House. This can be misleading. Neither in the Commons nor the Lords do members actually begin at clause 1, page 1, line 1, and proceed line-by-line. The expression "line-by-line scrutiny" should be understood to mean that members can focus on any part of a bill as they see fit. This is consistent with Parliament's role as critic of legislation. For Sir Stephen there is no need for the two Houses to carry out an "exhaustive supervision of every aspect of the production of legislation". In line with this pragmatic approach to parliamentary scrutiny, Sir Stephen makes what many will think a surprising suggestion—that since sampling is an accepted and effective form of quality control in other areas, it is legitimate for each House to discharge its role as critic of legislation by adopting a sampling process. He argues that this would allow Parliament to concentrate on the aspects of legislation which it is important for Parliament to influence. Those aspects will change from Parliament to Parliament and from bill to bill. Therefore Parliament needs to be willing to change its methods of scrutiny in order to prioritise the issues that political considerations demand should be given most attention on a particular occasion. He suggests that sampling could be based on some of the issues and good legislative standards brought to light during scrutiny of legislation in recent years.

Jack Simson Caird and Dawn Oliver examine these standards in chapter 4. They consider whether parliamentary scrutiny of legislation could be improved by the adoption of a code of substantive constitutional standards against which legislation would be assessed. A draft of such a code has been produced by the Constitution Unit at University College London. The draft has been extracted from reports of the House of Lords Constitution Committee from

2001 to 2015.[1] That committee examines the constitutional implications of public bills before the House. Its first chairman was Lord Norton of Louth. The draft code has five sections: the rule of law, delegated powers, separation of powers, individual rights and parliamentary procedure. It is contended that these standards are relevant beyond the specific bill to which the Constitution Committee's report relates and can be developed into a code of good legislative standards for general application. One of the difficulties here is that the draft code includes both procedural norms and substantive constitutional protections. The question of whether a bill has been published in draft for public consultation before its introduction to Parliament or whether the bill as introduced represents a rounded set of proposals is fundamentally different from the question of whether the right to a fair trial or the principle of natural justice is being respected in the legislation. As Sir Stephen Laws points out, it is peculiar to assert that in scrutinising a bill the process for its preparation should be prioritised for scrutiny ahead of the bill that emerges from that process.

Lord Norton of Louth writes about "Legislative Scrutiny in the House of Lords" in chapter 6. As might be expected of a member of that House, he is generous in his assessment of its value: he views the House of Lords as complementing rather than competing with the Commons, focusing on the means and not the ends of legislation, delivering detailed scrutiny of legislation facilitated by procedures distinctive to itself. More cynical commentators have suggested that it is because it lacks democratic legitimacy that the House of Lords seeks to justify itself by taking on a gruelling burden of meticulous legislative work which it conceitedly supposes the Commons has done badly or not at all. The picture that emerges from this book is that the House is particularly busy on the details of legislation, regularly defeating the government in divisions and making thousands of amendments to government bills each session. Whether this necessarily means that legislation is more effectively scrutinised in the House of Lords than in the House of Commons is perhaps debatable. Lord Norton points out that some observe that the House can be "notably self-congratulatory" about its work (he is too discreet to say whether he agrees with such observations). The number of amendments made by the Lords is often used as evidence of its worth. But the number of amendments made in each House is not necessarily significant: government amendments in the Lords may be simply late additions to a bill or reflect a change in government policy that is unrelated to scrutiny in the Lords. The number of amendments is not a good measure of the House's influence over legislation. Lord Norton recognises this

[1] J Simson Caird, R Hazell and D Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, 2nd edition (Constitution Unit, UCL, 2015).

in emphasising the significance of government amendments that respond to amendments moved, or points raised, by peers at earlier stages of a bill.

Sir Stephen Laws and Lord Norton both think that effective parliamentary scrutiny has a deterrent effect when legislation is being prepared. Sir Stephen explains that as a parliamentary counsel he was conscious of the risk that a certain sort of provision would attract undue parliamentary attention. Lord Norton refers to the "unseen" impact of the House of Lords as a deterrent to the inclusion of certain types of provision in a bill. A government would not necessarily win in a confrontation with the Lords (because there is no government majority in that House). So "non-decision-making" in the sense of influencing what is not put in a bill is "an important dimension of the Lords' power in the legislative process". It is useful to be reminded that the effectiveness of parliamentary scrutiny of legislation cannot be measured simply by the number of bills dropped or amendments made.

Part 2 of the book examines recent innovations in how Parliament holds the executive to account. These have added to the tools available to Parliament in scrutinising national security matters and international treaties. Alexander Horne and Clive Walker deal in chapter 10 with Parliament and national security. They consider whether a new convention has been established whereby Parliament must be consulted when the government wish to deploy the armed forces. They cite authorities that found the existence of such a convention in 2011 to be "doubtful", but conclude that in the light of votes in the House of Commons on military action in Libya (2011) and Syria (2013) and against ISIS/ISIL/Islamic State (2014) the convention can no longer be doubted. They ask whether the convention should be formalised, for example in legislation. Legislation risks decisions on the deployment of the armed forces ending up in court. A useful interim step might therefore be found in a report from the House of Commons Political and Constitutional Reform Committee, which enjoyed a brief life in 2010–15. It recommended that a parliamentary resolution (which falls short of legislation) could entrench the current convention and at the same time remove any ambiguities that exist in relation to it.

Alexander Horne and Clive Walker also consider the Intelligence and Security Committee (ISC). This is not a parliamentary committee but a statutory committee consisting of parliamentarians.[2] It was first established in 1994 to examine the UK's security services: MI5, MI6 and GCHQ. The Justice and Security Act 2013 increased its powers and remit. It is currently chaired by a former Attorney General. It has access to highly classified material.

[2] Parliament's Ecclesiastical Committee (which examines draft legislation presented to it by the General Synod of the Church of England) is similar in constitution and composition.

It might therefore be viewed as a courageous step towards transparency and accountability in the most secret areas of executive activity. Among other matters, it has examined how government powers of surveillance threaten the privacy of the citizen. The authors note that "extraordinary powers should be subjected to extraordinary scrutiny". Critics have suggested that the ISC does not live up to this high standard: criticisms include that its members are too close to the agencies that they are supposed to scrutinise; and that as mostly former ministers from the defence and foreign affairs departments they are not the kind of people to ask awkward questions. The authors are kinder to the ISC. They nonetheless quote the view of the House of Commons Home Affairs Committee that the weaknesses of the ISC reflect badly not only on the accountability of the security services but on the credibility of Parliament.

Another development in parliamentary scrutiny and executive accountability relates to international treaties. Arabella Lang explains in chapter 11 that the UK government signs and ratifies international treaties under the royal prerogative. It had been the practice of the UK government to ensure that domestic law was in line with treaty obligations before ratifying a treaty. Parliament was therefore being asked not whether the treaty should be ratified but only how it should be implemented. An Act of 2010 gave Parliament a new power to delay ratification. Treaty-making—the reader may be surprised to learn that there are 30–40 treaties a year—now involves the government laying the treaty and an explanatory memorandum before Parliament for 21 days. If within that time either House objects, the government must give further reasons to justify ratification. The House of Commons then has another 21 days to consider the government's reasons, and can object again, and so on, indefinitely. So the Commons has the power to block ratification. The Lords however can object only once, and therefore has the power only to delay ratification. The author points out that this reform may not in fact appreciably increase Parliament's power over the executive unless there is machinery to support Parliament in its new role. Without help, how are parliamentarians to gauge the significance of the treaties laid before them or indeed to know that an important treaty has been laid? Moreover, the new role does not include power to amend treaties and there is no requirement for a debate or vote on most treaties. The author concludes that "it is hard to see how much difference [the 2010 Act] has made in practice". The balance of advantage appears still to lie with the executive.

Firm evidence to test this impression will almost certainly be provided in the next two years or so. This is because the UK's exit from the European Union will require treaties to be negotiated and ratified. Parliament's new powers over treaties will be relevant as never before. The treaty to give effect to the formal departure from the EU, and the treaty or treaties to establish the post-Brexit settlement, will be subject to the procedures outlined above. Who would be

brave enough to forecast at this stage, and in the light of the recent UK Supreme Court judgment on article 50, what are the implications of "taking back control" for Parliament's scrutiny of the executive's treaty-making powers?

Parliamentary scrutiny takes place in a tough political environment where competing interests seek rewards. Oonagh Gay notes in her essay on the regulation of lobbyists (chapter 8) that groups outside Parliament have always tried to influence the legislative process. Their methods have in the past included bribery of members, which is of course a high crime and misdemeanour. But it is an offence that cannot easily be prosecuted in an ordinary law court because of parliamentary privilege. Today the external pressures come from lobbyists seeking privileged access. Lobbying of Parliament is permissible and even desirable, subject to stringent rules. Thus both Houses prohibit paid advocacy, which is the acceptance of money to advance a particular cause or interest external to Parliament. But currently only the Lords bans its members from offering parliamentary advice or services for money. MPs but not peers are still free to have consultancy arrangements with PR firms. As a result some MPs have been accused of being "available for hire" and some have been found guilty of serious breaches of parliamentary rules. Oonagh Gay quotes Transparency International's finding that the House of Commons is among the weakest public bodies in regulating lobbying. She concludes that MPs are lagging behind and that this may cost them dear. Her concerns may however have been met to some extent by the time this review is published, because at the time of writing the matter is being examined by the Commons authorities.

This book will be a helpful guide to anyone who wishes to catch up on recent procedural developments at Westminster. As Lord Lisvane points out, every subject dealt with is a moving target. The book provides readers with a good understanding of the speed and direction of movement at a time when UK politics seems volatile and unpredictable.

CONSOLIDATED INDEX TO VOLUMES 81 (2013) – 85 (2017)

This index is in three parts: a geographical index; an index of subjects; and lists of members of the Society who have died or retired, of privilege cases, of the topics of the annual questionnaire and of books reviewed.

The following regular features are not indexed: books (unless substantially reviewed), sitting days, amendments to standing orders and unparliamentary expressions. Miscellaneous notes are not indexed in detail.

ABBREVIATIONS

ACT	Australian Capital Territory;
Austr.	Australia;
BC	British Columbia;
Can.	Canada;
HA	House of Assembly;
HC	House of Commons;
HL	House of Lords;
LA	Legislative Assembly;
LC	Legislative Council;
LS	Lok Sabha;
NA	National Assembly;
NI	Northern Ireland;
NSW	New South Wales;
N. Terr.	Northern Territory;
NZ	New Zealand;
PEI	Prince Edward Island;
Reps	House of Representatives;
RS	Rajya Sabha;
SA	South Africa;
Sask.	Saskatchewan;
Sen.	Senate;
Vict.	Victoria;
WA	Western Australia.

GEOGRAPHICAL INDEX

For replies to the annual questionnaire, privilege cases and reviews see the separate lists.

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