No. 271A

1984–85

PARLIAMENT OF NEW SOUTH WALES

REPORT

from the

Joint Select Committee

of the

Legislative Council

and

Legislative Assembly

upon

Parliamentary Privilege

Ordered to be printed, 26 September, 1985

BY AUTHORITY
D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1985

51106-10314 1984–85—287

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"Doubtless there may be members of strong energy, easy credulity, and impulsive temperament who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important there should be perfect liberty of speech in Parliament, even though it may sometimes degenerate into licence."

(Gipps v McElhone (1881) 2 LR (N.S.W.) 18 at 24)

per Sir William Manning, J

"That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place our of Parliament."

Article 9 of The Bill of Rights (1688)

Members of the Committee

The Hon. R.M. Cavalier, B.A. (Hons), M.P. (Chairman).

Legislative Council

*The Honourable D.D. Freeman, A.M., B.D.S., D.D.S. (Toronto), L.D.S. (Ontario), F.I.C.D., F.R.A.C.D.S., F.A.C.D., M.L.C.

The Honourable D.M. Grusovin, M.L.C.

The Honourable B.H. Vaughan, LL.B., M.L.C.

**The Honourable Max Frederick Willis, E.D., LL.B., M.L.C.

Legislative Assembly

Mr D.J. Bowman, B.A., Dip.Ed., M.P.

+Mr J.H. Brown, M.P.

Mr G.D. McIlwaine, LL.B., M.P.

Mr T.J. Moore, LL.B., M.P.

++Mr W.T.J. Murray, M.P.

* Discharged 31st March, 1983 am

** Appointed 31st March, 1983 am

\+ Did not seek re-election at the 1984 general election

++ Appointed 10th May, 1984

PREFACE

To be elected the Chairman of a Select Committee of the Parliament is a privilege - in the customary sense of that word. This Select Committee was expected to inquire into an arcane area of law and parliamentary practice. It is an area of law and practice that has developed over centuries in Westminster, firstly, and then New South Wales, to provide a code (largely unwritten) to enable practising politicians to protect their individual and collective rights and the rights of their institutions.

Our work required a lot of reading and a lot of listening. We envisaged that we would be sedentary but found, instead, that we needed to travel to all the States and Territories of Australia. The Committee believed that our inquiries could not be complete without a personal analysis of how foreign legislatures operated and how they protected the rights and privileges of their members.

The Committee deliberated over thirty-three months and, in that time, the course of politics affected our membership and our individual capacities to devote large blocs of time to this important work. One member stood down in anticipation of a general election and another retired at the election. The Chairman became a Minister of the Crown, one member became the Leader of a party, another became Opposition Whip. The Clerk to the Committee became Clerk of the Legislative Assembly. Towards the end the scheduling of our meetings was a major hazard.

Throughout it all the members remained friends. When matters went to resolution there were only rarely party-line divisions. There was humour in the midst of our deliberations and a spirit of co-operation even when our differences appeared intractable. For those personal qualities I am very grateful. Certainly the Committee was forbearing about a Chairman whose first responsibility for the past fifteen months was to the portfolio that he held. As I was more and more distracted so others did more and more - they worked harder without complaint or snide remark.

I conclude by expressing my thanks to the many officers who helped us in our work. Our own parliamentary establishment in both Houses helped us beyond the call of duty. This was true of the officers of the other legislatures in Australia and overseas. Officers of the Premier's Department and the Attorney-General's Department were always willing to assist. The Solicitor-General and Crown solicitor gave us advisings whenever requested.

Finally, my thanks again to the members past and present of the Select Committee. In particular, I thank Tim Moore and Grahame Cooksley for their friendship, their advice and their industry.

Rodney Cavalier, M.P.,
Chairman

18 September, 1985

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On 3rd November, 1982, on a Notice of Motion by the Premier, the Honourable N.K. Wran, Q.C., M.P., the Legislative Assembly resolved:

> (1) That a Joint Select Committee be appointed to review and report whether any changes are desirable in respect of:
>
> > (a) The law and practice of parliamentary privilege as they affect the Legislative Council and the Legislative Assembly, the Members and Committees of either or both Houses and other persons;
> >
> > (b) The powers and procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined.
>
> (2) That such Committee consist of three Members of the Legislative Council and five Members of the Legislative Assembly.
>
> (3) That at any meeting of the Committee any three Members shall constitute a quorum, provided that the Committee shall meet as a Joint Committee at all times.
>
> (4) That Mr Cavalier, Mr McIlwaine, Mr Bowman, Mr Moore and Mr Brown be appointed to serve on such Committee as Members of the Legislative Assembly.
>
> (5) That the Committee have leave to sit during the sittings or any adjournment of either or both Houses; to adjourn from place to place; to make visits of inspection within the State of New South Wales and other States and Territories of the Commonwealth; and have power to take evidence and send for persons and papers; and to report from time to time.

Following agreement to this resolution in the Legislative Council on 9th November, 1982, your Committee held its first meeting that day and elected the Honourable (then Mr) R.M. Cavalier, M.P., as Chairman.

The outline of the initial visits, submissions and evidence by your

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Committee appears in its Progress Report (Parliamentary Paper No 94, 1983) which was ordered to be printed on 1st December, 1983.

In addition to this, your Committee travelled to the Australian Capital Territory to inspect the Parliament of the Commonwealth of Australia; held a colloqium with the Members of the Commonwealth Parliament's Joint Select Committee on Parliamentary Privilege and took evidence from officers of both Houses of the Commonwealth Parliament, its Press Gallery and its support services.

While in the Australian Capital Territory, your Committee also inspected the new parliamentary complex which is under construction, and held discussions with officers of the constructing authority as to the definition of the precincts of that new complex.

Your Committee also met with and took evidence from Members and Officers of the ACT House of Assembly.

The former Member for Oxley and a valued member of this Committee, Mr J.H. Brown, did not contest the general election held on 24 March, 1984. He was replaced by the Member for Barwon, Mr W.T.J. Murray, M.P.. Following the return of the Government, the Committee was reconstituted and the Chairman, the Hon. R.M. Cavalier, M.P., was re-elected. The Chairman was first appointed to the Ministry as Minister for Energy and Minister for Finance on 10 February, 1984. The Clerk to the Committee was appointed as Clerk of the Legislative Assembly on 13 October, 1984. This is believed to be the first time that a Minister and a Clerk of a House of Parliament have been simultaneously Chairman of, and Clerk

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to, a Select Committee.

Several members of the Committee, together with the Clerk, attended the seminar of the Australasian Study of Parliament Group on Parliamentary Privilege, which was held in Melbourne on 24 and 25 August, 1984. The Chairman addressed delegates upon the visit overseas by Mr Moore, the Clerk and himself to the Parliaments discussed in the Appendix to this Report. The Chairman delivered a paper on privilege, as seen from a New South Wales perspective, which provoked lively debate, and joined in a panel discussion with Mr Moore on the various aspects of privilege canvassed at the seminar.

The issuing of the final report by the Joint Select Committee on Parliamentary Privilege of the Commonwealth Parliament, in October, 1984 was greeted with keen interest by your Committee. Several of the findings of the Commonwealth Committee are at variance with the findings of your Committee, reasons for which are elucidated subsequently in this report.

The very existence of an inquiry into their rights and privilege raised the awareness of Members. Whether this influenced the airing of matters that otherwise would have been ignored is not certain. Certainly, two genuine cases of attempted intimidation of Members of the Legislative Assembly of New South Wales in the performance of their parliamentary duties have arisen since the release of the Progress Report in November 1983.

Mr E. Page, M.P.

Introduction

On Wednesday, 19 September, 1984, the Honourable Member for Waverley, Mr Page, drew the attention of the House to the fact that he had received a telex at Parliament House threatening him with legal proceedings should he be associated with the screening of a film in the parliamentary theatrette. Mr Page maintained that this constituted a grave breach of privilege.

Mr Speaker stated Mr Page had established to his satisfaction that a prima facie case of a breach of privilege existed. Mr Page accordingly moved:

> 1. That this House re-asserts that behaviour and activity within the precincts of this Parliament are matters for the Presiding Officers and the Houses to determine.
>
> 2. That in the opinion of this House the despatch of a telex by D.W. Rogers of Arthur, Robinson & Hedderwicks to the Honourable Member for Waverley at Parliament House threatening him with legal proceedings should he be associated with the screening of a film in the parliamentary theatrette in the pursuit of his parliamentary duties constitutes a grave breach of privilege.
>
> 3. That this resolution be conveyed by Mr Speaker to Mr D.W. Rogers of Arthur, Robinson and Hedderwicks.

Debate ensued, with the Motion being agreed to.

Subsequently the Chairman of this Committee circularised the decision of the Legislative Assembly to all Presiding Officers of all Parliaments in Australia.

Mr B. Jeffery, M.P.

On 9 November, 1984, the Honourable Member for Oxley, Mr Bruce Jeffery, M.P., wrote to the Committee, drawing its attention to an enclosed letter from one James E. Marshall, written on the

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letterhead of The Rocks Workers' Club, Gregory Street, South West Rocks, 2441.

The letter is as follows:

> "In late 1982 a Police investigation was carried out on the financial affairs of The Rocks Workers' Club. This was done as a result of representations made by James H. Brown to the Minister for Police on the request of Norman R. Brading.
>
> This investigation caused mischievous nuisance and, as a result of talk by Brading in its respect, brought in its train a disgraceful spate of erroneous and malicious rumour concerning Club Officers - in particular the writer.
>
> Now, two years later, Brading has used you and the Minister for Police as tame messenger boys in an endeavour to again cause trouble making mischief.
>
> You are now formally notified and for your own good it is suggested that you give such notification your very serious consideration:
>
> > 'Should you take or attempt to take any further action at any time to again aid or abet Norman R. Brading, whether at his request or otherwise, in the perpetration of nuisance to any one or more of the officers of The Rocks Workers' Club the requisite legal action will be immediately taken against you.' "

Mr Jeffery was advised that the letter threatening him with legal action should he pursue the matter in the course of his parliamentary duties was a breach of privilege.

Mr Jeffery subsequently advised the Clerk to the Committee that the threat was subject to police investigation. The matter so rests at the going to print of this report.

PRIVILEGES OF THE NEW SOUTH WALES PARLIAMENT - THE CURRENT POSITION

It is argued that the Parliament of New South Wales, not having legislated generally in respect of privilege, has only the following privileges -

IN5

1. Such powers and privileges as are implied by reason of necessity: Armstrong v Budd (1969) 71 SR (NSW) 386.

2. Such privileges as were imported by the adoption of The Bill of Rights (1688) 1 William and Mary Sess. 2 c.2: Imperial Acts Application Act 1969.

3. Such privilege as is conferred by the Defamation Act 1974.

4. Such privilege as is conferred by other legislation e.g. Parliamentary Evidence Act 1901 and the Public Works Act 1912.

The Content of the Privilege

A. Privileges Implied by Reason of Necessity.

In Kielley v Carson (1841-42) 4 Moo.P.C. 63, which has, hitherto uncritically been accepted as determinative of the powers of colonial legislatures, the powers of the House of Assembly of Newfoundland were described as those

> "... as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." (p. 88)

Current Position

The powers are not static in the sense of being confined to what was necessary at the time of the establishment of the Parliament, but

> "... what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of [Parliament] as it now exists." (per Wallace P.; Armstrong v Budd (supra at 402).

Although the principles are stated with sufficient generality to ensure the proper functioning of Parliament, their general formulation is such that, in the absence of more specific provision, the Courts will be the final arbiters of what powers and privileges vest in the Parliament of New South Wales.

It is perhaps useful to set out in detail some of the matters which have been considered by the Courts.

In Kielley v Carson (supra) the Privy Council held that the Legislative Assembly of Newfoundland had no power to order the arrest of a stranger so that he might be punished for a libel on a Member of the Assembly.

In Doyle v Falconer (1866) LR 1 PC 328 it was held that the Dominican House of Assembly did not have power to punish a contempt though committed in its face and by one of its Members. In so holding the Privy Council referred to its earlier decision in Fenton v Hampton 11 Moo. PC 347 that there is no implied power to adjudicate upon or punish for contempts committed outside Parliament. However the Privy Council distinguished between punishmnent and power to remove any obstruction to its proper deliberations saying:

Current Position

> "If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for an offence. The right to remove for self-security is one thing, the right to inflict punishment is another." (p. 340)

The power to suspend was confirmed by the Privy Council in Barton v Taylor (1886) 11 Apr. Cas. 197, a case concerning the New South Wales Legislative Assembly. Their Lordships considered that a power to suspend "during the continuance of any current sitting" was reasonably necessary and added that:

> "...it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member." (p. 204)

However their Lordships also observed that:

> "A power of unconditional suspension for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse."

More recently in Armstrong v Budd (supra) the Supreme Court of New South Wales held that there is power in the Legsislative Council to expel a Member provided that special circumstances exist and the expulsion is by way of self protection and not punishment. The special circumstances postulated appear to relate to fitness or worthiness to sit in the Parliament. Conduct outside the Parliament may render a person unfit or unworthy. In reaching this decision, the Court relied heavily on the Privy Council decision in Harnett v Crick [1908] AC 470 upholding the power of the New South Wales Parliament to suspend a Minister charged with bribery and corruption until a verdict was given in the criminal proceedings or

the House sooner determined.

In Gipps v McElhone (1881) 2 LR (N.S.W.) 18 and Chenard & Co. v Joachim Aressol [1949] AC 127 the absolute privilege of statements made by a Member in the Parliament was confirmed as being inherently necessary for the conduct of the business of Parliament.

B. The Bill of Rights (1688)

Article 9 of The Bill of Rights provides:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

In Namoi Shire Council v Attorney General for New South Wales (1980) 2 NSWLR 639 Mr Justice McLelland (in Equity) decided that "Art. 9 of The Bill of Rights does not purport to apply to any legislature other than the Parliament at Westminster."

It is not clear from the report of that decision whether his Honour's attention was directed to the adoption of The Bill of Rights in New South Wales by the Imperial Acts Application Act 1969 which came into force in 1971.

Without going to the detail of the arguments which may be available, it is argued that his Honour's decision on The Bill of Rights was wrong. However, for practical purposes that is a view which can only be tested by further litigation.

In large measure, many of the freedoms guaranteed by The Bill of

Current Position

Rights would be implied as necessary for the existence and functioning of Parliament, for example absolute privilege for statements made in the Parliament. On the other hand it would appear that The Bill of Rights would not afford protection in some areas which are of particular interest to Members of Parliament.

Apart from absolute protection for statements made in the Parliament, other privileges which flow from The Bill of Rights include:

1. Right to exclude strangers.
2. Right to control publication of debates and proceedings.
3. Protection of witnesses etc. before the Parliament and its Committees.

All of the above privileges would, in the view of your Committee, be implied by reason of necessity.

Other privileges identified in Erskine May's Parliamentary Practice (Twentieth Edition pp. 77 ff) as having their origins in The Bill of Rights would not in the view of the Committee be implied by necessity.

One such important privilege is the right of each House to be the sole judge of the lawfulness of its own proceedings. This matter came under consideration in Namoi Shire Council v Attorney General for New South Wales (supra) where the validity of the Local Government Areas Amalgamation Act 1980 was challenged on the basis that its passage through the Legislative Assembly contravened certain Standing Orders. Mr Justice McLelland held that non-compliance with Standing Orders did not affect the validity of

the Act; however, he rejected argument that the internal proceedings of Parliament were not examinable by the Courts. In rejecting this argument, he suggested, contrary to Erskine May's analysis, that the privilege of each of the Houses of the British Parliament to be sole judge of the lawfulness of its proceedings was not based on The Bill of Rights.

Many questions have arisen as to the meaning of "the proceedings of parliament" in the context of the law of defamation. It would appear to cover not only the formal transaction of business in both Houses and committees, but also everything said and done by a Member in the exercise of his functions as Member of the House or a Member of a committee. However when a Member of the House of Commons was threatened with a libel action in respect of a letter to a Minister, the House of Commons decided that the letter was not a proceeding in Parliament. (See HC Official Report (5th Series) 8th July, 1958 cols. 208-346). That decision resulted in recommendations from the Joint Committee on the Publication of Proceedings in Parliament 1969-70, the Committee on Defamation 1975 and the House of Commons Committee of Privileges 1976-77 for legislation granting privilege to communications between Members and Ministers where such communication was for the purpose of enabling a Member to carry out his functions. Such legislation has apparently not been enacted. (See Halsbury, 4th Ed., Vol. 34, Para. 1486). This subject is treated elsewhere in this report and subject to specific recommendations by your Committee.

C. The Defamation Act 1974

Section 17 of the Defamation Act extends Parliamentary privilege by

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providing:

> "(1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House or both Houses of Parliament.
>
> (2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament.
>
> (3) There is a defence of absolute privilege for the publication of -
>
> > (a) a document previously published as mentioned in subsection (1) or a copy of a document so published; and
> >
> > (b) debates and proceedings previously published as mentioned in subsection (2) or a copy of debates and proceedings so published."

The position both in England and New South Wales would seem to be that absolute privilege does not attach to the publication of a speech otherwise than as part of the whole debate or proceedings of the House: Creevey's Case CJ (1812-13) 604. Creevey was fined one hundred pounds for the publication of a correct copy of his speech after inaccurate reports had appeared in several newspapers. He complained to the House of Commons, but the House refused to admit that a breach of privilege was involved (Parl.Deb. (1812-13) 26, L. 898).

In a preliminary essay canvassing the privileges of the Parliament of New South Wales, that sought to establish the principal powers, privileges and immunities of the House of Commons as at 1894 (the date of approval by the Governor of the Standing Rules and Orders of the New South Wales Legislative Assembly) the then Clerk-Assistant of the Assembly, Mr Grahame Cooksley (who is also the Clerk to this Committee) argued that it is tenable that:

Current Position

1. In any action for defamation a Member of Parliament cannot raise a successful defence based on s 17. (A re-print is not covered by s 17(1); s 17(2) is confined to the Government Printer and s 17(3) refers to previous publications under s 17(1) and (2)).

2. Members are not precluded from raising the defence of qualified privilege where appropriate; i.e. where the publication is limited to constituents or where the recipient has a real interest in receiving the communication or the case otherwise falls within s 22 of the Act.

3. The publication of a Member's speech can obtain the protection of s 25(b) in certain circumstances. To come within the protection, it would not be enough (in every case) to publish a verbatim account of a Member's speech. If, for example, in the very next speech, much or some of what was said by the Member was refuted, his speech would not be a fair extract or abstract of the debates and proceedings.

4. In the case of speeches containing defamatory imputations the safest course is for the Government Printer to print extra copies of Hansard.

He argued that it is perhaps less tenable:

1. Whether the Member's speech printed alone and in its entirety would come within the words "debates and proceedings" in s 17(2). If the view that it would not is correct, this may seriously weaken the position of the Government Printer.

2. Whether the defence of qualified privilege would apply to the Government Printer - it may well depend upon the circumstances of the publication. The actual publication of the speech to the Member or person who collects it for the Member would be the subject of qualified privilege. But if the reprint is for distribution - which in most cases would be the reason for the reprint - the Government Printer becomes a joint publisher with the Member. If the publication is limited to constituents, both the Member and the Government Printer have qualified privileges in respect of the publication. If, however, the Member maliciously publishes his defamatory speech, on the basis of the express decision in Webb v Bloch 41 C.L.R. 331 that the malice of one joint publisher defeats the privilege of other joint publishers, the protection of the Government Printer is defeated. In England the law is now the contrary: see Eggar v Chelmsford (1965) I.Q.B. 248.

If a speech is published to non-constituents, then the defence of qualified privilege would only arise if the recipient had a real interest in receiving the communication or the case otherwise fell

Current Position

within s 22 of the Act.

Recommendations from your Committee with respect to the production, distribution and extraction of Hansard are dealt with later in this report.

The Clerk to your Committee continued to set out fifteen general categories of such powers, privileges and immunities attaching to Parliament. They were as follows:

. the power to order the attendance at the Bar of the House of persons whose conduct has been brought before the House on a matter of privilege;

. the power to order the arrest and imprisonment of persons guilty of contempt or breach of privilege;

. the power to arrest for breach of privilege by warrant of the Speaker;

. the power to issue such a warrant for arrest, and imprisonment for contempt or breach of privilege, without showing any particular grounds or causes thereof;

. the power to regulate its proceedings by standing rules and orders having the force of law;

. the power to suspend disorderly Members;

. the power to expel Members guilty of disgraceful and infamous conduct;

. the right of free speech in Parliament, without liability to action or impeachment for anything spoken therein established by Article 9 of The Bill of Rights (1688);

. the right of each House as a body to freedom of access to the Sovereign for the purpose of presenting and defending its views;

. immunity of Members from legal proceedings for anything said by them in the course of parliamentary debates;

. immunity of Members from arrest and imprisonment for civil causes whilst attending Parliament, and for 40 days after every prorogation, and for 40 days before the next appointed meeting;

. immunity of Members from the obligation to serve on juries;

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. immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes;

. immunity of parliamentary witnesses from being questioned or impeached for evidence given before either House or its committees; and

. immunity of officers of either House, in immediate attendance and service of the House, from arrest for civil causes.

The privileges of the House of Commons are not necessarily the privileges enjoyed by the Parliament of New South Wales. Unlike the Commonwealth Parliament and most of the other State Parliaments, the New South Wales Parliament has not asserted its privileges by express enactment. The privileges of the New South Wales Parliament are to be found in the whole body of the common law and a few relevant statutes. The exhaustive historical inquiry required to establish just what our privileges are has been a particularly fascinating exercise for the Members of the Committee. The historical method was the one recommended by Professor Campbell in her testimony to the Committee:

> "Some form of historical inquiry would be unavoidable. The starting point must be the history of privilege in the United Kingdom. That is important because, often, the rationale is lost sight of if one does not understand why it was, for example, that the House of Commons secured the enactment of article 9 of The Bill of Rights (1688). One should seek to find out what was the mischief they were driving at when they sought to include article 9 in the celebrated Bill of Rights of 1688. ...
>
> One would need to examine carefully the justification, if any, for the kinds of privileges that are asserted by the House of Commons and by legislative institutions that have adopted common privileges in toto. Likewise one would have to examine carefully the justification for the kinds of privileges set out in the statutes that have been enacted in some other jurisdictions within the Commonwealth of Nations.
>
> In other words, I am suggesting there is a basic philosophical question that one cannot avoid; that is, why does one need absolute immunity from defamation in respect of words that are published during the course of parliamentary proceedings. One's answer to that on consideration, may be that there are very good reasons for conferring that absolute privilege. If

> those participating in judicial proceedings enjoy such a privilege, parliamentarians have an equal claim to enjoy the privilege in relation to the conduct of their business."

A good part of that historical inquiry has been undertaken by the Office of the New South Wales Solicitor General. In an opinion provided to the Committee, the Solicitor General, M/s Mary Gaudron, confirmed that the New South Wales Parliament enjoyed privileges under four headings:

> "(1) Such powers and privileges as are implied by reason of necessity.
>
> (2) Such privileges as were imported by the adoption of The Bill of Rights (1688).
>
> (3) Such privilege as is conferred by the Defamation Act 1974.
>
> (4) Such privilege as is conferred by other legislation, e.g., Parliamentary Evidence Act 1901 and the Public Works Act 1912."

It is within the first heading - the privileges implied by the doctrine of necessity - that the principal problems have arisen in our State in determining what privileges the Parliament enjoys. This limitation upon the inherent rights of the New South Wales Parliament enjoys no less an authority than the Judicial Committee of the Privy Council which, in 1841, ruled in Kielley v Carson (supra) that a colonial parliament did not enjoy the power to try and punish those who offended against parliamentary law. The powers of a colonial or dominion legislature were limited to those privileges as were reasonably necessary for them to carry out their legislative functions, until and unless they asserted otherwise by express enactment.

Current Position

In the 140 years since, the Parliament of New South Wales has operated under that handicap - if handicap it be - without being able to reach accord on a statute that would have reversed the situation. As long ago as October 1878, a Bill passed through the Legislative Assembly that attempted to invest the Parliament with powers and privileges identical to those then in existence in the House of Commons. The penal jurisdiction, however, was to be transferred to the Supreme Court of New South Wales and the House would have been able to direct to Attorney General to prosecute. That first attempt failed in the Legislative Council. In 1901 another attempt to define privilege passed through the Assembly but it lapsed when the Parliament was prorogued. In fact, over the past century there have been five major attempts at legislation that sought to define parliamentary privilege. All five attempts have failed.

Those lost opportunities took place in a constitutional framework where the New South Wales Parliament was untrammelled in its capacity to alter its own modes of Government and the constituent powers of its Houses. In 1919, however, after a decade of strife involving the Legislative Council, the Parliament established certain manner and form requirements that were binding on all future parliaments that might attempt to alter the powers of the Legislative Council. This question will be considered at length later by the Committee. It is worth noting, however, that an assertion by statute that the New South Wales Parliament enjoys all of the privileges of the House of Commons may fail - according to the advice of some learned counsel - because the Legislative Council did not enjoy those powers prior to the enactment of s 7A of the Constitution Act and may not now be conferred with those

powers, except by reference to the people in a referendum.

Your Committee has had learned advice that the decision of the Privy Council in Kielley v Carson is of arguable validity. Your Committee does not believe it is currently binding in the State of New South Wales.

While only a ruling in the High Court of Australia could put this challenge beyond doubt, your Committee recommends that the Parliament should not be inhibited from legislating a general expression of what is the privileges power of the Parliament today and what it has been in the years since the establishment of responsible Government.

Professor Campbell opined that a colonial legislature of the 1840's is in a qualitatively different status to a sovereign state in the 1980's. In the years since, the colony became a State - itself part of a federated nation - with its own constitution.

The conclusions that are available to your Committee after consideration of the evidence on this point are:

(1) to adopt the view that the powers, privileges and immunities of a New South Wales Parliament are those of the House of Commons as at 1856 and that such position needs no reinforcement by change to the Constitution Act; or

(2) to adopt the view that the powers, privileges and immunities are those of the House of Commons as at 1856 and to recommend that the Constitution Act be so amended to place this conclusion beyond

doubt; or

(3) to adopt the view that Kielley v Carson is correct and that a separate express document is necessary to currently define the powers, privileges and immunities which should appertain to the New South Wales Parliament.

In its consideration of the second of the above options, your Committee took evidence and considered the question of whether incorporation in the Constitution Act of a provision clarifying the position with respect to the powers, privileges and immunities of the Legislative Council being co-extensive with those of the House of Commons as at 1856, involved the extinction of or alteration to, the powers of the Legislative Council so as to require a referendum pursuant to s 7A of the Constitution Act. The evidence given to your Committee, including evidence by the Solicitor General, led your Committee to the view that such an amendment to the Constitution Act would not involve an alteration to the powers of the Legislative Council as comprehended in s 7A of the Constitution Act.

Current Position

Your Committee therefore recommends that:

(1) the Constitution Act be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the House of Commons as at 1856; and
(2) to enact such other provisions as are recommended elsewhere in this report.

Your Committee does not believe that it is of value to pursue an extensive codification of privileges. The adoption of the privileges of the House of Commons, together with the body of precedent available with respect to those privileges, provides a more than adequate framework within which the New South Wales Parliament can deal with future matters of privilege which might arise. Your Committee recommends that no such codification occurs.

The view that a referendum is required under s 7A of the New South Wales Constitution Act to confer the Legislative Council with the privilege of punishing offenders for contempt is not a view held with any tenacity by legal commentators.

In 1980-81 the New South Wales Government took a cautious approach in the matter of the powers or otherwise of the New South Wales Legislative Council when it put to a referendum the question of the disclosure of the pecuniary interests of members of the Legislative Council. The referendum was held concurrently with the 1981 election and was carried.

Current Position

On that occasion two learned counsel, Mr L.J. Priestley, Q.C. and Mr J.P. Bryson offered the Opinion that "legislation which conferred powers on the Legislative Council to punish breaches of legislation relating to registration of pecuniary interests would be invalid unless enacted in the manner provided by s 7A".

The Government did not see fit to act contrary to that Opinion at that time, upon the advice of the New South Wales Solicitor General. After further reflection, however, the Solicitor General, in evidence before your Committee, while noting that her advising then could be considered the "perfectly safe line", asserted that sound arguments existed which would enable s 7A to be read down in an historical context. The Solicitor General would be prepared to argue that case in the appropriate court.

The critical test that a court is likely to apply is the legal meaning of the word "powers" in the terms of s 7A and the intention of the legislature when it attempted to establish rigid manner and form requirements to protect the "powers" of the Legislative Council from alteration by any means other than referendum.

Professor Campbell does not believe that s 7A created a new set of restrictions that would prevent the conferment of any privileges function:

> "I think the word 'powers' in that context refers primarily to the powers of the Council as a constituent part of the Legislature and one whose assent is absolutely essential before any proposed legislation can become an Act of Parliament. The powers of the Legislative Council would not, to my mind, be affected at all by an Act of the New South Wales Parliament that codified the offences against the institutions of Parliament and conferred that jurisdiction to determine whether those offences had been committed in particular cases to the courts of law."

Current Position

Professor Geoffrey Sawer largely concurred with the view that the verbal history of the term "powers" was all important. In a letter written to your Committee after he had given evidence Professor Sawer observed:

> "From an abstract point of view, legislation which enabled the Council to summon, try and punish a person for conduct outside Parliament such as defamation of the institution or members would 'alter' its powers. However, it is arguable that it is a matter of verbal history, such provisions relate not to 'powers' but 'privileges', and that one would have expected the section to include that word if the provision was intended to cover it.
>
> It is also arguable that the word 'powers' in s 7A, having regard to context, means 'powers vis a vis the Legislative Assembly', not self protecting 'privilege-powers'."

The Solicitor General in essence agreed with these observations and conceded that an argument that s 7A related only to legislative power and not quasi-judicial power would have "good prospects of success".

Your Committee accepts these views. Section 7A exists to protect the Legislative Council against an infringement (or an expansion) of its "powers" of a kind not contemplated by a declaration of privileges and immunities that have always existed and which continue to exist. A declaration by express enactment does not alter its powers. As alterations recommended elsewhere in this Report to privileges enjoyed in common by the Parliament do not alter the balance of power and are specifically "privilege powers" only, your Committee believes that no referendum is necessary.

ALLEGED PARAMOUNTCY OF COMMONWEALTH LAW

On 17th August, 1983, the Honourable Peter Duncan made a speech in the Parliament of South Australia upon the then Royal Commission on Australian Security and Intelligence Agencies.

On 18th August the Royal Commissioner, the Honourable Justice Hope, referred to the then Federal Attorney-General Senator the Honourable Gareth Evans, questions relating to the interaction of federal legislation with the parliamentary privileges of Members of State Parliaments.

Senator Evans sent the following documents to the Secretary of the Commission on 23rd August:

23 August 1983

Mr B Cox OBE MBE
Secretary
Royal Commission on Australian
Security and Intelligence Agencies
PO Box E349
CANBERRA ACT 2600

Dear Mr Cox,

I refer to your letter of 18 August in which you bring to my attention newspaper reports of a speech by Mr Peter Duncan in the South Australian Parliament and the statement of His Honour Mr Justice Hope indicating his intention to refer matters raised by that speech to me.

The Solicitor-General, Sir Maurice Byers QC, and I have considered the points raised in His Honour's statement and have prepared in response the Joint Opinion appended to this letter.

Our conclusions may be briefly stated as follows:

(1) While Commonwealth law may in some circumstances be capable of overriding claims of parliamentary privilege in both Commonwealth and State Parliaments, neither s 6D or s 6O of the Royal Commissions Act, nor s 92 of the ASIO Act, have that effect.

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(2) Mr Duncan could not, accordingly, be prosecuted under these provisions even if they were otherwise applicable to him.

(3) Media reports, however, even if constituting no more than fair reports of what is said in Parliament, may as a matter of strict law be capable of prosecution under those sections to the extent that they involve:

. wilful contravention of a Commissioner's suppression order;

. a wilful prejudgment or prejudicial treatment of issues being dealt with by the Commission; or

. identification of an officer (other than the Director-General), employee or agent of ASIO.

Notwithstanding the conclusion in (3), and the possibility that the law in question may have been breached, I do not propose to take any action in relation to those accounts of Mr Duncan's speech which have appeared in the media to date. A number of accounts were published or broadcast before my statement of 18 August counselling caution by the media, when it is reasonable to suppose that the media in question were acting on the assumption that fair reports of parliamentary proceedings were fully protected. Subsequent to that caution, reasonable restraint has been exercised in all cases of which I am aware.

As we state in our Joint Opinion, there are obviously acutely sensitive questions of public policy involved in these matters. Other than in the most exceptional circumstances, we believe it to be more appropriate that reliance be placed on parliamentarians and the media exercising reasonable self-restraint than that the sanctions of the criminal law be applied to them.

We are sure that His Honour's statement of 4 August 1983, drawing attention as it does to the need of the Commission to be able to proceed with its deliberations in a calm, dignified and unprejudiced atmosphere, will have been closely heeded.

I would be grateful if you would convey the above to the Commissioner. As discussed with you, I propose - because of the intense public interest in this matter - to immediately publicly release the text of this letter and the accompanying Joint Opinion.

Yours sincerely,

Signed
Gareth Evans

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RE: ROYAL COMMISSION ON AUSTRALIAN SECURITY AND INTELLIGENCE AGENCIES

JOINT OPINION

On 18 August the Royal Commissioner on Australia's security and intelligence agencies, the Honourable Mr Justice Hope, referred to the Attorney-General questions relating to the interaction of federal legislation with the parliamentary privilege of a Member of a Parliament of a State. The Attorney-General has thought it appropriate that the matter be considered by both himself and the Solicitor-General.

Reference by the Royal Commissioner

2. The Commissioner's action followed a speech made in the Parliament of South Australia by the Honourable Peter Duncan on 17 August 1983. That speech contained a number of allegations and comments in relation to issues that are being examined by the Royal Commission, to evidence that has been given to the Royal Commission, and to the manner in which the Royal Commissioner has conducted the inquiry to date.

3. The Royal Commissioner stated on 18 August that some of the detail of the speech suggests strongly that the ultimate source for that detail is evidence given in camera to the Commission and subject to orders by the Commission prohibiting its publication. It seems reasonably clear that Mr Duncan's speech involves a prejudgment of matters relevant to a determination of paragraph (c) of the Letters Patent of 17 May 1983 appointing Mr Justice Hope a Commissioner to inquire into and report upon the matters therein, specified. The Commissioner stated that, if the speech is not protected by Parliamentary privilege, offences may have been committed against several federal statutory provisions.

Constitutional Question

4. We have considered first whether the privilege of free speech members of State parliaments enjoy under State Constitutions would provide complete immunity from the application of federal law in all circumstances. We believe not.

5. Free speech for things said in proceedings in Parliament is provided for in s 38 of the Constitution Act of South Australia. Section 106 of the Commonwealth Constitution specifically deals with the saving of each State Constitution, and provides for its continuance until altered in accordance with the Constitution of the State. However, it is relevant to note that s 106 is expressed to be subject to the Commonwealth Constitution, and it has not been treated as invalidating a law which otherwise falls within Commonwealth legislative power: Attorney-General (Qld) v Attorney-General (Cwlth) (1915) 20 CLR 148, at 172; Engineers Case (1920) 28 CLR 129, at 154; Melbourne Corporation Case (1947) 74 CLR 31, at 83. In Stuart-Robertson v Lloyd (1932) 47 CLR 482, federal bankruptcy law was held applicable to State parliamentary

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allowances payable under the New South Wales Constitution to members of the State Parliament.

6. On the other hand, we note that Commonwealth powers have been considered to be subject to an implied general limitation, affecting all Commonwealth legislative powers, that the Commonwealth cannot legislate to impair the capacity of the States to function: Victoria v Commonwealth (1971) 122 CLR 353. We note that most recent cases dealing with the applicability of Commonwealth laws to the States have been concerned with their effect upon State executive power. They are not cases that explore the extent to which a Commonwealth law otherwise valid may affect the parliamentary functioning of a State. In an analogous situation in the United States, it was held by the Supreme Court that freedom of speech of individual State legislators must yield where important federal interests are at stake, as in the case of federal criminal statutes: United States v Gillock (1980) 445 US 360. Whether that decision would be followed completely in Australia is not certain, but at the least it indicates that it is not intrinsically incompatible with federalism for federal laws to inhibit free speech by State legislators in appropriate circumstances.

7. Certainly if federal law is to have such an application the power supporting it would need to be commensurate with its effect. One example of how federal law might have an overriding effect could occur in the context of matters prejudicial to the defence and safety of the country in times of war: in our view a law which forbade a person, whether in a parliament or not, to make public the position of a convoy at sea and thereby to expose those manning it to the risk of death by enemy action, would be a valid law.

Federal Statutory Provisions

8. In our view, the crucial question in the present case is not the constitutional one but rather that of statutory interpretation: whether the relevant federal provisions, on their proper interpretation, extend to what is said in proceedings in the parliament of a State by a member. Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away: see Duke of Newcastle v Morris (1870) LR4HL 661, at 671, 677 and 680. In the case of the Parliament of the Commonwealth, s 49 of the Constitution requires an express declaration.

9. In the light of these considerations, we turn to the relevant federal provisions. Subsections (3) and (4) of s 6D of the Royal Commissions Act as amended, are as follows:-

"(3) The Commission may direct that -

(a) any evidence given before it;

(b) the contents of any document, or a description of any thing, produced before, or delivered to, the Commission;

or

(c) any information that might enable a person who has given evidence before the Commission to be identified,

shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

(4) A person who makes any publication in contravention of any direction given under sub-section (3) is guilty of an offence punishable, upon summary conviction, by a fine not exceeding $2,000 or imprisonment for a period not exceeding 12 months."

Section 60 of the Act provides:-

"60. (1) Any person who wilfully insults or disturbs a Royal Commission, or interrupts the proceedings of a Royal Commission, or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any manner guilty of any wilful contempt of a Royal Commission shall be guilty of an offence.

Penalty: Two hundred dollars, or imprisonment for three months.

(2) If the President or Chairman of a Royal Commission or the sole Commissioner is a Justice of the High Court, or a Judge of any other Federal Court, of the Supreme Court of a Territory or of the Supreme Court or County Court or District Court of a State, he shall, in relation to any offence against sub-section (1) of this section committed in the face of the Commission, have all the powers of a Justice of the High Court sitting in open Court in relation to a contempt committed in face of the Court, except that any punishment inflicted shall not exceed the punishment provided by sub-section (1) of this section."

10. The Commissioner has from time to time made orders, whenever evidence of a witness was taken in camera, prohibiting the publication of that evidence. Evidence given in public is not the subject of any order under s 6D(3). Where a witness gives evidence as to part in camera and as to part in public, the transcript of his evidence contains passages which have been blocked out to give effect to the various orders which have been made. It is also the case that some orders originally prohibiting publication of all or substantial portions of evidence have later been varied by the Commissioner so as to diminish the scope of the prohibition.

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11. The proceedings before the Commissioner are not in the nature of court proceedings. No reason thus exists to confine a direction given pursuant to ss 6D(3)(a) so that it applies only to parties (for there are none) or to persons before the Commission. In other words, the subsection may bear its literal meaning, with the result that publication of evidence by "outsiders" in contravention of the terms of a direction subjects the publisher to the penalties imposed by ss (4) of ss 6D. Of course, knowledge that publication is forbidden is necessary, for the sanctions are criminal ones: Cameron v Holt (1980) 142 CLR 342.

12. Section 60(1) applies to a Commission the rules that have been worked out as to contempt of court. Subsection (1) in its first arm - that is, so much of it as includes "insulting language towards a Royal Commission" - applies the rules relating to contempt in the face of the court, as ss (2) would suggest. We think the remainder of ss (1) extends to attract the rules relating to other contempts. In particular, the words "in any manner guilty of any wilful contempt" make it a contempt for persons publicly to prejudge or prejudice issues being dealt with by the Commission where that is done deliberately: see, for example, Attorney-General v Times Newspapers Ltd (1974) AC 273.

13. We do not think that either sections 6D or 60 of the Act can be construed as subjecting the members of the Parliament of the Commonwealth or the members of the parliaments of the States in relation to what is said in proceedings in parliament, to the penalties to which those sections refer. They cannot be construed as declarations under s 49 of the Constitution. They contain no clear and express language cutting down parliamentary privilege. They must therefore be construed as not intending to affect it.

14. We have also considered s 92 of the Australian Security Intelligence Organization Act 1979, but if anything the conclusion that parliamentary privilege is not affected is even clearer in the case of that provision. It is apparent from ss (2) of s 92 that ss (1) does not apply to statements made in the Commonwealth Parliament. When the rule requiring express removal of the privilege is borne in mind, we take it to be clear that s 92(1) does not apply to statements made by a member of a State parliament in proceedings in parliament. Subsection (2) suggests, however, that those who broadcast or report State parliamentary statements may offend ss (1).

Media Reports

15. There are, of course, substantial reasons for treating the prohibition in the federal provisions we have examined as also not extending to fair and accurate reports of proceedings before any parliament. The common law treats reports of those proceedings as necessary to be protected in the national interest. In defamation proceedings, the interest of the public in being informed of what occurs in parliament has been said to require that fair and accurate reports of parliamentary debates should be privileged: see Wason v Walter

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(1868) LR4QB 73 at 89.

16. Nevertheless, the federal provisions in question clearly apply to media reports, which are not - despite a common impression to the contrary - themselves protected by parliamentary privilege. While, for example, s 249 of the Criminal Law Consolidation Act (S.A.) fully protects publication in that State of parliamentary proceedings, that provision cannot stand if inconsistent with s 6D and s 60d of the Royal Commissions Act and s 92 of the Australian Security Intelligence Organization Act.

17. There are powerful arguments of public interest which may be urged against this position. We have indicated them above. It may be that were the matter to be tried, the court might be minded to afford some protection to the media for its report of parliamentary proceedings by some extension of the principles in the Duke of Newcastle case. However, we think that, as the law now stands, the provisions of the Royal Commissions Act require the conclusion that those who publish statements made by a member of the parliament of a State which amount to a contempt of the Commission are liable under s 60(1) of the Royal Commissions Act if the contempt is a wilful one; and, where an order prohibiting publication has been made under ss 6D(3)(a) and the publisher knows he is publishing contrary to an order, for a breach of s 6D(4). We have already indicated our view as to s 92 of the Australian Security Intelligence Organization Act - ss (2) indicates that those who broadcast or report State parliamentary statements may offend against ss (1).

Conclusion

18. It is our view, therefore, that the statements made in the Parliament by the Honourable Peter Duncan are not subject to s 6D or s 60 of the Royal Commissions Act, nor are they subject to s 92(1) of the Australian Security Intelligence Organization Act. We also think however that as a matter of strict law publication of those statements may in certain circumstances expose the publishers to the penalties provided by the three sections.

Signed Gareth Evans,
Attorney-General

Signed M.H. Byers,
Solicitor-General

23 August 1983

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The NSW Parliamentary Response

In the Legislative Assembly, following upon the release of this Joint Opinion of the Attorney-General and the Solicitor-General, Mr W.G. Petersen, M.P. (Member for Illawarra) that day directed a question to the Speaker relating to privilege and the exercise of freedom of speech by members within the South Australian Parliament. That member requested advice about the rights and privileges of members of the Legislative Assembly in similar circumstances.

The Speaker said that the freedom of the press to provide fair and accurate reports of the proceedings of Parliament was a fundamental right which should be cherished by all members. Freedom of speech within the Parliament was one of the basic tenets upon which has been built the principles of parliamentary democracy. The Speaker felt that any statute - of this or any other State or of the Commonwealth - should not take precedence over parliamentary privilege in this State. Indeed, freedom of speech within the Parliament was basic to democratic government as we know it and, as Speaker of the House he would strenuously resist any attempt to restrict members in that basic right in this House.

The Speaker added that parliamentary government in Australia had reached a most important stage. Any attempt to make a parliament subservient to a judicial authority was a retrograde step and one that should be denied. Likewise, any attempt to restrict by federal statute freedom of speech within a State parliament was not to be countenanced and also should be denied.

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He made his view as Speaker of the House clear: the privileges of honourable members of the House were not to be liable to be influenced or diluted by external authorities, judicial or non-judicial, whether constituted by State or Federal laws. He thought it appropriate that the House should express its views.

The Chairman of your Committee was then granted leave by the House to move a motion arising out of the statement by Mr Speaker relating to privilege.

He moved:

> "That the Legislative Assembly expresses profound concern at recent statements reflecting upon the privileges of Members of Parliament and, as a constituent House of the Legislature of the sovereign State of New South Wales -
>
> > (1) reaffirms its undoubted rights and privileges including the fundamental right of every member to freedom of speech in Parliament; and
> >
> > (2) asserts that, in the public interest, the media should be untrammelled in their reporting of the proceedings of Parliament.
>
> Mr Speaker, I welcome your statement. I trust that it will be welcomed by all honourable members. The reassertion by the House of its undoubted privileges is the minimum step that it can take. It is worth while to place on record why the House is dealing with this matter today. In mid-August a member of the South Australian Parliament made a speech in that Parliament in which he referred to certain matters under inquiry by a Commonwealth Royal commission. It is immaterial who that member was, to which party he belongs, or the subject matter of his speech. The fundamental question for this House to consider is whether a speech made in Parliament by a member enjoys absolute privilege; that is, a privilege untrammelled by external judicial processes or the alleged paramountcy of Commonwealth legislation. The basis of freedom of speech in the Parliament is Article 9 of The Bill of Rights (1688). That article reads:

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> **The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.**

There have been some learned writings on what is parliamentary privilege. Erskine May, in his classic treatise, defined it as follows:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by members of each House individually, without which they could not discharge their functions...

In 1938 the House of Commons Committee on Privileges observed:

> The privilege of freedom of speech enjoyed by members of Parliament is in truth the privilege of their constituents. It is secured to members, not for their personal benefit but to enable them to discharge the functions of their office without fear of prosecutions, civil or criminal.

Later I shall refer to what motivated the House of Commons Committee to make that observation. In response to the recent speech made in the South Australian Parliament, the Royal Commissioner Mr Justice Hope referred details of it to the Commonwealth Attorney-General, Senator the Hon. G.J. Evans, to have determined whether a speech made under parliamentary privilege was in contempt of a Commonwealth Royal commission. One could not contemplate a more dangerous step. An observer of the distinguished career of Senator Evans might have assumed that he would have dismissed the reference out of hand. Instead, the Commonwealth Attorney-General requested an advising from the Commonwealth Solicitor-General, Sir Maurice Byers, on the suggested conflict between parliamentary privilege of State parliaments and the law of contempt of Commonwealth Royal commissions. At the same time, the Commonwealth Attorney-General offered a warning. The words were fairly chilling:

> In the meantime it should not be assumed that publication of the details of the statement is necessarily covered by the common law privilege protecting media reports if there is contempt or other breach of criminal law involved.

I have characterized that statement of the Commonwealth Attorney as one of lip-smacking arrogance. Subsequently the Joint Select Committee upon Parliamentary Privilege of this

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Parliament, which I have the honour to chair, authorized me to issue the following statement:

> The Committee is aware of and concerned at any attempt by the Commonwealth Government purporting to limit freedom of speech in State Parliaments. This goes to the roots of parliamentary privilege inherited from the Parliament of Westminster. The Committee is not interested in the merits of party political matters raised by this incident. Our anxiety is aroused by any potential conflict between parliamentary privilege of State Parliaments and Commonwealth legislation. The Committee is inquiring into all the issues raised by Mr Justice Hope and will be making definite recommendations to the New South Wales Parliament. The Committee does not accept that there should be or are constitutional inhibitions on freedom of speech in state Parliaments caused by Commonwealth legislation. The question has grave potential and is a matter properly to be considered by the Standing Committee of the Australian Constitutional Convention.

That statement was adopted as a resolution by the committee - an unusual step - and entered in the committee's records. That procedure was a symbolic assertion of the absolute privilege that the Parliament has conferred upon its own committees. At that point the potential for grave conflict was in operation, unless the Commonwealth resiled. Let it be stated clearly that intrusion by the Commonwealth into the very chambers of a State parliament enters an area of grave uncertainty where constitutional law and the basic assumptions of the Westminster system are placed in jeopardy. What had been a fascinating area for abstract speculation might have become a question four-square about parliamentary democracy. In train was a double-barrelled assault. First, the speech of a member of a State parliament was being investigated for possible contempt; and second, though equally as serious, the right of a free press to report what was said in Parliament was being openly challenged.

The peril in this state of affairs cannot be overstated. If the qualified privilege of a fair and accurate report of Parliament by the media is in jeopardy, then the concept of freedom of speaking within Parliament is rendered meaningless. I was especially concerned about the immediate threat to free reporting. Fortuitously, an open hearing of the Joint Select Committee upon Parliamentary Privilege fell on 19th August, the day after Mr Justice Hope's reference. On that day the committee's witnesses were none other than gentlemen of the New South Wales Parliamentary Press Gallery. The committee heard learned evidence from the gallery president, Mr David Llewellyn Jones. When I asked Mr Jones, "To what extent would any of you be influenced personally by such a far-reaching statement, or directed by your managements as a result of it?", he responded:

> I would hope that management would treat that comment with the contempt that it deserves.

He continued:

> Parliamentary privilege is as important to us as it is to members of Parliament, because that provides us with the ability to accurately report material that otherwise would not be ventilated. News organizations have to fight to protect parliamentary privilege as strongly as members of Parliament have to protect it.

Mr Michael Steketee, the State political correspondent for the Sydney Morning Herald added:

> It is encouraging...that most newspapers and a lot of other media outlets for all intents and purposes did ignore the threat that the Government made. It was recognized as a fairly heavy-handed attempt at political censorship. It is particularly encouraging that the management of newspapers generally recognized the importance of parliamentary privilege and the need to preserve it.

Independent to the deliberations of the committee, in a letter to me of the same date the Premier articulated his own concern. His interest was most encouraging and places these hitherto arcane matters in the forefront of the political agenda. The Premier argued forcefully as follows:

> The issue raised by these events - the interaction of federal legislation with the privilege of the parliament of a State - is vital to the workings of our Parliament and central to the matters upon which your Committee is required to report. I trust therefore that the Committee will give the question whether federal legislation can prevail over state parliamentary privilege its earnest consideration.

It was then that I came to believe that nothing less than a reassertion by this House of its undoubted privileges was appropriate. The committee came to that view on a bipartisan basis. Before that, however, was a truly fascinating historical inquiry into precedent parallel to a study of the constitutional interaction to which the Premier referred. I hope that I can convey to the House the excitement of the two apposite situations I was able to discover. The first was in 1917, in the midst of the conscription plebiscites and involved the Queensland Parliament. It is all too easy for people of my generation to believe that we lived through uniquely difficult times when the nation entered its constitutional crises of 1974-75 over the powers of the Senate

in regard to supply. But, in 1917 the people of that time tested the political and lawful processes almost to the limit over the right of the Commonwealth Government to prosecute the war in its own fashion without criticism and without regard to the liberty of the individual.

By October 1917 the Premier of Queensland, the Hon. T.J. Ryan, was the acknowledged leader of anti-conscription. He made powerful, memorable speeches, across Australia. Audiences responded enthusiastically. However, the substance of what he said - sometimes all of what he said - was not recorded by newspapers because of military censorship. The Commonwealth censors, acting under the provisions of the War Precautions Act, directed newspapers not to publish certain remarks or, if required, intervened to excise whatever they deemed injurious to the war effort, a definition of extraordinarily broad sweep.

In those years, it is worthwhile to recall, the Prime Minister, the Hon. W.M. Hughes, boasted that he could rule Australia with a fountain pen and Sir Robert Garran beside him. He made a fair fist of proving just that. Regulations were promulgated with unseemly haste to cope with new situations as they arose. The Premier of Queensland was not willing to tolerate the obliteration of his remarks by the censors. He sought, understandably, an audience wider than those physically present to hear him on the hustings, a situation entirely apposite to that which recently confronted the member of the South Australian Parliament. Premier Ryan devised the stratagem of delivering the same speeches on the floor of the Parliament. Again they were not reported, following intervention by Commonwealth censors. It was then that the Queensland Government threw down a cold and deliberate challenge to the authority of the Commonwealth. It tested the reach of the defence power under the War Precautions Act.

The Queensland Government ordered the Government Printing Office to print many thousands of additional copies of State Hansard containing the Premier's speech. The intention was to distribute the Hansard far and wide. The Prime Minister struck first. He authorized, led and then observed from a short distance, a raid by uniformed soldiers on the Government Printing Office. About 3,300 copies of Hansard were seized and taken away. That happened at about 10 o'clock in the evening. Shortly afterwards Premier Ryan arrived at the Government Printing Office, clad in his pyjamas, and ordered a police guard around the building. The police were instructed to admit no-one. The newspapers were forbidden to report the raid. None did. The Prime Minister and the Queensland Premier met soon after this incident. They exchanged correspondence. They exchanged writs. So did their officers.

Premier Ryan went directly to the people, but within the law. He called a special Cabinet meeting, and the Cabinet, as Executive Council, resolved upon confrontation. The same afternoon the Government published an extraordinary issue of the Queensland Government Gazette - a special run of 50 000 -

and arranged for its immediate distribution on the street corners of Brisbane and rushed delivery to country towns. Honourable members can imagine the impact of having the Queensland Government Gazette distributed literally like handbills on the corners of Brisbane streets, in the suburbs of Brisbane, and throughout the Queensland country. The gazette set out to inform the public - in language not dissimilar to the preamble to the motion before the House today - to inform the public of the sovereign State of Queensland of the Commonwealth of Australia that a report of the proceedings of the Legislative Assembly had been denied transmission through the post by the federal Government. The gazette published relevant correspondence and assured the public that its Government would keep the people informed.

Perhaps the most extraordinary aspect of the whole affair lay in its aftermath. Notwithstanding the bitterness engendered by the clash between these two political giants, the issues were settled out of court. The High Court did not have to adjudicate upon the major constitutional questions involved. In some ways that was a pity, but the political struggle had revealed the infinite resourcefulness of a State Parliament determined to protect its privileges. The right of the Premier, and hence any member, to speak in Parliament uncensored survived the challenge.

The second precedent to which I shall refer was in 1938 in the British House of Commons. On that occasion the House had to determine how far it was willing to go in defending free speech in its Chamber when an arm of the executive government considered the exercise of that free speech a threat to national security. Mr Duncan Sandys tabled a question that, in the opinion of the Secretary of State for War, reflected upon Britain's war preparedness. I shall abbreviate the events that unfolded. The War Minister, the Lord Chancellor and the Attorney General conferred to determine whether the security of the realm had been placed in jeopardy. Mr Sandys formed the impression, from manoeuvrings, from soundings with him, and from the fact that the army council had set up a committee of inquiry to discover the sources of his information, that he was facing prosecution. Mr Sandys responded in an entirely appropriate and responsible manner by raising in the House whether those activities constituted a breach of privilege. Mr Sandys was relying upon his ancient right of free speech enunciated in Article 9 of The Bill of Rights.

The question for the House of Commons Privileges Committee was to determine whether that ancient right was overridden by the Official Secrets Act of 1910 - legislation that is eerily similar in several respects to the Australian Security and Intelligence Organization Act, as amended. The committee of the House of Commons deliberated for some considerable time on whether Duncan Sandys had committed a breach of privilege. Ultimately it brought down a report, which is quite seminal for those who are interested in the general issue of privilege and the way in which that House can protect its individual members. The committee of the House of Commons considered also quite specifically whether statute law overrode ancient

and assumed privileges of members. They resolved that issue. In that respect I should like to quote from a learned writing of Mr L.A. Abraham, Assistant Clerk of the House of Commons, in the Journal of the Society of Clerks-at-the-Table in Empire Parliaments for 1938, in which he observed:

> The Official Secrets Act which said nothing express, could not by intendment or implication derogate from the established privileges of the House. Privileges enjoyed by either House of Parliament or by the Members of either House in their capacity as Members could be abrogated only by express words in a statute.

That report was included in the annals of the House of Commons and, by extension, is applicable to the Parliament of New South Wales. It became part of the doctrine of what is known as lex et consuetudo parliamenti - the doctrine and custom of Parliament.

I believe that that decision was the persuasive influence in the advising that the Solicitor-General, Sir Maurice Byers, gave Senator the Hon. G.J. Evans in his report on the reference to him. Sir Maurice Byers advised that in those circumstances it was not competent for the Commonwealth to prosecute the South Australian member of Parliament; nor did he believe that the privileges of a State Parliament could be taken away except by express words of a statute. Sir Maurice went on to observe that none of the three relevant provisions - section 6D and section 60 of the Royal Commissions Act, and section 92 of the Australian Security and Intelligence Organization Act - contains any express language cutting down parliamentary privilege and could not therefore be construed as intending to affect it. It was the opinion of Sir Maurice Byers that there were powerful arguments of public interest to support the same protection being given to media reports that might otherwise offend against the federal laws. The opinion went on to state:

> Media reports, even if constituting no more than fair reports of what is said in Parliament, may as a matter of strict law be capable of prosecution under those sections to the extent that they involve:
>
> > Wilful contravention of a Commissioner's suppression order;
> >
> > A wilful prejudgment or prejudicial treatment of issues being dealt with by the commission; or
> >
> > Identification of an officer (other than the Director-General), employee or agent of ASIO.

Those last observations in the opinion are certainly alarming, but it is worthy of note that, in the political by-play that evolved, the Commonwealth Government has not attempted to

prosecute in any way any media organization. Senator the Hon. G.J. Evans, in his statement adopting the advising of the Solicitor-General, has foresworn in a short stroke any pretensions the Commonwealth might have had to regulate the freedom of speech that members of this Parliament enjoy and the freedom of speech that any member of a State Parliament of this nation enjoys. In one strike the pretensions of the Commonwealth, the grave political and constitutional questions that were raised in the 1917 raid, which were considered again by the House of Commons in Sandys case, have been put aside. The political processes have ensured that there will not again be pretension in that direction. No Commonwealth Government and no party represented in the Commonwealth Parliament today would dare to bring forward in that Parliament any bill that contained any express provision attempting to override parliamentary privilege.

The other matter that the House should consider is the general question of Commonwealth-State interaction and the undoubted protection afforded this Parliament by section 106 of the Commonwealth Constitution, a section that was part of the original constitutional document of 1901. That section preserves the State constitutions of that time and it preserves also the requirements as to the manner and form in which amendments to the contitutions of that time should be made. It is the opinion of learned counsel that any attempt by the Commonwealth to render impossible the workings of State governments, and thus the workings of State parliaments, would strike at the root of parliamentary government and would be in breach of and contrary to section 106 of the Constitution. The doctrine of immunities would apply and legislation designed to achieve that end would fail. It is the opinion of learned counsel as well that not only legislation would be so affected but so also would any executive act of the Commonwealth Government relying upon any section of the Commonwealth Constitution that sought to do the same, such as the harassing of journalists.

A member of the Victorian Legislative Council, the Hon. Joan Coxsedge, has from time to time defied the express provisions of the Australian Security Intelligence Organization Act and, in a ritualistic fashion, not unlike Sulla in the old Roman Senate, has incanted the names of ASIO officers in an attempt to provoke a prosecution of herself. It is her practice to do that on any matter, no matter how irrelevant it may be. She did so in 1981 when the Victorian Parliament was discussing the Works and Services Appropriation Bill. On that occasion she named two ASIO officers. I do not intend to do that. A point of order was taken by the Hon. H.M. Hamilton of Higinbotham Province in the following terms:

> I raise a point of order. I appreciate the fact that members of Parliament have complete Parliamentary privilege. However, I point out to honourable members that in recent months the Commonwealth Government passed a special Act to protect the names of people employed by the Australian Security Intelligence Organization. Although we might have special Parliamentary privilege, the honourable member is using that privilege to get

around an actual offence under the Act.

I refer to that point of order for the purposes of paying tribute to the Chairman of Committees of the Victorian Legislative Council. I think he was a member of the Liberal Party but he could well have been a member of the old Country Party. He ruled as follows:

> Order! There is no point of order so far as this Parliament is concerned.

The right of the Hon. Joan Coxsedge to mention those names - I do not refer to the wisdom of it - is not in doubt under the doctrine of parliamentary privilege. I have spoken at some length because the issues before the House are of enduring importance. We take no party position towards them. No party position should be taken in response to your statement. I hope that the other State parliaments of Australia, with all deliberate speed, will make a similar re-assertion.

Mr T.J. MOORE, a member of your Committee, observed:

I rise as an Opposition member of the Joint Select Committee upon Parliamentary Privilege to support the motion before the House and to express my support for the sentiments that you, Mr Speaker, expressed earlier today in response to the assertions by Senator the Hon. G.J. Evans, the Attorney-General of the Commonwealth of Australia, that the Commonwealth ought to have some control over matters raised under parliamentary privilege in the New South Wales Parliament and in State parliaments generally. In my opinion Senator the Hon. G.J. Evans will soon be launching, in co-operation with State governments, a serious attack on the freedoms that are inherently supported in the second part of the motion before the House; that is, that the members of the news media should have an untrammelled right to report the proceedings of State and Commonwealth parliaments. I shall advert briefly to that matter later.

The uniform defamation laws proposed by the Standing Committee of Attorneys-General would amount to an attack on the freedom of speech and freedom of expression of members of this Parliament, both with respect to media reporting of remarks made in this Parliament and remarks made as citizens of the State that will infringe the tightened-up existing draconian laws of defamation in New South Wales.

In moving the motion, which I have pleasure in supporting, the honourable member for Gladesville said rightly that the fundamental freedom of speech in a Parliament and the right not to have that speech called into question derives from Article 9 of The Bill of Rights (1688). In my view there is a strong argument that that article of The Bill of Rights, transported into the laws of the Colony of New South Wales, which later became the sovereign State of New South Wales, through the operation of the Colonial Laws Validity Act and the Statute of Westminster, is not capable of being explicitly

or implicitly overriden by a Commonwealth Statute that seeks to avail itself of the powers of section 109 of the Commonwealth Constitution. Indeed, such an argument would have great prospect of success.

Any attempt by the Commonwealth Parliament, in the context of one of its heads of power under section 51 of the Constitution, to remove the absolute privilege that attaches to the freedom of speech in this Parliament would not succeed.

The freedom of the news media to report speeches of members of this place is dealt with in section 17 and other sections of the Defamation Act of this State. Those sections provide that, so long as a fair and accurate report is made, the absolute privilege that attaches to members speaking in this place and the other place shall not be eroded, and that the threats implicit in the remarks of His Honour Mr Justice Hope and the report of the investigations of the Commonwealth Attorney-General, Senator the Hon. G.J. Evans, should be put aside.

Though there is space for perhaps one hundred people in the gallery of this Parliament, unless the news media have the right, without legal hindrance, to report the proceedings the public will not be aware of the work that honourable members do. The New South Wales Hansard is hardly the most riveting publication known to man. If it were distributed on the streets of Brisbane in an issue of the Government Gazette, it would not be likely to receive the reception it received on the occasion referred to by the honourable member for Gladesville. Similarly, the people of New South Wales are not likely to flock to sit and listen spellbound to the proceedings of this Parliament. It is only the untrammelled right of the news media to report on proceedings of Parliament that makes the Parliament relevant for the citizens of New South Wales. Any attempt to erode that privilege must be resisted absolutely.

Mr Speaker, I repeat my support for your remarks, the motion before the House, and the necessity for honourable members to have absolute freedom of speech. Members of this Parliament should enjoy the right to have their speeches reported by the press."

In the Legislative Council, a similar debate took place.

There, the Hon. B.H. VAUGHAN, a member of your Committee, by consent, moved:

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> "That the Legislative Council expresses its profound concern at recent statements reflecting upon the privileges of Members of Parliament and, as a constituent part of the Legislature of the sovereign State of New South Wales -
>
> (1) reaffirms its undoubted rights and privileges, including the fundamental right of every member to freedom of speech in Parliament; and
>
> (2) asserts that, in the public interest, the media should be untrammelled in their reporting of the proceedings of Parliament.

On 14th September last I sat in the Legislative Assembly gallery and listened to what I thought was an historic speech. I have been a member of the Legislative Council for about two years. I was more impressed by what was said on that occasion by the Honourable member for Gladesville than by anything else I have heard, even if I had said it myself. The honourable member for Gladesville moved the resolution that I have just put before this House. One would think that an asseveration of such principles was unnecessary, pointless, or axiomatic, except that in recent days what can be termed - and I do not understate it - an assault on this Parliament, on the institution of Parliament in the federation, was made in Canberra.

In mid-August a member of the South Australian House of Assembly, a former Attorney-General, made a speech in the Parliament. He referred to certain matters under inquiry by a Commonwealth Royal commission. It does not matter to which party the honourable member belonged, or what he said. The fundamental question for this House to consider is whether a speech made in Parliament by a member of Parliament enjoys absolute privilege. That is, a privilege untrammelled by external judicial processes or the alleged paramountcy of Commonwealth legislation. The Royal Commissioner was Mr Justice Hope, who presides over the Combe Royal commission. His Honour spoke publicly on details of the speech made in the South Australian Parliament and, by direction, referred it to the Commonwealth Attorney-General, Senator the Hon. G.J. Evans. The judge sought a determination whether a speech made in the circumstances I have outlined was in contempt of a Commonwealth Royal commission. The 10th August edition of the Sydney Morning Herald reported the matter as follows:

> "MP's privilege questioned after attack on ASIO - The Federal Attorney General, Senator Evans, is seeing whether criminal charges should be brought against Mr Peter Duncan, a Member of the South Australian Parliament, for allegations he made in the House of Assembly about the Combe-Ivanov affair."

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The report continued:

> "Mr Duncan, himself a former State Attorney General, made allegations about the role of the Melbourne businessman, Mr Laurie Matheson, in the affair, and called for the abolition of ASIO.
>
> The speech provoked a statement from Justice Hope, who is conducting the Royal Commission into the Combe-Ivanov affair, raising the question that even though he was speaking under parliamentary privilege, Mr Duncan might have breached Federal laws."

The 19th August edition of The Australian stated:

> "The privilege of State MP's is to be tested against federal law following statements in the South Australian Parliament about a witness before the Hope Royal Commission.
>
> The Speaker of the South Australian House of Assembly, Mr Terry McRae, expressed concern after the Royal Commissioner, Mr Justice Hope, yesterday said a South Australian MP, Mr Peter Duncan, could have committed serious offences in naming a Melbourne businessman, Mr Laurie Matheson, as an ASIO agent in State Parliament on Wednesday...
>
> He referred Mr Duncan's use of State parliamentary privilege to the Attorney General, Senator Evans."

According to this report the Attorney-General responded with an announcement that he and the office of his Solicitor-General had agreed to examine the possibility of offences having been committed under the federal law. The newspaper report continued:

> "Questions of parliamentary privilege and constitutional law are involved as well as the law of contempt of Royal commissions, Senator Evans said."

That same report quoted Speaker McRae as saying:

> "If we are going to reach the stage where the Commonwealth's legislation can override the privileges of the State Parliaments, if that principle is going to be thrown into doubt, God knows where we'll be.
>
> It's not just Royal commissions, it's Commonwealth courts, Commonwealth tribunals of inquiry, it's endless, it goes on and on."

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The Australian newspaper was becoming interested in this matter. In its 20th August edition it stated:

> "Parliamentary privilege dates from 1688 when the British Imperial Parliament passed The Bill of Rights. Its effect was that MPs could not be held answerable to, or be subjected to, any kind of criticism or attack for statements made in Parliament ...
>
> It has generally been supposed that the privilege was automatically extended to State parliaments - the first of which, New South Wales, was established in 1823, almost 80 years before federation - and generally considered a sacrosanct privilege which goes to the very institution of the Parliament."

On 22nd August the Australian Financial Review reported:

> "The most recent, and perhaps the most astonishing, of these encroachments on free speech and ordinary civil liberties is the suggestion, advanced by both the Royal Commissioner into the Combe-Ivanov affair, Justice Hope, and the Commonwealth Attorney General, Senator Evans, that there might be some limits on the absolute privilege of State parliamentarians."

That report continued:

> "Democracy must surely be moribund in the States if parliamentarians cannot speak freely without fear of either State or Federal laws. Indeed, there are no laws which explicitly purport to limit the privilege of parliaments. The fact that the sovereignty of State Parliaments is limited by the fact of federation ought not to imply that the absolute privilege of members of those Parliaments should also be limited. ...
>
> If the electors are not to be protected in their right to know what their elected representatives think and believe on any issue, or about any person, then democracy is meaningless."

On 23rd August the Melbourne Age dealt with the matter as follows:

> "The initial question involved is whether the general prohibition in the Royal Commissions Act, 1920, interpreted in the light of all applicable common law doctrines, applies to words spoken in a State Parliament. This raises the long history of freedom of speech in Parliament. In England, whence it derives, the claim to

> complete freedom of speech for what is said in Parliament goes back to before 1396. In that year, the claim was upheld, in accordance with "the law and custom which had been before". The Tudor and Stuart monarchs sought to limit this freedom. The attempt helped to cost one king his head and another his crown. In 1668 the House of Lords reversed the 1629 conviction of Sir John Eliot and two other members for sedition."

The alleged seditious words were spoken in the House of Commons. So, as long ago as 1668 it was not considered that any words could be seditious. The revolution of 1688 was followed by The Bill of Rights, to which I shall refer in a moment. The article in the Melbourne Age states that Mr Duncan seems safe. However, it then says that the editor's position in publishing what was said in Parliament may be more dangerous. In reporting what the member said, the editor may have published material to which the Royal Commissions Act might well apply. The question is whether the editor might gain exemption from any liability on the basis that he is producing a fair and accurate report of parliamentary proceedings. If the privilege of Parliament extends to making the parliamentary debates known to citizens, obviously the editor should be given that exemption. To date the courts have not treated the publication of debates in Parliament as an extension of parliamentary privilege. That problem is within the power of this House to solve. So far the extension has not been given. Protection by qualified privilege is based on the premise that what is reported is for the good of the public. An example of this is the reports of law courts. Though various State laws now give additional statutory protection, that is not the case in this State. On 26th August the Daily Telegraph also canvassed this issue. It reported:

> "Freedom of the press and of speech are basic tenets of our society. So is parliamentary privilege. Advice given to the federal Attorney-General, Senator Gareth Evans, puts all three in jeopardy. Senator Evans received the advice after ordering an examination of comments by a South Australian MP, Mr Peter Duncan, concerning the Combe-Ivanov affair being investigated by Royal Commissioner Mr Justice Hope. The Royal Commissioner suggested that comments in Parliament by Mr Duncan might not be protected by parliamentary privilege and that he could be in breach of federal laws. This suggestion was rejected by Senator Evans' advisers."

Senator Evans rejected the advice. The Daily Telegraph report continued:

> "Parliamentary privilege appeared to remain sacrosanct. But the legal opinion went further. It was that the media could be prosecuted for publishing comments made in Parliament under privilege. Such a move would be a travesty, not only of justice, not only of the right of

> Members of Parliament to speak their minds, but of the rights of Australians to hear and read about their elected representatives."

In all seriousness I say that at first blush on the morning when I read that report I considered that a call to the barricades might not have been an unjustifiable reaction. I am not given to going to the barricades. Any one who treasures the wondrous traditions of the Westminster system knows what I am speaking about. All of those traditions and conventions are firmly against going to the barricades. Let us consider briefly the wellspring of freedom of speech in any parliament in this country, including that sibling to which the President referred earlier. Article 9 of The Bill of Rights (1688) is in the following terms:

> "The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Erskine May put it thus:

> "Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions."

The House of Commons Committee on Privileges, as latterly as 1938, put it in this way:

> "The privilege of freedom of speech enjoyed by members of Parliament is in truth the privilege of their constituents. It is secured to members, not for their personal benefit but to enable them to discharge the functions of their office without fear of prosecutions, civil or criminal."

I pause from that quotation to make an aside. When I spoke on the motion for the setting up of the Joint Select Committee upon Parliamentary Privilege I made the comment that a lot of people believe that parliamentary privilege has something to do with perquisites - perks of office. In those remarks I referred specifically to the swimming pool in the new parliamentary building. In this debate I am not discussing perquisites, but am dealing with parliamentary privilege. Mark my words, what I have read from the report of the House of Commons Committee on Privileges in 1938 should be borne in mind for it is without argument that save for the lack of any general power to punish breaches of privilege or contempt of parliament, the New South Wales Parliament has similar powers and privileges to those of the House of Commons. It is

interesting to note that the New South Wales Parliament is the only Parliament in the Australian federation that does not have power to punish for breaches of privilege or contempt of Parliament.

I return now to deal with the actions of Senator Evans. I remain incredulous that the federal Attorney-General requested an advising from the Solicitor-General on a so-called conflict between parliamentary privilege and the law as it relates to the contempt of Commonwealth Royal commissions. It is well known that the federal Attorney-General is no shrinking violet. I wonder why he did not ever so gently point out to the learned Royal commissioner that in this matter he was being a trifle aberrational. Some honourable members of this House may not be aware that on the very day on which those reports were published, the Joint Select Committee upon Parliamentary Privilege, of which I am a member, approved and released to the press the following statement:

> "The committee is aware of and concerned at any attempt by the Commonwealth Government purporting to limit freedom of speech in State Parliaments. This goes to the roots of Parliamentary privilege inherited from the Parliament of Westminster. The committee is not interested in the merits or party political matters raised by this incident. Our anxiety is aroused by any potential conflict between parliamentary privilege of State Parliaments and Commonwealth legislation. The committee is inquiring into all the issues raised by Mr Justice Hope and will be making definite recommendations to the New South Wales Parliament. The committee does not accept that there should be or are constitutional inhibitions on freedom of speech in State Parliaments caused by Commonwealth legislation. The question has grave potential and is a matter properly to be considered by the Standing Committee of the Australian Constitutional Convention."

I refer the House to a most telling portion of the speech of the honourable member for Gladesville. He said:

> "Let it be stated clearly that intrusion by the Commonwealth into the very chambers of a State Parliament is an entry into an area of grave uncertainty where constitutional law and the basic assumptions of the Westminster system are placed in jeopardy."

He went on to say that the speech of a member of a State Parliament was being investigated for possible contempt. He further said:

> "... the right of a free press to report what was said in Parliament was being openly challenged...If the qualified privilege of a fair and accurate report of Parliament by

> the media is in jeopardy then the concept of freedom of speaking within Parliament is rendered meaningless."

In a speech following that of the honourable member for Gladesville, the honourable member for Gordon in the other place, when speaking about reporting by the news media, said:

> "It is only the untrammelled right of the news media to report the proceedings of Parliament that makes the Parliament relevant for the citizens of New South Wales."

When referring to the two points set out in the motion moved by the honourable member for Gladesville, the honourable member for Lane Cove commended the Government and the Chairman of the Joint Select Committee upon Parliamentary Privilege for reaffirming the rights of a parliamentarian, and he made the pithy remark that rights may be lost for lack of restatement. With the greatest deference, I warn you, Mr President, and I warn this House, that in the years to come the New South Wales Parliament and the Parliaments in the other States might require another John Pym or a John Hampden to defend them. That might sound exaggerated, but there will be another aberrational judge and another diffident Attorney General and a further creation of monstrous centralism in this country which could threaten its parliaments, in particular the one in which I sit. The parliamentary lion, John Pym, in the middle of the seventeenth century said:

> "The powers of parliament are to the body politic as the rational faculties of the soul to man."

I say: God save the states.

The Hon. DEIRDRE GRUSOVIN: I support the motion. The events of the past weeks arising from the Hope Royal commission, which posed the question of whether State parliamentary privilege prevails over federal law, have caused much concern to all who value the parliamentary institution and believe passionately in the absolute privilege of parliament. I pay tribute to the honourable member for Gladesville, the chairman of the Joint Select Committee upon Parliamentary Privilege, who in another place moved a motion in terms similar to that which is before the House. His speech on that occasion was a major contribution to the current debate on privilege. Those honourable members of this House who wish to be better informed on the subject would do well to acquaint themselves with the contents of that speech. Parliamentary freedom of speech is based on Article 9 of The Bill of Rights (1688). It provides that the freedom of speech and debate on proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. Professor Enid Campbell, in the introduction to her widely respected and authoritative book Parliamentary Privilege in Australia, wrote:

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> "The privileges of parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a Parliament and to the Houses of Parliament acting in a collective capacity.
>
> Broadly speaking, they exist to enable parliaments to proceed with the business of legislation and review of the activities of the administration without molestation, and to protect them against unwarranted attacks upon their authority."

The doubts raised by Mr Justice Hope in "The interaction of federal legislation with the parliamentary privilege of Parliament of a State", followed by the suggestion of the Commonwealth Attorney-General, Senator the Hon. G.J. Evans, that there might be some limits on the absolute privilege of State parliaments, have brought into public focus the question of parliamentary free speech and the right to have such speech available to the public. If there is to be no surety of free speech in the Parliament, democracy, civil liberty, and the Westminster tradition are in jeopardy. The New South Wales Joint Select Committee upon Parliamentary Privilege has viewed these events with deep concern, pointing out that the matters go to the roots of parliamentary privilege inherited from the Parliament of Westminster. The editorial of the Australian Financial Review stated clearly:

> "The great virtue of the doctrine of parliamentary privilege is that it reminds the community of the doctrine of popular sovereignty through Parliament - a doctrine which is increasingly disliked by courts and the legal profession."

It went on to say:

> "The Australian High Court, indeed because its existence is enshrined by the Constitution, has gradually attempted a virtual coup d'etat to establish itself as superior to, rather than inferior to, the Parliament."

The privilege of Parliament is the privilege not of a special group of citizens but of each and every elector. Mr Quentin Hogg, a member of the House of Commons Privileges Committee set up in 1967, had this to say:

> "The real basis of privilege is to safeguard in the interests of the nation a corporate entity, the efficient and independent working of Parliament as an institution."

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The anxieties of this committee reflected the concern of a previous House of Commons Privileges Committee which almost thirty years earlier had examined the privileges of the House against a background of impending war. This was in 1938, at a time when the possibility of the Official Secrets Act being used in order to obstruct members in the performance of their parliamentary function was brought urgently before the House. That committee reminded the House:

> "The privilege of freedom of speech enjoyed by Members of Parliament is in truth the privilege of their constituents. It is secured to Members, not for their personal functions of office without fear of prosecutions, civil or criminal."

The Commons, in its famous protestation of 1621, had declared the privileges of Parliament to be the birthright and inheritance of the subject. It conceded that there were dangers in the limited immunity from prosecution under the Official Secrets Act, secured to members by parliamentary privilege. But there were dangers which had to be run if members were to continue to exercise their traditional right and duty of criticizing the executive. John Pym said at that time:

> "Freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."

Pym was quoted further with approval:

> "Parliaments without parliamentary liberties are but a fair and plausible way into bondage."

It is a cause for continuing concern that, despite a legal opinion from Sir Maurice Byers that Mr Duncan could not be prosecuted for what he said in the South Australian Parliament, there appears to be legal opinion that the media, the press, radio and television, could be prosecuted for reporting what Mr Duncan had said in the House. It should be noted here that the Commonwealth Government has declined, however, to prosecute media organizations in any way. The opinion that the media should be liable to prosecution for reporting what is said in open session in Parliament is in contradiction of all accepted principles of democracy as we know it. The vital importance of the parliamentarian's right to free speech has been recognized, and along with that right to speak without fear of reprisal, has grown the tradition enshrined in the common law that the media should enjoy similar immunity in reporting parliamentary proceedings so long as reports are fair and accurate. The advice revealed by Senator Evans is in direct conflict with that tradition and should concern us all. Were the media to become liable for

prosecution for reporting the proceedings of Parliament, in effect they would not be able to report at all. The consequences can only be imagined. I concede that the press is not covered by the privilege of Parliament. However, it is my view that the press has a privilege of its own, a privilege to report the proceedings of Parliament that is built upon the liberty of speech phrase expressed by Mr Justice Willes in Henwood v Harrison, of 1872, when that judge said:

> "...the public convenience is to be preferred to private interests, and...communications which the interests of society require to be unfettered may freely be made by persons acting honestly and without actual malice..."

The learned judge went on to say that such communications are:

> "...protected for the common protection and welfare of society; and the law has not restricted the right to make them within any narrow limits."

Though the remarks of Mr Justice Willes were made in the context of defamation proceedings, he did not shrink from the proposition that there is:

> "...privilege in every subject of the realm to discuss matters of public interest honestly and without actual malice."

Honourable members will agree that statements made in Parliament are matters of public interest. The privilege to report the proceedings of Parliament is based not only on the general privilege of free speech but also on the proposition that what has been said in Parliament is in the public domain. The concept of the public ownership of what is said in Parliament was explained in Adam v Ward in 1917, by Lord Dunedin, in the following terms:

> "...a man who makes a statement on the floor of the House of Commons makes it to the world."

It is further explained:

> "I think it may be laid down as a general proposition that where a man, through the medium of Hansard's reports of the proceedings of Parliament, publishes to the world...he selects the world as his audience."

Whether the privilege is the privilege of free speech or the

privilege to republish matter in the public domain, it is a privilege recognized by the common law. It is not simply a privilege to which the right to bring action in defamation is an exception that depends on the malice of the publisher. So fundamental is this privilege to the proper functioning of society that it may be argued that clear words are necessary to override it. In my view the privilege to report the proceedings of Parliament is a fundamental freedom recognized by the common law, and unmistakable language is required for its abrogation. We, as parliamentarians, must stand together to preserve our right to freedom of speech, a right that is historically ours and should be guarded jealously against outside interference. The right of the media to make fair and accurate reports of statements made in Parliament should also be jealously preserved, unfettered by Commonwealth laws that might purport to negate this right. I ask the House to carry this motion, thus reaffirming its undoubted rights and privileges and in so doing assert that in the public interest the media should be untrammelled in their reporting of the proceedings of Parliament. Accordingly, I support the motion.

The Hon. M.F. WILLIS: I support the motion. I am privileged to be a member of the Joint Select Committee upon Parliamentary Privilege to which previous speakers have referred. The work that that committee is doing is some of the most interesting and, as I think eventually will be proved, important work that I have been involved with in this Parliament. In debating this motion it is vital that this House should assert its undoubted rights. It is appropriate that the other place should have already done this. I hope that every House in every Parliament of Australia does the same thing because, as other speakers have said, this issue goes right to the core of the federation. If the existence of this right is not crystal clear, with all of its ramifications, then the federation is as nothing. Indeed, I was heartened to hear members on the other side of the House defend parliamentary privilege so boldly and bravely, though by their party philosophy they are committed to centralism and the ultimate abandonment of the States, at least while the States exist as part of our legal constitutional system.

I was indeed surprised when I read in the news media the comments of Mr Justice Hope in his capacity as Royal commissioner. I have the honour to know that gentleman personally. I hold his intellect and his integrity in the highest regard. The fact that he was moved to refer the matter to the Attorney General, that he in his own talented mind even thought for one moment that this possibility existed, to me sounded grave warning bells. I was astonished by the comments of the federal Attorney General, Senator the Hon. G.J. Evans. I thought what a splendid example they were of the arrogance based on alleged supremacy that all honourable members in all parties are familiar with in relation to their federal colleagues. Then I was utterly appalled when Senator Evans made comments to the effect that the media should be extremely careful about what it published in relation to what Mr Duncan had said. Even if it was not intended to be, to my mind that was a very dangerous intimidation of the freedom of the press.

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> As honourable members who have read the splendid speech on this matter given by the honourable member for Gladesville in the other place will be aware, this is not the first time since federation that this question has arisen. It arose dramatically in 1917, in a tryst between the wartime Prime Minister, the Hon. W.M. Hughes, and the Premier of Queensland of that time, the Hon. T.J. Ryan, who was regarded as the popular leader of the anticonscription movement. Without going into details one observes that tryst was on this very issue. Unfortunately they ultimately got together on a one-all draw and the matter was never resolved.
>
> This issue goes to the core of federation. Freedom of speech in our community distinguishes us from many unhappy lands. Freedom of speech distinguishes Australian parliamentary democratic institutions from the dictatorships and the tyrannies that are abundant throughout the world. Any suggestion that freedom of speech should be, to use the words of article 9 of The Bill of Rights, impeached or questioned in any court or place out of Parliament, is repugnant. I was heartened to hear that this matter is to be referred to the standing committee of the Australian Constitutional Convention. If there is any legal doubt about this matter, in the interests of functioning democracy in this country it must be cleared up. Freedom of speech in federal and State Parliaments must be enshrined in the Australian Constitution. I hope to hear more about the deliberations of that standing committee. In the meantime it is vital that this motion should be carried. As the honourable member for Lane Cove said in another place, often rights are forfeited for lack of having been restated. I support the motion.

After the conclusion of the formal debate on the resolution, but prior to the Question being put, the President, the Hon. John Johnson, MLC, made the following statement from the Chair:

> The PRESIDENT: Considering the importance of the motion moved by the Hon. B.H. Vaughan, I should like to make some brief comments before putting the motion to the House. It has been long recognized that in the absence of express grant, the powers, privileges and immunities possessed by the Houses of Parliament in New South Wales are such as are implied by reason of necessity to the existence of such bodies. Freedom of speech is an integral and essential part of our democratic process. It is one of the fundamental privileges enjoyed by parliaments under the Westminster system, and without which parliaments would be completely different institutions. I cannot emphasize too strongly that this privilege, which Parliament jealously guards, is not for the purpose of protecting members for their own personal benefit, but for the House in its corporate capacity. It enables honourable members to discharge fully their parliamentary duties without fear of prosecution, civil or criminal.
>
> The public interest requires that there should be no restraint

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beyond the rules of the House, rules that impose various limitations to prevent honourable members from misusing their rights. The qualified privilege of the news media to publish fairly and accurately reports of proceedings of Parliament also must be strongly maintained. As long ago as 1832, when the press of this State was first permitted to report at full length the proceedings of Parliament, the Sydney Gazette of 21st January that year commented on the Legislative Council in this way:

> "Its transactions from day to day will be reported at full length so that the people will be in entire possession of its doings. This will greatly facilitate the free discussion of the press and consequently contribute to sound and wholesome legislation."

That freedom has existed, and should continue to exist, without hindrance. We could, and indeed should, well remember the words of Saint Augustine of Hippo when he asserted that all that is necessary for evil to triumph is for good men and women to sit back and do nothing. In these parliamentary institutions good men and women have not sat back and done nothing."

Further Consideration by Your Committee

Following the reaffirmation by the two Houses of their undoubted rights and privileges, your Committee referred the matter to the Solicitor General of New South Wales, whose Advice was as follows:

> Questions have arisen in relation to statements made by Peter Duncan M.P. in the Parliament of South Australia and their republication in the Press. The statements identified a certain person as an A.S.I.O. informer. At the time the statements were made and reported a Commission of Enquiry was being conducted into matters concerning A.S.I.O.
>
> The Commonwealth Attorney General and the Commonwealth Solicitor General have published a joint advice considering the operation of the Royal Commissions Act , 1902 and the Australian Security Intelligence Organization Act, 1979 in relation to the statements made in Parliament and their subsequent republication. Broadly they advised:
>
> > (a) that neither Act operated so as to prevent discussion of such matters in State Parliaments, but
> >
> > (b) that each Act may operate to prevent the republication of what was said in State Parliament.

I should state immediately that it is my view that in war-time the defence power (section 51(vi) of the Constitution) would

support laws which prohibited the discussion of certain matters in Parliament, for example the location of military installations, and/or the republication of statements made in Parliament where those statements would entail a defence risk. It is not appropriate in this advice to canvass such matters.

However, with great respect to the Attorney General and the Solicitor General of the Commonwealth, I consider it arguable -

(a) that the Royal Commissions Act, 1902 and the Australian Security Intelligence Organization Act do not, as a matter of construction, preclude the reporting of statements made in the Parliaments of the states; and

(b) that as a matter of constitutional law, if the said Acts do purport to apply to the reporting of the proceedings of State Parliaments, they are in peace-time beyond the legislative competence of the Commonwealth Parliament.

The Attorney General and the Solicitor General of the Commonwealth correctly point out that the Press is not covered by the privilege of Parliament. What they do not consider is whether there is an independent privilege to report the proceedings of Parliament, and, if so, whether that privilege has been abrogated by the said Acts.

Privilege is distinct legal concept, well understood as such in the Common Law. It is defined as succinctly in the Oxford English Dictionary as in any legal treatise. The Oxford English Dictionary contains the following:

"P. communication, in Law (a) a communication which a witness cannot legally be compelled to divulge; (b) a communication made between such persons and in such circumstances that it is not actionable, unless made with malice. P. debt, a debt having a prior claim to satisfaction. P. share, stock, preference stock."

The concept of privilege is different from the underlying concept of the Rule of Law that anything is lawful unless it is expressly forbidden by Act of Parliament or Common Law. The concept of privilege is positive. The concept of the Rule of Law is negative. The difference is perhaps illustrated by the observations of Murphy J. in Sorby v The Commonwealth (1983) 152 CLR 281 on the privilege against self incrimination. That privilege was described by Murphy J as "part of the Common Law of human rights".

With the internationalization of the law of human rights through various multilateral treaties and protocols the quest for such rights in the Common Law has to some extent been neglected. Learned jurists have taken quite disparate views on the issue of the existence of human rights and fundamental

freedoms within the Common Law.

Professor Dicey in a display of patriotic zeal of which Chauvin might have been envious asserted in The Law of the Constitution that "the revolutionists of France and the Constitutionalists of Belgium borrowed their ideas about freedom of opinion and the liberty of the press from England" but conceded that "Freedom of discussion is, then, in England little else than the right to write or say anything which a jury of twelve shopkeepers, think it expedient should be said or written".

Even at the time of publication of the first edition of Professor Dicey's work on the Constitutional Law of Britain (1885) that statement was incorrect. In Henwood v Harrison [1872] L.R. 7 C.P. 606, Willes J. had pointed out:

> "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury according to their individual views of religion or policy, might hold the church, the army, the navy, parliament itself to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant."

The view of Professor Dicey was in conflict with the earlier treatises of Blackstone who had no doubt that there was a right to free speech:

> "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or, illegal, he must take the consequence of his own temerity." (Blackstone's Commentaries, Vol. 4, p. 152).

Thus Blackstone asserted a Common Law right to free speech to which there were acknowledged exceptions, for example, libel, sedition, blasphemy, obscenity. It is not necessary for the purposes of this exercise to assert the existence of such a right, although, it is worth noting some passages from judgments which assert its existence, for example - ex parte Bread Manufacturers Ltd (1937) 37 S.R. (N.S.W.) 242, per Jordan CJ at 249-250 and approved by Lord Reid in Attorney General v Times Newspapers [1974] A.C. 273 at 296:

> "The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a

> person who happens at the time to be a litigant. It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation..."

Orr v Isles (1965) 83 W.N. 303 per Walsh J p 306-307:

> "I think that both the law of fair comment and that of privilege were founded upon and developed out of the same underlying principle. On the one hand, a person whose reputation was damaged by what was published of him ought, prima facie to have redress. On the other hand, in certain situations and for certain purposes, the welfare of the community required that there should be freedom to make comments and statements unfettered by the risk or the fear of action. The law set about in the development both of privilege and of fair comment, to achieve a proper balance between the two objectives."

Ambard v Attorney General for Trinidad and Tobago [1936] A.C. 322 in which Lord Atkin delivering the opinion of the Privy Council said:

> "The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune."

One cannot help but question whether Professor Dicey in his enthusiasm to advance the Rule of Law pressed too much into its service. "The so-called liberty of the press" he stated "is a mere application of the general principle, that no man is punishable except for a distinct branch of the law". (The Law of the Constitution, 5th Ed. p 248). It was Sir Owen Dixon in his paper, "The Common Law as an Ultimate Constitutional Foundation" (Jesting Pilate, 1965, p 203) who pointed out that the Rule of Law and the Supremacy of Parliament were themselves Common Law Constitutional guarantees which operated as the foundations of the Australia Constitution as well as the British Constitutional system.

The Common Law not only developed these important constitutional guarantees, but recognized basic rights which are identifiable inter alia through the existence of a cause of action or the recognition of a privilege. Thus freedom from arrest, to which of course the law developed exceptions, is embodied in the cause of action known as "false imprisonment"; freedom from search and seizure, to which again there are exceptions, is embodied in the law of trespass.

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These rights may of course be negated by Act of Parliament, but they are sufficiently identifiable in the Common Law to justify the statement of Lord Ellenborough in The King v Cobbet (1804) 29 St. Tr. 1 that "the law of England is a law of liberty".

Other examples of freedom recognized in the Common Law are to be found in the areas of privilege that is, immunity from action. Such privileges have a more direct similarity with what have in the internationalizing process come to be known as human rights and fundamental freedoms.

One such privilege expressly recognized by the Common Law was the privilege of "communications which the interests of society require to be unfettered" (per Willes J in Henwood v Harrison) (supra). Such communications "may freely be made by persons acting honestly and without actual malice..." and "are protected for the common protection and welfare of society; and the law has not restricted the right to make them within narrow limits".

The above quoted remarks of Willes J were given in the context of defamation proceedings. But such privilege is no mere exception to the law of defamation, rather the law of defamation, contempt, etc. are exceptions to the privilege as is clear from the remarks themselves and the above quoted observations of the Privy Council in Ambard's Case.

The privilege to report fairly and accurately the proceedings of Parliament was recognized in Regina v Abingdon (1794) 1 Esp. 226 and exists because what is said in Parliament is intrinsically a matter of public interest as was held in Wason v Walker [1868] L.R. 4 Q.B. 95.

The privilege to report the proceedings of Parliament may not be as important as the privilege of Parliament itself to freely discuss matters, but it is an important privilege as basic to our conceptions of freedom as the privilege against self incrimination. Of that privilege Murphy J remarked in Sorby v The Commonwealth (supra) that:

> "Because the privilege is such an important human right, an intent to exclude or qualify the privilege will not be imputed to a legislature unless the intent is conveyed in unmistakable language".

Similar remarks are to be found in the judgments of other members of the Court in Sorby's Case, as follows:

> "Although the legislature may abrogate the privilege, there is a presumption that it does not intend to alter so important a principle of the common law". (per Gibbs CJ at p 251)
>
> "The principle is that a statute will not be construed to take away a common law right, including the privilege

against self incrimination, unless a legislative intent to do so clearly emerges, whether by express words or necessary implication".

Commissioners of Customs and Excise v Harz [1967] 1 A.C. 760 at 861 cited with approval by Mason, Wilson and Dawson JJ at p 260.

For precisely the same reason that the Attorney General and the Solicitor General of the Commonwealth concede that as a matter of construction neither Act affects the privilege of Parliament, neither Act, in my view, affects the privilege to report the proceedings of Parliament.

Because neither Act operates to curtail what may be said in a Parliament, it is also possible to argue that, as a matter of Constitutional law, neither Act can in peace time operate to prevent the fair and accurate reporting of the proceedings of Parliament.

The Royal Commissions Act is founded on the incidental power of the Commonwealth (Constitution s 51 (xxxix): see Colonial Sugar Refining Co. Ltd v Attorney General (1912) 15 C.L.R. 182, and on appeal to the Privy Council at (1914) 17 C.L.R. 644). In relation to the Royal Commission which led to a consideration of the present questions, the enquiry may be incidental to the Defence Power (s 52(vi)). The prohibition contained in s 92 of the Australian Security Intelligence Act is either incidental to the defence power, is itself supported by the defence power or is supported by the implied nationhood power (Victoria v Commonwealth (1975) 134 C.L.R. 338 AT 397) - or what some Constitutional observers are pleased to call s 51 (xl) of the Constitution.

The incidental power may "complement but not supplement" an express power: per Isaacs J in Duncan v Queensland (1916) 22 C.L.R. 556 at 624-625; "nothing is incidental to [a] power that is not directly aimed at the precise [power]"...To be incidental it is "not essential to show that...the incidental power is absolutely necessary for the exercise of the express power; it is sufficient to show that it is appropriate, or could fairly be deemed to be appropriate or suitable" per Higgins J in George Hudson Ltd v Australian Timber Workers' Union (1923) 32 C.L.R. 413 at 452.

The use of the defence power in peace-time depends upon "a connexion with defence [which is not] too remote, indirect and indefinite" per Windeyer J in Illawarra District County Council v Wickham (1959) 101 C.L.R. 467.

To the extent that the powers relating to National Security derive by implication from the Constitution itself, they depend on "an essential and inescapable implication which must be involved in the legal constitution of any polity" per Fullager J in the Communist Party Case (1951) 83 C.L.R. 1 at 260.

What is said in Parliament "is already matter belonging to the

public" per Grove J in Henwood v Harrison (supra). The concept of the public ownership of what is said in Parliament was explained in Adam v Ward [1917] A.C. 309 thus:

> "...a man who makes a Statement on the floor of the House of Commons makes it to the world." (per Lord Dunedin p 324).
>
> "I think it may be laid down as a general proposition that where a man through the medium of Hansard's reports of the proceedings of Parliament, publishes to the world...he selects the world as his audience..." (per Lord Atkinson, p 343).

How can it be said that the subsequent prohibition on reporting that which is already in the public domain, and may publicly be disseminated per medium of Hansard, is complementary, reasonable, appropriate or incidental to any power or function of the Commonwealth? Much less can it be said that it is necessary, essential or an inescapable implication deriving from the Constitution. How is the ban on reporting what is in the public domain anything but remote, indirect and indefinite in its connection with defence or any other head of Commonwealth power?

For the above reasons, I respectfully disagree with the conclusions of the Attorney General and the Solicitor General of the Commonwealth. In his publicly released letter to the Secretary of the Royal Commission, the Attorney General indicated that only in the most exceptional circumstances would the sanctions of the criminal law be applied to the reporting of the proceedings of state Parliament. Should those exceptional circumstances ever arise, the Attorney General of New South Wales should intervene to argue the matters raised herein. I so advise.

Signed
M. Gaudron,
Solicitor General
22nd September, 1983

The Honourable the Attorney General
(Forwarded through the Under Secretary of Justice)

Your Committee took lengthy evidence from Timothy Frank Robertson, Barrister-at-Law on 26 August, 1983. Mr Robertson is a former constitutional advisor to the Solicitor General of New South Wales.

Mr Robertson's evidence concerning the interaction of Commonwealth

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law and State privilege supported the view of your Committee that the Commonwealth Parliament has no power to restrict or inhibit the exercise of the "undoubted rights and privileges" of members of the New South Wales or any other State parliament. Mr Robertson's evidence appears in the Minutes of Proceedings and Evidence of your Committee's deliberations.

Your Committee is fortified in its view that Commonwealth laws cannot override the parliamentary privilege of the sovereign State Parliaments by the majority report of the Senate Standing Committee on Constitutional and Legal Affairs on this subject. This report, which was tabled in the Senate on 30 May 1985, decided that the Joint Opinion of the Federal Attorney-General and Solicitor-General (supra) was incorrect.

Your Committee recommends, in the unlikely event that such a conflict in future is forced to litigation, that the NSW Parliament should seek to intervene in any such litigation to advance the views that no Commonwealth power exists to override the parliamentary privilege of the State Parliaments.

PARLIAMENT HOUSE AND ITS PRECINCTS

The meeting place of Parliament and the surrounding buildings and grounds that accommodate and service Members occupy a special status within the law. They are a place apart wherein ordinary jurisdiction of civil and military authorities does not extend, except in the express permission of the presiding officers of the Houses themselves. The right of Members of Parliament to go about their business within the precincts of a Parliament is a basic privilege and one of the most ancient. Within the precincts a Member cannot have a summons served upon him. No person has the right of access to the Houses of Parliament except as the Parliament itself might determine.

These ancient privileges derive from the privileges that attach to the Palace of Westminster in London. On the banks of the Thames the present Houses of Parliament meet on a site that was once the Royal Palace of Edward the Confessor. Just as Westminster became the usual residence of the King, the Palace became the habitual meeting place of Parliament. Records exist from at least 1341 indicating that the Lords and Commons met in a chamber within the Palace. In the subsequent centuries of constitutional conflict, the Commons was able to assert its independence and, ultimately, its sovereignty to deny the King and his officers access to their chamber and surrounding precincts. The Commons became a sanctuary within the law and its chamber became a place where all Members could speak fearlessly in the knowledge that they were not accountable to any external authority for their utterances. It is curious to note, however, that these precincts in which the writ of the Crown was expressly denied remained a royal palace until 1965.

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Parliament House and its precincts in the State of New South Wales enjoy the same privileges as the Palace of Westminster. Although Parliament is a public building in virtually every sense of the word and access to it is both permitted and encouraged, the rights of the Presiding Officers and the constituent Houses to assert their control over all parts of the precincts are not in doubt.

Tasmania

The Parliament of Tasmania has asserted its control over its own precincts through an Act of Parliament and accompanying Statutory Rules. The Parliament House Act, 1962, is a model of modern drafting that requires only nine sections for the Parliament to indicate that it controls Parliament House and in whom that day-to-day control is vested. As an example of modern and clear drafting, section 2, setting out the legal position of Parliament House and what it comprises is set out below:

> (1) Parliament House at Hobart and its grounds are domain lands of the Crown set apart for the use of the Parliament of Tasmania.
>
> (2) The grounds of Parliament House comprise -
>
> (a) the drive, lawns, and gardens in front of Parliament House;
>
> (b) the yard at the northern end of Parliament House;
>
> (c) the yards and outbuildings at the back of Parliament House, but not any part of the land formerly occupied by or in connection with the house and shop known as number 6, Murray Street, and now demolished; and
>
> (d) the lane between Parliament House and Salamanca Place as far as the prolongation to Salamanca Place of the western boundary of the yard behind the southern end of Parliament House.

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Other provisions dealing with the drive, land and yards in the grounds of Parliament House were enacted because motorists used the laneway. The control of the grounds is vested in a House Committee that is itself created by the Standing Orders of the Houses of Parliament. Although the grounds in front of Parliament House are extensive, they in fact serve as a public reserve to which no one is denied access. There is a low stone wall on the perimeter, a few statues and well cared for gardens. Demonstrations do take place there without any objections from the Parliament, although the House Committee could, under the Act, deny anyone the use of the reserve.

Victoria

The Parliament of Victoria relies upon the assumed powers of the House of Commons to maintain order and decorum within its precincts. The Victorian Parliament has the advantage that its Parliamentary Reserve has been defined by a 1970 amendment to the Road Traffic Act. That amendment describes the reserve as "Crown land in the city of Melbourne (being land within the boundaries of which the buildings of Parliament House are situated)". The House Committee of the Parliament may appoint an officer to institute prosecutions for parking offences under the Principal Act.

South Australia

The geographical position of the South Australian Parliament made it a fortress; it is on the corner of two major streets and adjoins the Constitutional Museum and the Festival Theatre complex. Alone in the Parliaments it enjoys no grounds or reserves. No

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legislation exists to define the parliamentary precincts. The front steps of Parliament are part of the precincts - an Opinion in 1969 by the Crown Solicitor advised that the steps were regarded by the Parliament and the Police as providing sanctuary: the police must be invited by the Presiding Officers to act on the steps. The precincts of the Parliament extend to an inalienable part of the Festival Theatre Car Park. The area in question involved certain underground marked spaces immediately adjoining the basement areas of Parliament House. The Parliament gained inalienable rights to that area because that section of the Festival Theatre had abutted part of the precincts and was ceded to the Festival Theatre for car parking purposes. This section of the car park is connected to Parliament House by a tunnel which members may enter with a security key.

The Constitutional Museum, the original Parliament House itself, was also part of the parliamentary precincts. Today it serves as a superb example of restoration in which the development of South Australia from colonial times to a representative democracy is the subject of changing displays and exhibitions. The title of the Festival Theatre Car Park and the Constitutional Museum is vested in the Minister for Public Works. The title to Parliament House itself is vested in the Minister for Public Works, also.

The steps at the front of the building provide a wide area for demonstrators to assemble and for their speakers to address the gathering. With the exception of the uranium demonstration in 1982, the demonstrators have been co-operative in ensuring that access was unimpeded to the building at all times. In the case of the uranium demonstration, an inspector of police was required to

come to the steps and supervise the establishment of a passageway for people wishing to enter and leave Parliament House.

Western Australia

Perhaps the most interesting experiment governing Parliament House, its precincts and the vista beyond is the tripartite committee system employed in the west. In that State three distinct committees with overlapping personnel protect Parliament House.

The first is the Joint House Committee which, as its name implies, undertakes the usual activities of supervising the maintenance of the building and precincts of Parliament House.

The Parliamentary Reserve surrounding Parliament House is defined as a reserve under the Western Australian Parks and Reserves Act; under section 3 of that Act, Boards have been established to administer the various reserves in the State. The board administering the Parliamentary Reserve is prescribed by schedule to the Act to be the members of the Joint House Committee. The members of the Joint House Committee were gazetted as members of the Board and any changes in personnel are similarly gazetted. The Committee and the Board meet separately but, on occasions, sequentially. Notices for each meeting are distinct as are the minutes. Demonstrators use the ground in front of Parliament House (that is, the area between the House and the freeway - the present front was once the rear). They require the permission of the Board: permission has been granted always.

The third committee, known as the Parliamentary Precincts

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Committee, is responsible for the vista from Parliament House. This Committee is a sub-committee of the Metropolitan Regional Planning Authority. It consists of various architects, Perth city councillors, planners and two members of Parliament. It has a responsibility to see that the heights of buildings and general appearance of such buildings do not cause offence to the aesthetic sensibilities of people viewing them from Parliament House nor impose upon what should be the pre-eminence of the Parliamentary precincts. Plans submitted for building approval have been altered in order to comply with the wishes of the Parliamentary Precincts Committee.

Queensland

The precincts of Parliament House in Queensland are defined by a 1978 Order-in-Council issued under the Land Act. After a period of new construction and refurbishing of buildings, the precincts now include the original Parliament House, the Parliamentary Annexe and a car park area underneath the south-east freeway. The Order-in-Council sets out in clear language what constitutes the precincts. In addition to the ordinary laws of trespass, anyone committing an offence or disturbance within the grounds of Parliament commits an offence against the Criminal Code. Under the Code the Speaker has the power to take action and can have offenders arrested without warrant. The power vested in the Speaker is vested in the Clerk of the Parliament whenever the Speaker is not present.

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The Northern Territory

The Legislative Assembly of the Northern Territory currently meets in squat and unprepossessing buildings beside Darwin Harbour. The Legislative Council, the precursor to the Assembly, first met there in 1955. The old Council had met in the naval headquarters (now the Administrator's office) and then the Supreme Court building (which, confusingly, is now naval headquarters). In the present buildings there are but the Chamber and the adjoining offices plus a number of de-mountable huts. Members use offices in an administrative building next door and gain access to the precincts by walking out of that building through the public entrance and walking along the public footpath.

The Legislative Assembly (Powers and Privileges Act), 1977, refers to the precincts in several sections. Section 15 sets out the precincts, while section 17 deals with the removal of persons from the precincts. The precincts themselves are defined in a schedule to the Act. The Northern Territory Criminal Code creates criminal offences for persons who attempt to interfere with the Legislative Assembly by force, deception, threat or intimidation; another section (section 61) creates a criminal offence for persons who intentionally disturb the Legislative Assembly while it is in session or engage in conduct in the immediate view and presence of the Assembly with the intention of interrupting it.

The National Parliament

The title to the land on which Parliament House is situated is as curious as any title in any part of the Westminster world. J.A.

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Pettifer (former Clerk of the House of Representatives) has written:

> "The land on which Parliament House is erected and the building itself are the property of the Commonwealth. By notification in the Gazette in 1927 the Governor-General under the Seat of Government (Administration) Act vested in the Federal Capital Commission all the Commonwealth land in the Australian Capital Territory other than the land as shown in a Schedule attached to the notice. The Schedule sets out the site allotted for Parliament House. Apart from the building area itself, an area on Camp Hill was also reserved for Parliament together with the 2 parliamentary gardens on each side of the House, the boundaries of which were delineated by a hedge. These areas were at no time passed over to the Parliament for its control. No instrument sets out the precise area over which the Executive Government has given Parliament exclusive jurisdiction or the conditions under which that jurisdiction is to be exercised."

The precincts of Parliament House, Canberra, have not been defined with any precision. Even without that precision, the Presiding Officers exercise an exclusive jurisdiction over what the Parliament regards as its precincts. Mr Odgers (former Clerk of the Senate) has written:

> "In practice, the Presiding Officers at Canberra have exercised jurisdiction over the actual Parliament House building, the front steps, open verandahs, and the enclosed gardens situated on either side of Parliament House."

The perils of failing to define the precincts by a precise legal instrument resulted in the National Parliament suffering the ultimate indignity of having its jurisdiction examined by the ordinary courts. The offence arose out of the quite trivial matter of a parking infringement notice being placed upon a vehicle parked in front of the House. The Supreme Court of the Australian Capital Territory in the case of Rees v. McCay rejected an argument to the effect that the ordinary law of the land has no application in relation to Parliament House and its precincts.

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Your Committee is surprised at the certainty of expression employed by his Honour Mr Justice Fox in dismissing the appeal:

> "Reliance was placed on an alleged general proposition to the effect that the ordinary law of the land has no application in relation to Parliament House and its precincts. Parliament, it is said, can manifest an intention that particular laws should apply there, but otherwise it is for Parliament (in the sense of the Houses of Parliament) and for it alone to regulate and govern what is done in Parliament House and its precincts. This is a misconception. Parliament enjoys certain privileges designed to ensure that it can effectively perform its function and there are some aspects of conduct concerning the operation of Parliament into which courts will not inquire... Doubtless it can also control the use of the immediate precincts of those buildings, but arrangements about such matters are made in a sensible and practical way, bearing in mind the reasonable requirements of Parliament. The fact is that there is no general abrogation of the ordinary law."

It is a matter of some regret that the Presiding Officers did not authorize an appeal to the High Court itself. That the Parliament had failed to define its precincts by a precise instrument may well be the material factor and, if it had done so, one wonders whether any judge in any court would assert that the ordinary parking ordinances override a standing order or instruction issued under the authority of the House. The English case involving the author, A.P. Herbert, and the application of the liquor laws in the refreshment rooms in the Palace at Westminster indicate that English law is contrary to this doubtful precedent in the A.C.T. In that case the divisional court of the King's Bench Division refused to inquire into the sale of liquor within the precincts of Parliament as no court of law was competent to call into question the legality of such a sale: it was a domestic matter for the Houses of Parliament. The observations of Mr Justice Fox are, in the opinion of your Committee, untenable.

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Definition of the Precincts of the Parliament of New South Wales

Many generations of Presiding Officers in our Parliament have simply assumed ownership and control of the precincts of Parliament House.

The Committee sought the assistance of the present Presiding Officers, Hon. J.R.Johnson, M.L.C. (President of the Legislative Council) and Hon. L.B. Kelly, M.P. (Speaker of the Legislative Assembly), on what they considered to be the parliamentary precincts and the means by which they exercised lawful authority. Mr Speaker Kelly advised the Committee:

> "Ownership and control was something successive persons in authority have decided it was better to assume the existence of rather than attempt to prove."

The Chairman had written a letter setting out a number of questions.

(a) What the precincts are thought to be.

The President offered a straightforward definition of the precincts based on usage and clear assertion of control;

> "I consider the precincts of Parliament House to be the area bounded by the front fence facing Macquarie Street, the dividing wall, or line, between the Parliamentary premises and Sydney Hospital, the building alignment fronting Hospital Road, and a dividing line upon which a fence existed - prior to the present building operations being carried out - between Parliament House and the State library.
>
> I know of no legal basis which would support the

foregoing but it is highly desirable to me that the parliamentary buildings and the land occupied or used by Members in their parliamtary duties should be regarded within the Parliamentary precincts."

(b) Survey of title

In the absence of any recent survey in the precincts, the Committee has carried out its own research into the legal history of the various parcels of land that make up our precincts. The Crown Solicitor observed as long ago as 1947:

"The land upon which the parliamentary establishment is situated consists partly of Crown land, which has never been alienated, and partly of lands which have been resumed."

(c) Legal instrument for control

The President has advised your Committee that the Presiding Officers in New South Wales have assumed that they enjoy an authority similar to the authority exercised by the Presiding Officers of the United Kingdom Parliament. A detailed advising by the Crown Solicitor (the same Advising as mentioned above in 1947) sets out the law at some length concerning the basis of lawful authority by Mr Speaker. The case of Kielley v. Carson was quoted by the Crown Solicitor as deciding the authority in common law that the Presiding Officers exercise. Their Lordships in that case observed:

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> "... we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceedings."

The Crown Solicitor concluded by pointing out that the Speaker was, "in de facto control of certain parts" and that his authority had been exercised "without question".

Control of the Parliamentary Precincts

There is no doubt in the mind of your Committee that the precincts of the Parliament have a special status and that the control of them is vested in the Presiding Officers.

The historical immunity, derived from the "powers, privileges and immunities" of the House of Commons that a member may not be served with legal process within the precincts of the Parliament reflects this status.

In addition, it is without doubt in the view of your Committee that the Presiding Officers have, as delegates of the Houses, an absolute power to regulate the access of police and other law enforcement agencies within the Parliamentary precincts: the power to restrict the areas to which members of the public may have access and the circumstance of such access and, indeed, during times of demonstration or apprehended breach of security of the Parliament to totally exclude the public from the precincts of the Parliament.

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Intrusions into the Parliamentary Precincts

A bizarre occurrence at Parliament House was the visit by two ASIO operatives to the Legislative Assembly on 30 September, 1982.

The ASIO operation was revealed when two members of the Parliament House staff told the Committee about an incident. One of them (the then Clerk of the Legislative Assembly) commented that "it started to take a feeling of a 'Get Smart' series".

The first agent had shown his ASIO pass to an attendant and demanded to see letters addressed to two MPs, delivered only minutes before by a diplomatic courier.

A second agent entered Parliament House minutes later and asked what the first was doing. Refused assistance by parliamentary attendants, he allegedly became aggressive, but ultimately left.

When the Premier, Mr Wran, heard about ASIO agents operating on the parliamentary precincts, he said that as far as he was concerned ASIO was banned from the precincts.

The Chairman then wrote the following letters to the Prime Minister and Commonwealth Attorney-General, respectively:

> Dear Prime Minister,
>
> Presence of A.S.I.O. in Parliamentary Precincts.
>
> I am writing to draw to your attention testimony before our Committee concerning the activities of an alleged agent of the Australian Security and Intelligence Organisation. I attach a copy of the transcript of evidence of the Principal Attendant of the Parliament of New South Wales, Mr F. Shepherdson, and the Clerk of the Legislative Assembly, Mr D.L. Wheeler.

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As you will see, both these officers - men with decades of experience in our Parliament - have related an incident that occurred some twelve months ago in which a person who claimed to be an agent of A.S.I.O. sought to examine envelopes addressed to Members of Parliament delivered by a diplomatic car. The attempted surveillance took place within the precincts of Parliament House, Sydney.

The Committee has authorised me to inquire of you, as Head of the Executive Government of the Commonwealth, whether it is regarded as proper practice for A.S.I.O. and its agents to operate within the precincts of a Parliament House in Australia.

Concern on this matter has crossed any customary party division: our Committee was unanimous that the privileges of a Member are breached seriously if his activities within the parliamentary precincts are to be subject to interference, scrutiny or monitoring by any arm of the executive government. This concern is shared by the Premier of New South wales who has stated that, so far as he is concerned, A.S.I.O. and its agents should be and are banned from Parliament House.

In view of the current investigations into A.S.I.O. by the Royal Commission of Inquiry on Australia's Intelligence and Security Agencies, conducted by His Honour, Mr Justice Hope, I leave to your discretion whether the general operation of A.S.I.O. within the precincts of a parliament should be referred to His Honour for consideration.

Yours sincerely,
Signed
Rodney Cavalier, M.P.,
Chairman."

"Dear Minister,

Presence of A.S.I.O in Parliamentary Precincts

I am writing to draw to your attention testimony before our Committee concerning the activities of an alleged agent of the Australian security and Intelligence Organisation. I attach a copy of the transcript of evidence of the Principal Attendant of the Parliament of N.S.W., Mr F. Shepherdson, and the Clerk of the Legislative Assembly, Mr D.L. Wheeler.

As you will see, both these officers - men with decades of experience in our Parliament - have related an incident that occurred some twelve months ago in which a person who claimed to be an agent of A.S.I.O. sought to examine envelopes addressed to Members of Parliament delivered by a diplomatic car. The attempted surveillance took place within the precincts of Parliament House, Sydney.

The Committee has authorised me to seek your permission for the appearance of the Regional Director of A.S.I.O., before the Committee. The testimony of your Regional Director will

be on oath. It can be in camera if that is required.

I would appreciate your early response to this request.

Yours fraternally,
Signed
Rodney Cavalier, M.P.,
Chairman.

The Prime Minister responded:

Dear Mr Cavalier

Thank you for your letter of 17 August 1983 drawing to my attention evidence given to the Joint Committee upon Parliamentary Privilege by two members of parliamentary staff as to the actions of two men who identified themselves as members of the Australian Security Intelligence Organization.

You also wrote to the Attorney-General, Senator Evans, on this matter, and I assume that you have now received his reply. This advised that the two men were, in fact, members of ASIO, that their visit to Parliament House was incidental to a current operation and gave an assurance that no member of Parliament was under surveillance.

The letter also referred to instructions given by the Director-General of Security on the procedures to be followed when such inquiries need to be made.

The activities of members of the Australian Security Intelligence Organization are regulated by law, and this includes the law relating to parliamentary privilege. On the other hand, whilst a member of Parliament is protected in respect of his normal privileges in the Parliament, in other respects he is in no different position to any other citizen in Australia. Given the above, I would not think it necessary to refer the matter of the operation to the Royal Commissioner on Australia's Security and Intelligence Agencies. Your Committee is, of course, free to make its own submission to Mr Justice Hope on this subject.

Yours sincerely
Signed
R.J.L. Hawke

The then Commonwealth Attorney-General responded:

Dear Rod,

I refer to your letter dated 17 August 1983, drawing my attention to certain evidence given to your Committee by two members of the New South Wales Parliamentary staff, and seeking my permission for the Regional Director of the Australian Security Intelligence Organization to appear before

the Committee.

The evidence given by Mr Shepherdson and Mr Wheeler related to a visit to Parliament House by two men who identified themselves as members of the Australian Security Intelligence Organization. I have been given a report by the Director-General of Security advising me that their evidence may relate to events which took place on 30 September 1982. On that day two members of the Organization visited Parliament House in the course of their duties. Their visit was incidental to a then current operation. I am not prepared to disclose details of that operation, on grounds of national security, but I can give you an assurance that no members of the New South Wales Parliament were under surveillance.

One of the members of the Organization had a conversation with an attendant, who then referred him to the Clerk. That member identified himself to both men as a member of ASIO. On the same day, the other member of ASIO had a short conversation with a Parliament House guard on the footpath outside the House.

I am informed that both members conducted themselves courteously during their inquiries and made no "demand" for services; nor did they interfere with or intercept correspondence.

In his report, the Director-General of Security has informed me that surveillance officers are instructed to regard all parliamentary precincts with special respect and are aware of the proper sensitivities surrounding the work of parliament. Further, the Director-General has instructed that on those rare occasions where such inquiries must be made in the interests of national security, the relevant Regional Director will personally see the appropriate senior parliamentary officer to ensure that the proper respect is paid to parliamentary sensitivities and that the proper forms are observed.

Finally, I have considered your Committee's request that I permit the New South Wales Regional Director of the Organization to appear before your Committee, and have decided that I should decline the request. To accede to your Committee's request might risk compromising a national security operation. Moreover, the Regional Director has no personal knowledge of the events concerned, and whatever evidence he could give would be in the nature of hearsay. However, in view of the information given above, and the instructions given by the Director-General, your Committee might now be of the view that the appearance before it of the Regional Director was no longer necessary.

Yours sincerely,

Signed
Gareth Evans

When the Prime Minister's views became known, senior Government

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sources were reported in the Sydney Morning Herald of 21 November, 1983, as confirming that:-

> "Mr Wran had not changed his view and was not impressed by the attitude of the Federal Government. He would leave the matter to the State committee on privilege for the time being, but would enter into the controversy again if he thought it necessary."

Your Committee is of the opinion that the actions of these ASIO agents were a breach of the privileges of the New South Wales Parliament by way of an improper intrusion into its precincts.

RECOMMENDATIONS WITH RESPECT TO THE PRECINCTS OF THE PARLIAMENT

Having inspected the precincts of all the Parliaments in the Commonwealth of Australia and having taken extensive evidence on matters relating to the protection of the precincts from breach of privilege or contempt of Parliament. Your Committee recommends:

(1) That a statute be enacted physically defining the precincts of the Parliament and vesting their control in the Presiding Officers. The Western Australian statutes would provide a useful starting point for such a statute. This statute would include provisions making it clear

(a) that the Presiding Officers have absolute authority over access to the precincts of the Parliament or any individual sections of those precincts;

(b) no law enforcement agency has any right to operate within the precincts of the Parliament without the express permission of the Presiding Officers;

(c) the control of demonstrations within the Parliamentary precincts should be by the Parliamentary attendants and the police directed by the Serjeant-at-Arms and Usher of the Black Rod using the delegated powers of the Presiding Officers.

(2) A number of civil provisions need be made with respect to

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members of the New South Wales Police Force within the precincts of the Parliament. These would be:

(a) The conducting by the Parliament, in conjunction with an officer delegated by the Commissioner of Police, of an induction course on the institution of Parliament and its privileges for officers whose duties will bring them to be part of the patrol of the Parliamentary precincts during Parliamentary Sittings;

(b) the control of such police while they are within the precincts by the Serjeant-at-Arms and Usher of the Black Rod under delegated authority from the Presiding Officers; and

(c) firearms should not be carried by members of the Police Force within the precincts of the Parliament.

MEDIA WITHIN THE PRECINCTS

During the consideration of the relationship between the Parliament and the media within the precincts of the Parliament, consideration arose of the conduct of the members of the press gallery - particularly those associated with the electronic media - outside meetings, particularly the meetings of the parliamentary political parties but also meetings of committees and the like.

During its observations overseas, the delegation of your Committee was able to observe, at the Canadian House of Commons in Ottawa, the concept of a media "scrum".

A "scrum" involving members of the electronic and print media occurs in the lobby outside the Chambers when a member has raised a matter, on the floor of the House, which warrants, in the eyes of the media, immediate treatment by it. If the member shares this opinion - with the nature of politics, this is usually the case - the member exits the Chamber to the lobby. He is then surrounded by a tight gathering of media representatives and conducts what amounts to an impromptu press conference in the immediate vicinity of the parliamentary Chamber.

This tradition, which does not appear to be widely repeated throughout Westminster parliamentary systems outside Canada was described, to your Committee's delegation, at the Ontario Provincial Parliament in Toronto although it was not witnessed by the delegation.

This unusual relationship between the media and the Parliament, in at least those two Canadian instances, would not, in all

probability, be tolerated elsewhere. Within its milieu, however, this is not only tolerated but, apparently, desired, as part of the relationship between the media and the members of the parliaments involved. Its evolution is lost but its existence is, now, acknowledged and fostered.

At the Palace of Westminster, a different system has evolved which is, also, apparently, without parallel. The system of Lobby Correspondents and a separate press gallery is one which cannot be adequately described, in brief, in a report such as this. A detailed treatment is available, should further reading on the subject be required, in the book by Jeremy Tunstall "The Westminster Lobby Correspondents" (Routledge, 1970, London).

The relationship is of access and confidentiality, particularly in respect of the regular, non-attributable briefings given by the Prime Minister's office.

The New South Wales Parliament has its own idiosyncratic habit with respect to members of its press gallery. In recent years, principally arising from the proximity of the Public Works Room to the Press Gallery in the now-demolished sections of the old parliamentary building, a practice had arisen of the press gallery observing - and the T.V. media filming - members of the various parliamentary political parties as they entered the Public Works Room via the short external verandah then leading to it. This external verandah was only some twenty feet across an air well between two wings of the building from the press gallery area. A practice had also developed of the filming, by permission of those party meetings, of "background" clips of the members of these party

Media within the precincts

meetings for T.V. news "library footage".

When significant events occurred within a parliamentary party such as the removal of a leader or a minister, the media were able to report and capture these events as the participants exited from this room.

There is no record of any challenge ever having been made by the parliamentary political parties or the presiding officers of the day to this occurring.

With the transfer of parliamentary political party meetings to specially-designated government and opposition party rooms on the 8th floor of the first stage of the new parliamentary complex, this was perceived by some members of the Press Gallery as having been translated into a right to film in the foyer or lobby areas immediately outside these party rooms when significant events were occurring. The custom of taking "background" clips with the concurrence of the relevant meeting has continued and remains without question.

Your Committee recommends that, in view of the extensive interview facilities now available on floor 6 of the parliamentary complex, the continuation of this practice should be the subject of discussions between the Presiding Officers and Press Gallery representatives.

Indeed, a clear set of guidelines within the refurbished parliamentary complex should be devised so that the dignity and efficiency of the political process can be assured. Thus

Media within the precincts

Parliamentarians and journalists can interact in ways that preserve their proper interests. Parliamentarians ought not be covert or secretive; journalists ought not be intrusive or crass.

The appropriate code would best be a flexible instrument supervised by the Presiding Officers whose authority and experience enables them to respond to the legitimate claims of both parliamentarians and media.

The view of your Committee is that it is undesirable to propose that the current levels of access by the Press Gallery to areas outside party meetings should be curtailed. However, such access should be dealt with in the proposed Code of Conduct for the Press Gallery.

Finally, your Committee recommends that any specific complaints by any aggrieved member of the Parliament against an individual member of the media arising out of such press scrutiny should be dealt with by means of the consultative and control arrangements between the Presiding Officers and the Press Gallery.

DEFAMATION, HANSARD AND THE PUBLICATION OF SPEECHES

Perhaps no area of the Committee's inquiry has been more vexed than the wish of Members to have their speeches published and distributed far and wide. The concern is shared by the media who need to rely upon the certainty of Hansard as a record that is both accurate and legitimate - that is, enjoying immunity from defamation proceedings. It is the one aspect of privilege that a Member who takes his legislative function seriously will ultimately encounter, often in circumstances quite surprising to him, because of the rigidity of the New South Wales Defamation Act and the narrow scope of absolute privilege under the terms of that Act. All persons concerned with the proceedings of Parliament believe that the legislature should act to put the legal position beyond doubt. The concern is universal: Members who make speeches want to disseminate them far and wide while those allegedly defamed in that speech have an interest in restricting that circulation. The Hansard reporters who transcribe that speech and the staff of the Government Printing Office are not certain of their liability for any involvement they might have in the publication of an alleged defamation. The members of the working media and their editors want to be able to rely upon the proof that their report is based on a fair and accurate account of words stated in Parliament.

In summary, section 17(2) of the Defamation Act states that:

> "There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament."

It is the advice of the senior Crown law officers that the defence is available only for publication of the whole of the debate and not any part of it. Another section of the Defamation Act -

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section 25 - deals with the publication of official and public documents and records providing a defence for the publication of such document where it is:

> "a fair extract or fair abstract from, or fair summary of, any such document or record."

The then Attorney General of New South Wales, the late Hon. D.P. Landa, M.L.C., wrote to the Chairman of your Committee on this matter to advise:

> "There is, of course, a provision in section 25 of the Defamation Act which provides a defence for the publication of a fair extract or fair abstract from or fair summary of any document or record of the debates and proceedings of the House. However, senior counsel has advised that to come within this protection it would not necessarily be enough to publish a verbatim account of a Member's speech. If, for example, in the very next speech in the House much or some of what was said by a Member was refuted, reproduction of the first mentioned Member's speech alone would not be a "fair" extract of the debates of proceedings. The conclusion of the former Attorney General, and indeed senior counsel, with which I concur, is that under the present state of the law it could not be said that the privileges of Parliament would extend to a publication of an extract of a Member's speech..."

Subsequently, the Committee authorized the Chairman to write to the Clerk of the Legislative Assembly concerning the understanding of the Parliament about the present law. The Committee carried this resolution after many expressions of concern to its Members from other Members of Parliament who had received rejections from the Government Printer to their request for the reprinting of their speeches. Mr Wheeler wrote:

> "Advisings have been received from the Crown Solicitor and also senior counsel concerning the possible liability and defamation of the Government Printer and the Editor of Debates when supplying reprints of Members' speeches from Hansard. The advices were to the effect that the Printer and the Editor are at risk to some extent as joint publishers, if any

> material distributed by a Member was held to be defamatory in content. Similar principles would seem to apply so far as the photocopying of speeches is concerned. Advice received by at least one other Australian Parliament is to the effect that reprints of Members' speeches attract only qualified privilege and, in providing them to Members, the Government Printer and the Editor are at risk for defamation."

The Crown Law authorities are relying upon fairly ancient British precedent going back to Abingdon's Case in 1795 which decided that privilege does not protect a Member publishing his own speech apart from the rest of the debate. Erskine May has also indicated that there may be liability for defamation:

> "Although the privilege of freedom of speech protects what is said in debate in either House, this privilege does not protect the publication of debate outside Parliament...A Member who publishes his speech made in either House separately from the rest of the debate is responsible for any libellous matter it may contain under common law rules as to the defamation of character...If a Member publishes his speech, his printed statement becomes a separate publication, unconnected with any proceedings in Parliament."

Witnesses before the Committee might have had their differences about what Parliament should do to resolve the situation but they were united that new legislation should be introduced to put the situation beyond any doubt. It does appear curious to your Committee that Members might be at risk for disseminating the complete text of the speech that they made in Parliament and should be in some jeopardy while a newspaper that gives a comprehensive report of that speech or reproduces it verbatim will enjoy a strong defence of qualified privilege. Your Committee does not believe that there should be any distinction in law based on the mechanical processes of reproduction: that is, it should be immaterial whether the speech is a photocopy reproduction of Hansard, a galley pull from the typeset proofs, a booklet that transcribes the Member's

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entire speech verbatim or a newspaper report of some or all of that speech.

Production of Hansard

The production of Hansard involves many stages. It is important that the privilege (if any) attaching to these stages should be made clear.

Commencing with the shorthand notes taken by Hansard reporters (which are supplemented by a tape recording system) first versions of the Hansard are produced and edited by the Hansard staff. This process of editing is dealt with elsewhere in your Committee's report under the heading of "Hansard Style".

After the Hansard has been edited, the typescript version of Hansard, which is known as the "rough", is forwarded to the Government Printer for computer typesetting and printing in such form.

A version of "Hansard" known as the "galley proof" is then produced, usually overnight. From this extracts of Members' contributions are provided to them so that they may seek corrections. Such requests from Members are considered by the Editor of Debates and his staff. This is discussed, more widely, elsewhere in this report, under the heading "Hansard Style".

There is a wide departmental distribution of the "galley proofs" to the Government Departments and Statutory Authorities and this is dealt with elsewhere in this section of the Report.

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After the correction process has occurred, the corrected form of Hansard is produced in a daily pamphlet version - nominally within ten working days of the debates taking place. The only corrections which occur to this pamphlet form of Hansard, prior to its incorporation in the sessional bound volumes, are, as a rule, the correction of typographical and proofreading errors or questions of factual or spelling error of proper names, citations and the like.

Absolute Privilege

It is quite clear that the absolute privilege derived from Article 9 of The Bill of Rights (1688) is applied to what is known, finally, as Hansard. This is dealt with by Section 17 of the Defamation Act 1974, which states:

> "(1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House or both Houses of Parliament.
>
> (2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament.
>
> (3) There is a defence of absolute privilege for the publication of -
>
> (a) a document previously published as mentioned in subsection (1) or a copy of a document so published; and
>
> (b) debates and proceedings previously published as mentioned in subsection (2) or a copy of debates and proceedings so published."

This places, beyond doubt, the attachment of absolute privilege to the sessional volumes of the Debates of the Parliament of New South Wales.

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Difficulties arise, however, with respect to other steps of the process - particularly versions that are subsequently corrected. It is the intermediate stages of this process together with questions that arise from copying of or extraction from the documents at the intermediate stages or the sessional volumes to which your Committee has paid particular attention.

Your Committee is of the view that there should be no uncertainty, in the minds of those who use documents produced at these intermediate stages - particularly the "galley proofs" - that absolute privilege will apply to the use of those documents provided they are used bona fide and without knowledge of any error in them which might subsequently be corrected. To that end, your Committee recommends that absolute privilege should be attached, by a process discussed later in this Report, to quotation from the "galley proofs" of Parliamentary Debates provided that quotation was made during the period prior to the production of the pamphlet form.

Although some corrections may be made to the pamphlet Hansard, it is the view of your Committee that absolute privilege of the nature of that applied to the sessional volumes should also be applied to the pamphlet versions.

Difficulties have also arisen with respect to requests to be permitted to photocopy the "galley proofs". Questions have arisen because of both the indeterminate privilege attaching to the whole of the document and the fact that the copying amounts to an extraction of portion of a Parliamentary Debate rather than the reproduction of the whole of that Debate. This question also

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arises with respect to copying of extracts from pamphlet Hansards and with respect to extraction by the Government Printer of Members' speeches from such pamphlets.

Your Committee recommends:

(1) that photocopies of "galley proofs" should be absolutely privileged, where the text of such photocopied material was made part of the final proof; and

(2) such photocopies retain absolute privilege provided they are used bona fide and without knowledge of any error in them which might subsequently have been corrected.

The second recommendation above is made to protect members who might innocently distribute a photocopy of a section of the "galley proofs" which was subsequently the subject of a major and substantive textural correction.

In addition, the copying of the pages of the pamphlet volumes should have absolute privilege attracted to them. Uncertainties with respect to parliamentary privilege attaching to extraction by the Government Printer of Members' speeches for reproduction in limited pamphlet form for Members should be eliminated by attaching to them absolute privilege. Your Committee recommends that this occur, provided that a certificate containing information set out below, is enclosed:

(1) the date of the debate from which the extract is taken;

(2) the name of the Bill or the nature of the Debate during which the speech was made; and

(3) the statement that it has been published under the authority of the New South Wales Parliament.

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Distribution of Galley Proofs

Some concern was expressed to your Committee at the lack of ready access by Members of the Parliament to the "galley proofs" of Parliamentary Debates and at the scope of distribution to other bodies of those first copies. Information was supplied to your Committee by the Government Printer indicating the scope of distribution of those "proofs". The list of bodies currently receiving those proofs is:-

Attorney Generals Department (4)
Auditor General
Builders Licensing Board
Commissioner of Inquiry
Commissioner of Police
Dept of Agriculture
Dept of Consumer Affairs
Dept of Corrective Services
Dept of Education
Dept of Industrial Development and Decentralisation
Dept of Industrial Relations (2)
Dept of Lands
Dept of Local Government
Dept of Main Roads
Dept of Mineral Resources
Dept of Motor Transport
Dept of Sport and Recreation
Dept of Youth and Community Services
Division of Cultural Activities
Government Printing Office (2)
Housing Commission (2)
Land Commission of NSW
Maritime Services Board
Metropolitan Water Sewerage and Drainage Board
NSW Superannuation Office
Office of the Minister for Police (extra to Minister's copy)
Parliamentary Counsel
Premier's Department (9)
Public Service Board of NSW
Public Works Dept
Soil Conservation Service
State Pollution Control Commission
State Rail Authority of NSW
The Treasury (3)
Under Secretary of Justice
Urban Transit Authority
Valuer General's Dept
Water Resources Commission
Workers Compensation Commission

In addition, each Minister receives a copy of the Galley

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> Proofs in his Ministerial capacity in addition to any copy which he might receive as a Parliamentary Office Holder. These copies are charged to the Parliament rather than to his Department.

At the time this distribution process became known to your Committee, the Chairman wrote to each of the then recipients of these "proofs" asking whether they still had a need, in their eyes, for receiving these documents. In a significant number of cases, the recipients indicated a desire to continue receiving the documents. There was, however, also a number of voluntary removals from the circulation list which would, in part, offset the costs of wider circulation to Members. Additional voluntary removals might be anticipated when the cost recovery process commences as discussed below.

The costs of production and distribution of these proofs are a charge on the Parliament although, clearly, the benefit is derived from other Departments, Authorities and Instrumentalities. In order to offset the cost of a recommendation with respect to the distribution of "galley proofs" within the Parliament, your Committee recommends that the cost of distribution of "galley proofs" of Parliamentary Debates, other than to those enumerated in the next recommendation of your Committee, should be a charge to those Departments, Authorities or Instrumentalities and not a cost borne by the Parliamentary Budget.

Your Committee understands that, following its enquiries into this subject, consideration is already being given to imposing such charges.

Some submissions were made to your Committee that have made it

obvious that individual Members of the Parliament and Members of the Parliamentary Press Gallery would appreciate greater access to the "galley proofs" of Parliamentary Debates than is currently available through the Parliamentary Library, the Party Leaders and Whips in both Houses or through the Hansard office. Your Committee believes that it is not unreasonable for each Member to have access to an individual copy of the "galley proofs". In addition, to assist with a full and fair reporting of the proceedings of the Parliament, your Committee accepts that the availability of some copies of the "galley proofs" to the Parliamentary Press Gallery is desirable.

Your Committee recommends that each Member of the Legislative Council and the Legislative Assembly be provided, on request, with a complete copy of the "galley proofs" of Debates in both Houses when those proofs are available. Such "galley proofs" should be delivered to the Member's office at Parliament House.

In addition, your Committee recommends that five copies of the "galley proofs" be made available to the members of the Parliamentary Press Gallery with the distribution of these to be resolved after discussions between the Presiding Officers and the President and Secretary of the Parliamentary Press Gallery.

It is assumed that additional copies, if required, would be available to media organizations, upon subscription, from the Government Printer.

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Production of Hansard in Court Proceedings.

At present, production of Hansard (and other records of the Parliament) for use in court proceedings for the purposes of proof of what was said or what took place in the Parliament is dealt with by the Standing Orders of each House.

Standing Order 53 of the Legislative Assembly provides:

> "53. The custody of the Votes and Proceedings, Records, and all documents whatsoever laid before the House, shall be in the Clerk, who shall neither take, nor permit to be taken any such Votes and Proceedings, Records or documents from the Chamber or Offices, without the express leave or order of the Speaker."

On the other hand, Standing Order 17 of the Legislative Council provides as follows:

> "17. The custody of the Minutes of Proceedings, Records, and all Documents whatsoever laid before the House, shall be in the Clerk, who shall neither take, nor permit to be taken, any such Minutes, Records, or Documents, from the Chamber or Offices, without the express leave or order of the House."

Petitions are frequently presented to the Legislative Assembly seeking permission to produce Hansard or other official records of the Parliament in court proceedings. The most recent of these, at the time of writing of this Report, is set out below:

> "To the Honourable the Speaker and Members of the Legislative Assembly of New South Wales in Parliament assembled.
>
> The Petition of Minter Simpson, Solicitors, respectfully sheweth -
>
> (1) Your Petitioner is a firm of solicitors acting on behalf of James Markham and the Waverley Municipal Council who are defendants in an action for damages for defamation brought by Ernest Page and commenced in the Supreme Court of New South Wales. The said action has been set down for hearing commencing 6 August, 1985.

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(2) The defendants have been advised that it will be necessary for them to adduce in evidence the full and official records of the Legislative Assembly of 8 November, 1983, pages 2639-2641 inclusive; Adjournment, Parliamentary Debates, 8 November, 1983, pages 2711-2714 inclusive; and Adjournment, Parliamentary Debates, 1 December, 1983, pages 4370-4372 inclusive.

Your Petitioner therefore humbly prays that your Honourable House will grant leave:

(1) to your Petitioner and to the defendants, James Markham and the Waverley Municipal Council, to issue and serve subpoenas for the production of the relevant official records of the proceedings of the Legislative Assembly referred to above;

(2) to your Petitioner and to the defendants to adduce the said official records of the proceedings as evidence only of what was in fact said in the Legislative Assembly on the dates referred to above;

(3) to an appropriate officer or officers of the House to attend in Court to produce the said official records of proceedings and to give evidence in relation to the recording of proceedings providing that such officer or officers should not be required to attend at any time which would prevent the performance of their duties in the Parliament; and

(4) to your Petitioner and to the defendants to interview and obtain proofs of evidence from the said officers and to issue and serve subpoenas for their attendance on the trial of the said action.

And your Petitioner, as in duty bound, will ever pray."

On Thursday 18th April, 1985, this petition was granted on motion by the Leader of the House when he moved "That in response to the Petition of Minter Simpson, Solicitors, presented to the House This Day, this House grants leave . . ." that the four requests in the second section of the Petition be agreed to.

In this case, as in earlier cases in recent Petitions, the Petition was granted as a matter of course.

It is considered by your Committee that the requirements of both

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Houses are redundant with respect to the production of these documents and it is recommended that, in the future, litigants should be permitted to produce copies of Hansard or other formal records of the Parliament as proof of what is contained in them after an application is made to the Clerk of the appropriate House for the provision of a copy certified to be a true copy.

It would not be unreasonable for a modest fee to be charged for the provision to a litigant of such a certified document. It is, however, not thought necessary for such a matter to be considered by the Speaker (in one current provision) or the House (in the other current provision).

Electronic Transmission of Hansard

During the production of Hansard, tape recordings are made of the proceedings of the Houses and retained, for some period of time, for use by the staff of the Editor of Debates. There is some possible doubt as to whether these electronic records are adequately protected at present. There would also appear to be some doubt as to whether the electronic transmission of the actual proceedings of the Parliament, throughout the cable reproduction system to the Parliamentary building, is also adequately protected under existing provisions. Whilst there is no doubt that a citizen who hears his name and reputation traduced on the floor of the Parliament whilst he is listening from the Visitors' Gallery to the physical utterance of those words without any subsequent re-broadcast of them has no power to challenge or call them into review by virtue of the provisions of Article 9 of The Bill of Rights (1688), some doubt may exist as to whether or not the

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electronic broadcast - even within the Parliamentary precincts - has the same absolute privilege attached to it. To place this beyond doubt, your Committee recommends that a statutory provision, in the Parliamentary Proceedings and Papers Act proposed at the conclusion of this section of your Committee's Report, incorporate an absolute immunity for tape recorded material held by the Editor of Debates and recorded under the authority of the Parliament as well as attaching absolute privilege to broadcasting, within the precincts of the Parliament, by methods authorised by the Presiding Officers, of the verbatim words used in each of the Chambers.

Such privilege should not attach to any unauthorised recording or re-broadcast of proceedings within the precincts of the Parliament.

Your Committee has not had within its terms of reference the question of broadcasting the proceedings of the Parliament, although your Committee believes that this warrants further consideration by the Parliament. Whether a separate Select Committee should be established, as has been listed as a General Business Notice of Motion by one of the Members of the Legislative Assembly; whether a further term of reference should be added to those of your Committee to permit it to consider these matters; or whether some other body should consider the matter, is the subject of a recommendation by your Committee later in this Report.

Parliamentary Papers and Proceedings Act

Your Committee recommends that the various provisions of the Defamation Act relating to Parliamentary proceedings together with

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the Parliamentary Papers (Supplementary Provisions) Act and its various amending Acts should be repealed and their provisions, as amplified or modified by the Recommendations of your Committee be incorporated in a Parliamentary Papers and Proceedings Act.

Your Committee is of the view that it would be both useful and desirable if all these provisions were collected and published in booklet form. It could then be readily available for reference to both the general public and Members of the Parliament - particularly new Members of the Parliament.

Hansard Style

In the course of its proceedings, your Committee has received considerable evidence concerning the stages through which the reports of Members' Parliamentary speeches pass before becoming part of the New South Wales Parliamentary Debates (Hansard).

Members of your Committee, in considering this evidence, have been concerned primarily with the protection against actions for defamation which attaches to their speeches, to the reporting of those speeches by the Parliamentary Reporting Staff or others, and to the stages of production of Hansard.

For example, the Committee has considered the problems which would be encountered by members of the media if, in making what they consider to be a fair and accurate report of what is said in the House, they were to find that their reporting was not supported in the final Hansard, due either to the corrections of Members or of the Parliamentary Reporting Staff.

It is in this context that the manner of reporting and editing of debates by the Editor of Debates and the staff, and the question of a Hansard style, has been raised by and before the Committee.

The principles which govern both the corrections which may be accepted by Hansard on behalf of Members and the editing of Debates are, according to the Acting Editor of Debates (now Editor), in his evidence of April 20, 1983, as follows:

> "...our object (will) always be to report what is said in the House in accordance with the requirements that are laid down in the well-known definition in May. I would expect it and require it to be a substantially verbatim report. I certainly

> would not be a party to accepting an amendment that altered in any way the sense of the Member's speech." (Transcript pp 45/46).

The definition in Erskine May alluded to by the Acting Editor was, in fact, first formulated in 1893 by a Report of the House of Commons Select Committee on Parliamentary Debates, which considered the arrangements for private contractors to report and print Debates. The findings of that Select Committee were endorsed by another select Committee in 1907, which finally led to the establishment of a Commons Reporting Staff. (HC 1907 vii 15).

This definition of what constituted the Commons Official Report formulated by these Select Committees, is now entrenched in Erskine May:

> "The Official Report is a full report, in the first person, of all speakers alike, a full report being defined as one 'which, though not strictly verbatim, is substantially the verbatim report, with repetitions and redundancies omitted, and with obvious mistakes corrected, but which, on the other hand leaves out nothing that adds to the meaning of the speech or illustrates the argument'." (Erskine May Twentieth Edition pp 263 and 264).

That definition has been adopted for the production of Hansard in most English-speaking parliaments. It is imprecise, but has been unchanged in all that time because it works; and it works because it allows for common sense and flexibility. It provides a map of the terrain to be traversed, but does not actually take us over the ground. The map must be read and the practical, slogging work done if the goal of a "substantially verbatim" report is to be reached. Hansard staff have a complex and delicate task to perform.

Certain conventions, of course, will universally apply as in any publication: a consistent set of rules covering punctuation,

capitalisation, accepted forms of address and the like. No significant problem need arise here unless the rules are excessively rigid. The process of standardisation - which term ought to be preferred to "Hansardisation" - will greatly assist in the production of a clear and accurate record.

Presumably, excessively coarse or unseemly language, or that which seriously affronts another Member, will be disallowed by the Speaker or President. "You are a liar!" will not be allowed in any Australian Parliament. There is, however, a good chance of getting away with the more oblique "You are of unparalleled mendacity!" It is often not an easy task to lay down reasonably consistent guidelines on which expressions should be considered unacceptable or unparliamentary. Most, if not all, Hansard chiefs in Australia stand ready to print "bullshit" if its use is permitted. This is as it should be. It is the Presiding Officer's prerogative to set the limits. (Your Committee feels that the use of this word ought to be prohibited or at least severely curtailed. Indeed it wishes that what is denoted by this expression would disappear altogether from the Parliament, but that would probably require Divine intervention).

Members who make errors such as confusing "reticent" with "reluctant", use "agreeance" instead of "agreement", or "revelant" instead of "relevant", or "billions" instead of "millions" need not fear that the error will appear in print. Nor need they fear that journalists will object to such tidying up, which is well within the bounds of "substantially verbatim".

In practice the "unscrambling" of sentences done by Hansard is

almost invariably effected, as it should be, in a way that shows the restraint of the book editor rather than the assertiveness of the newspaper sub-editor. Members are almost invariably grateful for the very skilful and sensitive way in which their words are recorded and edited.

It is agreed that colloquial expressions should not be re-rendered when they add to the meaning or flavour of the speech. Gough Whitlam, for example, once spoke of a political activist being "thrown in the jug", rather than "imprisoned". Similarly, Sir James Killen, another highly articulate parliamentarian, once recalled in a parliamentary speech that he had "swum bare-arsed in the Condamine" with Aborigines. In both instances sanitising of the quoted words would have been inappropriate and provided a less accurate record.

A recent example of what your Committee regards as overenthusiastic correction of the verbatim occurrence occurred when, in response to an interjection whilst answering a question in the Legislative Assembly during Question Time, the Honourable K.G. Booth, M.P., (Treasurer), gave the current score of the Sheffield Shield Final. The "galley proofs" of the occurrence made no mention of this.

The extract from the "galley proofs" said:

> "Mr K.G. BOOTH: ...The consumer price index increase for the December quarter of 1984, at 1.4 per cent was the same as the national average, while the change in the Consumer Price Index for the twelve months ended December 1984 was 2.2 per cent, which was lower than the national average of 2.6 per cent. For the three months ended December 1984 -
> [Interruption]
>
> Mr SPEAKER: Order! There is too much audible conversation in the Chamber.

Hansard

> Mr K.G. BOOTH: For the three months ended December 1984, compared with the same quarter in the previous year, employment growth in New South Wales was 3.8 per cent, against a national growth of 2.9 per cent."

When this was drawn to the attention of your Committee's Chairman, he wrote to the Editor of Debates in the following terms:

> "Mr T.R. Cooper,
> Editor of Debates,
> Parliament House,
> SYDNEY
>
> Dear Tom,
>
> Yesterday there was an exchange in the Parliament concerning the tense final stages of the Sheffield Shield Final. It occupied the attention of most members of the House, warranted a stern warning from the Speaker, occasioned an interjection from the Premier and rated an amusing account in Column 8 of the Sydney Morning Herald. Not one word of it appears in Hansard.
>
> I am writing to inquire why.
>
> There can be no excuse that the reporters did not hear what was said as Mr Speaker formally interrupted proceedings to call the House to order. There can be no excuse that the Treasurer's speech proceeded unhindered as he very obviously turned around to elicit information on the score and then advised the House of what the score then was. Without making too much of the incident, I believe that we have in this incident of non reporting the evidence of the smoking gun that Hansard does (from time to time) impose its own style so as to maintain the false 'sense of dignity' about the proceedings of the House.
>
> You may plead that it was very difficult for your reporters to have picked up the chit chat and nuances. I would accept that but I would also expect your reporters would seek out those involved to reconstruct the incident.
>
> What we had yesterday was an exchange observed by all members of Parliament, the public gallery, ministerial advisers and the press gallery - an exchange relayed to each room in the House - and the Hansard failed to record it.
>
> I would like to be able to discuss this with you because, trivial as the incident is, it does reflect graver questions of style and its impact on accuracy.
>
> Yours sincerely,
> R.M. Cavalier,
> Minister for Education"

Hansard

As a result of this intervention, the pamphlet form of Hansard records the exchange, with alterations to that which appears above, as:

> "Mr K.G. BOOTH: ... The consumer price index increase for the December quarter of 1984, at 1.4 per cent, was the same as the national average, while the change in the Consumer Price Index for the twelve months ended December 1984 was 2.2 per cent, which was lower than the national average of 2.6 per cent. For the three months ended December 1984 -
>
> [Interruption]
>
> Mr SPEAKER: Order! There is too much audible conversation in the Chamber. Members wishing to know the cricket score should go out and listen to the radio.
>
> Mr WRAN: What is it?
>
> Mr K.G. BOOTH: At the last report it was 8 for 193. For the three months ended December 1984, compared with the same quarter in the previoius year, employment growth in New South Wales was 3.8 per cent, against a national growth of 2.9 per cent."

In his evidence, the then Acting Editor of Debates was queried as to whether there was a Hansard style which might perhaps alter figures of speech or words chosen by Members. His view was:

> "There are techniques, of course, involved in getting the spoken word into readable form, but that should not mar in any way the gloss that a Member puts on the speech or the words he uses or the shape of the speech." (Transcript p 50).

The extensive use of back-up tape recordings since 1981 has promoted a much more verbatim style of reporting than was apparent in earlier days. This has many advantages. To some extent it takes the pressure off the reporter, helps ensure accuracy and an unchallengeable record. It is particularly helpful when evidence is taken by Select or Standing Committees. Consideration could be given to an extension of this system. The technology to enable an authorised sound recording to be made and kept is readily available and comparatively inexpensive.

Hansard

In the event of a dispute about what words were actually spoken, or about the appropriateness or legitimacy of the editing, the sound recording could enable the matter to be sorted out. If necessary, the Editor of Debates should arbitrate on an unresolved dispute between a Member and a Hansard Reporter, with the assistance of the authorised recording. In the unlikely event of the matter still not being settled, a final determination should be made by the appropriate Presiding Officer.

Your Committee recommends that, as part of the induction course for newly elected Members, there be thorough discussion of the rights and responsibilities of parliamentarians in relation to the recording and editing of their parliamentary speeches.

Members do not have, any more than Hansard, the right to alter the substance or meaning of their words. If parliamentarians and Hansard staff fully understand one another's problems then the difficulties of producing an accurate record must surely diminish. The Editor of Debates (or delegate) would be the appropriate person to lead such a discussion, having the authority to delineate the principles governing the preparation of the record and to reassure Members that conformity with these principles will not result in the production of a denatured version of the words they have spoken.

If such procedures help to ensure that the absolute privilege attaching to speeches made in Parliament is better understood and better secured, then they will be very worthwhile indeed.

PARLIAMENTARY PRIVILEGE AND MEMBERS' CORRESPONDENCE WITH THE EXECUTIVE GOVERNMENT

One problem which came to the specific attention of your Committee relates to the use of correspondence as a usual method for Members to raise problems on behalf of constituents or interest groups with Ministers of the Crown instead of using forms of the House such as petitions; questions with or without notice; speeches on the adjournment motion or speeches on "grievance" day.

The two principal concerns which have arisen relate to:

(1) the possibility of a defamation action being taken against the Member arising out of the "publication" of correspondence between a Member and a member of the executive government (see O'Connell's case, post); and

(2) "questionable" use of correspondence by Ministers and other members on the floor of the Houses (see, also, post).

Defamation

In New South Wales, the two provisions which relate to the freedom of speech and immunity of Members with respect to that freedom arise from Article 9 of The Bill of Rights (1688) and s. 17 of the Defamation Act 1974.

Article 9 of The Bill of Rights (1688) states:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

Members Correspondence

Section 17 of the Defamation Act 1974 states:

> (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House or both Houses of Parliament.
>
> (2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament.
>
> (3) There is a defence of absolute privilege for the publication of -
>
> > (a) a document previously published as mentioned in subsection (1) or a copy of a document so published; and
> >
> > (b) debates and proceedings previously published as mentioned in subsection (2) or a copy of debates and proceedings so published.

These provisions provide little direct comfort to a Member who passes on a representation on behalf of a constituent to a Minister or who writes such a representation which, in either case, contains material that the person about whom the complaints are made regards as defamatory.

In either case, the question arises as to what immunity, if any, is or should be provided for Members in such cases.

There seems no doubt that, in terms of following the precedents of the House of Commons, no absolute privilege attaches to such correspondence.

In the case of the London Electricity Board v Strauss, the Member was threatened with a libel action in respect of a letter to a

Minister. The House of Commons, in subsequently dealing with a privilege claim, decided that the letter was not "a proceeding in Parliament" [see H C Official Report (5th series) 8/7/1958-Columns 208-346].

As mentioned elsewhere in this Report, that decision resulted in recommendations in 1969, 1975 and 1976 for legislation granting privilege to communications between Members and Ministers where such communication was for the purpose of enabling a Member to carry out his duties.

Such legislation has, to date, not been enacted.

A number of cases were cited by members and former members, to your Committee in which action had either been taken or threatened, in New South Wales, with respect to such correspondence.

The case involving Mr Keith O'Connell, the former Member for Peats in the Legislative Assembly, involved the commencement of an action against him based on a letter which Mr O'Connell wrote. His letter endorsed complaints made to him with respect to an officer of the Housing Commission. The letter subsequently came into the hands of that officer and resulted in an action which was commenced but never tried, but which resulted in considerable personal expense to Mr O'Connell. Mr O'Connell's case was the most explicit of those before your Committee, but is representative of the general concern held by Members in this area.

Your Committee heard evidence with respect to the defence available of "qualified privilege" in such cases and it seemed clear to your

Committee that Mr O'Connell would have had a complete defence to the suit brought against him on the basis of "qualified privilege" - that is, an absence of malice on his part in the making of those representations.

On the material available to your Committee, there is no doubt that such a defence is readily available to a Member who is careful with his correspondence. Whether the Member simply makes representations by passing on the complaint or adds comments of his own, provided this is not done maliciously, such a defence must lie.

The question which remained to be considered by your Committee, however, was whether this was adequate or whether such correspondence should have vested in it absolute privilege between Member and Minister.

There is ready agreement on your Committee that often material potentially damaging to citizens is contained in representations to Ministers. The scope of the privilege with which your Committee is concerned relates to the "publication" to the Minister and to those servants of the Crown to whom the Minister must refer the complaint for determination. There is no desire for absolute privilege to apply to the constituent who raised the matter with the Member or with any wider "publication" of the material by the Member, the constituent or any other method of wider publication.

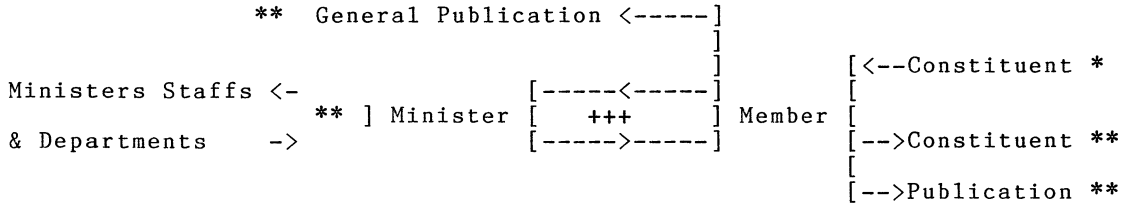
The consideration left to your Committee was whether that limited scope of absolute privilege should apply or whether qualified privilege was sufficient with some power existing to ensure that,

Members Correspondence

in cases such as that of Mr O'Connell, an action commenced against a Member would not, in itself, act as an inhibition of a Member in the performance of his duties.

Your Committee concluded that, on balance, absolute privilege should attach to communications between a Member and a Minister and vice versa. It also concluded that all other distributional circulation of such correspondence should be covered only by qualified privilege.

Schematically, your Committee considers that the following diagram illustrates the possible publications, in a technical sense, and the degree of privilege which would attach to each of them.



* No Privilege attaches nor should any
** Qualified privilege
+++ Your Committee recommends the attachment of ABSOLUTE privilege

Your Committee, therefore, recommends that the following steps should be taken with respect to correspondence between Members and Ministers of the executive government-

(1) the Parliamentary Papers and Proceedings Act, recommended elsewhere in this Report, should incorporate specific provisions making it clear that absolute privilege attaches to correspondence between Members of the Parliament and Ministers of the Crown relating to the responsibilities of

the Member as a Member of the Parliament;

(2) qualified privilege should attach to that correspondence whilst it is being processed by the Department, Instrumentality or Authority to which the Minister refers it;

(3) absolute privilege should apply to the reply of the Minister to the Member; and

(4) the provision of copies of this correspondence to the individual or group from whom the representations arose ahould, however, attract only qualified privilege.

Use of correspondence by Ministers (and Other Members) on the Floor of the House.

There have been several instances, over recent years, when Opposition Members of the Legislative Assembly have complained that Ministers of the Crown have used representations by Opposition Members to seek to inhibit or embarrass Opposition Members by instancing representations made by them on behalf of constituents. The essence of the complaint by these members is that the making of representations does not imply (and should not imply) endorsement by the Member, personally, of the contents of those representations.

On a number of occasions, the Member for Lane Cove (Mr Dowd) has sought to raise a question of privilege, under the present procedures for dealing with such complaints, to seek to have this practice stopped.

This subject was drawn to the attention of your Committee after one such instance. The complete analysis of what are perceived to be the problems and issues involved in this subject are set out in the Hansard of the Legislative Assembly of 10th November, 1983 at pages 2934 to 2940.

Members Correspondence

On the most recent occasion when this matter was raised on behalf of the Opposition, on the 17th April 1985, (Hansard pages 6196 to 6200) Mr Speaker made it clear that he was not prepared to take this matter further without a report from your Committee and its adoption, or otherwise, by the House.

The majority of your Committee, however, believes that the issues involved are those of ethics rather than privilege. In this view, the question of quotation from or adverting to Members' representations should be left to the individual judgment of Ministers or other Members who have knowledge of their contents.

The majority of your Committee, therefore, recommends that no action be taken with respect to this matter.

Several members of your Committee are mindful of the fact that such questions arise in the "rough and tumble" of debate in the Legislative Assembly, which is a Parliamentary Chamber noted for debate which is euphemistically described as "robust". These members, however, on balance, accept that there may be an inhibition on Members making representations on behalf of constituents - particularly when such representation does not involve the Member, personally, endorsing the contents of those representations - if Ministers (or any other Member into whose possession such representations might come) are able to freely quote from them on the floor of either House of the New South Wales Parliament.

Members Correspondence

These members of your Committee recognise that it is not politically practical to recommend an absolute prohibition on the use of such correspondence. However, by incorporating a prohibition on use of such correspondence in the Standing Orders of both Houses, it would require a conscious decision of the majority of either House to permit this to occur.

These members of your Committee have no doubt that an absolute prohibition on quotation of correspondence between Members and Ministers and the Ministers' replies would not be well received by Members who regard the right to rise on, for example, an adjournment or "grievance" debate, to complain about the inadequacy of a Ministerial response to be sacrosanct. These members concur in this view.

Therefore these members would recommend that a new Standing Order should be prepared by each House and presented to His Excellency for his concurrence in the following terms:

> "No Member shall quote from , or advert to the circumstances of, representations by any other Member of either House to a Minister except with the consent of such other Member."

A further Standing Order, in the alternative, stating:

> "No Member shall quote from, or name any person referred to in any representation made by any other member of either House to a Minister except with the consent of such other Member."

could be considered.

Either of these Standing Orders, in the view of those members who are in the minority on your Committee, would resolve this problem.

STANDING COMMITTEES OF PARLIAMENTARY PRIVILEGE?

The Value of a Privileges Committee

Whether or not the Parliament should determine to define its privileges by one means or another, it will need to consider as well whether a standing committee of privileges would be of value in the protection of the privileges of Members. Since 1856 both Houses have relied upon provisions in the standing orders that enable Members to rise in their places and raise matters of privilege that have suddenly arisen. Mr Speaker or Mr President is required to rule on whether a *prima facie* case of privilege has been established and the House as a whole is expected to enter a debate forthwith and make a deliberative decision without necessarily having the benefit of both sides of the case or supporting documentation.

Recent events in the Legislative Assembly have shown how unfair it is upon Mr Speaker to expect him to make rulings on incidents where privilege is claimed. Mr Speaker has not been able to contemplate the merits of the issues raised nor reflect carefully before issuing a ruling. As those rulings become part of the precedents of the House, it is important that they reflect the considered views of Mr Speaker rather than the best response he is able to give in the time available.

RECOMMENDATIONS FOR THE ESTABLISHMENT AND COMPOSITION OF PRIVILEGES COMMITTEES

Your Committee concludes that Standing Committees of Privilege of the Houses of the New South Wales Parliament should be established. To permit this to be implemented, your Committee recommends-

(1) each of the Houses of the New South Wales Parliament should resolve to establish separately, a Standing Committee upon Parliamentary Privilege;

(2) that no specific terms of reference should be included in such resolution, in each House, as such terms might limit the scope of the authority of such a Committee;

(3) that for joint sittings of the Houses of the Parliament or when a matter arising constitutes a contempt of the Parliament rather than of either of the Houses, the Committees should be empowered, by specific resolution, at that time, to sit as a single joint Committee;

(4) each House should invest its Standing Committee upon Parliamentary Privilege with the power to confer with the equivalent Committee of the other House;

(5) that the Committees should be of the same size and comprise seven members with four of those members being members who are supporters of the Government;

(6) that the Presiding Officers be specifically excluded from the membership of such Committee;

(7) that it be considered undesirable for Ministers to be appointed to such a Committee, but that they be eligible for membership;

(8) that a Minister should not be a Chairman of such a Committee;

(9) that the Clerks of both Houses be the Clerks to the respective Committees;

(10) that the three members of the Committee not being members supporting the Government should be nominated by the Leader of the largest minority party in that House; and

(11) the consideration of a report of such a Committee should take precedence over all other parliamentary business when it is presented to the House.

Role and Functions of Privileges Committees

During the deliberations of your Committee, considerable discussion took place with respect to the terms of paragraphs (5) and (10) of the above recommendation. A minority of your Committee believes that, in cases when the Legislative Council is not controlled by the Government, the majority party or grouping in the Legislative Council should have the majority on such a committee. The majority of your Committee, whose view prevailed, took the view that the government of the day was entitled to a majority on a committee of the Legislative Council even when that government did not have a majority in this House.

Method by which a Member should raise a matter of Privilege

Your Committee is of the view that the present methods of raising a grievance of a Member who believes that Privilege has been infringed is both too public and too immediate for a Presiding Officer to be able to give a considered response.

Therefore your Committee recommends that the Standing Orders of each House of the New South Wales Parliament should be amended to provide that a Member who considers that his privileges have been breached should lodge that complaint, in writing, to his Presiding Officer "as soon as practicable" after the alleged breach is drawn to the Member's attention.

In keeping with views expressed elsewhere in this report, your Committee recommends that such letter be clearly regarded as a "proceeding of the Parliament" and have absolute privilege attached to it.

When the Presiding Officer receives such a letter, Standing Orders

should provide that he be required to make a determination within three sitting days as to whether a prima facie case of a breach of Parliamentary Privilege has been made out.

Your Committee recommends that, when a prima facie case has been made out, the Presiding Officer shall respond in writing to the Member advising him of this; shall advise the House of his view and shall refer the matter to the Standing Committee upon Parliamentary Privilege which shall consider the matter and report to the House.

Your Committee recommends that when the Presiding Officer decides that no prima facie case has been established, the Member raising the matter shall be advised of this fact.

Your Committee is of the view that, in the vast majority of cases, these procedures will satisfactorily resolve potential problems. However, occasions may arise when a Member who has been advised that his Presiding Officer believes that no prima facie case has been established is still aggrieved by the alleged breach.
Your Committee recommends that, in such cases, that Member should still be able to raise the matter using the normal procedures of the House but that, in such cases, no precedence over other business of the House should be afforded to that Member.

Aspects of "Natural Justice" and "Due Process" before Privileges Committees

Your Committee notes that the final report of the Joint Select Committee Upon Parliamentary Privilege of the Commonwealth Parliament states, with respect to this aspect of its deliberations

that:

> "We therefore unreservedly support the view that the practices of the Privileges Committee should be reconstituted to meet basic requirements of natural justice. The case in support may be put in the terms of a question. If the question be asked - these days, can the proposition be sustained that a person may be gaoled or fined in a substantial sum yet have no opportunity to cross-examine or confront witnesses, to adduce evidence on his own behalf, or be represented by lawyers skilled in those matters - we think there can be only one answer."

Supporting this proposition, in the view of your Committee, leads to the conclusion that "natural justice" should be available to a person summonsed before a Privileges Committee who is in a position analagous to that of a defendant. Whilst the view might be taken that the Privileges Committee is itself not the "court" involved, its inquisitorial nature leads your Committee to recommend that certain "rights" are essential. These are:

(1) Public hearings with limited exceptions;

(2) the right to be silent with respect to matters that might prove self-incriminating;

(3) the right to be present throughout the hearings;

(4) the right to professional advice;

(5) the right to representation;

(6) the right to be heard in his own cause;

(7) the right to call witnesses;

(8) the right to cross-examine witnesses.

Legal Aid and "Costs"

Your Committee assumes that a "defendant" before a Privileges Committee would have access to legal aid under guidelines similar to those applying in criminal cases. Your Committee is of the view

that the question of "costs" might also need to be considered.

Your Committee recommends that a power be vested in a Privileges Committee to recommend to the House to which such Committee reports that an award of costs be made to a successful "defendant" before such a Privileges Committee.

"Right to Silence" under the Parliamentary Evidence Act

During consideration by your Committee of the provisions of the Parliamentary Evidence Act 1901, discussion took place with respect to the consequences under Section 11(1) of that Act of a witness refusing to answer any "lawful question" put to him.

Section 11(1) of the Parliamentary Evidence Act, currently reads:

> "If any witness refuses to answer any lawful question during his examination, he shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be."

Evidence was given to the Committee by the Chairman of the Parliamentary Select Committee into Prostitution of difficulties that had arisen relating to the scope of the concept of a "lawful question". It would appear that there exists a possibility of litigation arising out of this concept that should be eliminated by legislation to confirm the powers of Committees to question witnesses.

It was proposed to your Committee that the appropriate remedy would be to excise the concept of "lawfulness" with respect to a question

leaving it to the discretion of the Chairman of the interrogating committee, subject always to procedural remedies for members of the committee to dissent from the Chairman's rulings.

This, however, in the view of your Committee creates an undesirable breach of "natural justice" for witnesses who are appearing before any committee of either or both Houses of Parliament. Although to adopt this standard would merely reassert that which applies in the House of Commons (and which existed in the House of Commons as at 1856) it is an area with respect to which your Committee believes that a modification of those transmitted provisions is desirable.

Your Committee believes that there should automatically exist a "right to silence" for witnesses before any committee of the parliament with respect to answering what might generally be classed as "incriminating questions".

In general legal circumstances, a witness cannot be compelled to answer questions which are felt incriminating. The proposition that the Houses of the New South Wales Parliament constitute part of the succession to the "High Court of Parliament" from the era of Charles I and Oliver Cromwell is not universally accepted. For those who seek to assert that paramountcy and who adopt the view, as dealt with elsewhere in your Committee's report (and to which your Committee adheres) that the Houses of Parliament in New South Wales do have a judicial function with respect to the punishment of contempt of those Houses, it would be as well for those Houses to adopt the rules of "natural justice" and "due process" for themselves and their committees.

Some might suggest that an answer given under such compulsion,

which provides potentially incriminating material, should be excluded from any later probative value in any other tribunal requisition. To suggest that this provides an adequate remedy to difficulties of self-incrimination before a parliamentary committee is to ignore reality. Should a witness be compelled to provide incriminating material, the existence of that material or the confirmation it provides to previously held mere suspicion would undoubtedly act as a spur to the police or other investigative authorities to either initiate enquiries or provide greater vigour to existing lines of investigation. Indeed, although the evidence itself might have no probative value, it might well inadvertently reveal misdeeds not yet suspected by law enforcement authorities.

At the very least, witnesses before committees of the New South Wales Parliament should be provided with protection from self-incrimination relating to indictable offences. To this end, your Committee recommends that a proviso should be inserted into Section 11(1) which would state-

> "Provided that nothing in this section shall prevent any witness from refusing to answer any such question on the grounds that the witness believes that the answering of such question could tend to incriminate the witness with respect to an indictable offence."

Your Committee also believes that witnesses may be able to advance other logical reasons as to why they should not be compelled to answer a particular question.

Your Committee recommends that, additionally, a witness should be able to make, in camera, submissions to the Committee as to why that witness ought not be compelled to answer a certain question or questions.

RECALCITRANT WITNESSES

The Parliamentary Evidence Act 1901, deals with the power of a Parliamentary Committee to summons a witness to give evidence before it.

Your Committee is concerned that the provisions of the Act with respect to recalcitrant witnesses provide two different methods of dealing with such witnesses depending on the circumstances of their behaviour.

Section 11 of the Act deals with refusal to answer questions. Elsewhere in this Report, your Committee has recommended that a proviso be added to s 11 to permit a witness to refuse to answer incriminating questions.

The section provides that such a refusal constitutes a contempt of Parliament and that, immediately following the refusal to answer a question, such witness may be committed to gaol "for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be".

Sections 7 and 8, which deal with witnesses who are summonsed but who refuse to attend, are set out below:

> "7. If any witness so summoned fails to attend and give evidence in obedience to such notice or order, the President or the Speaker, as the case may be, upon being satisfied of the failure of such witness so to attend and that his non-attendance is without just cause or reasonable excuse, may certify such facts under his hand and seal to a Judge of the Supreme Court, according to the form in the Second Schedule hereto, or to the like effect.
>
> 8. Upon such certificate any Judge of the said Court shall issue his warrant in the form in the Third Schedule hereto, or to the like effect, for the apprehension of the person named in such certificate, for the purpose of bringing him before

the Council, Assembly, or Committee to give evidence."

Having dealt, philosophically, with the appropriate method of dealing with contempts of the Parliament, your Committee is of the view that the sections are inappropriate for the process of dealing with witnesses who are summonsed but refuse to attend to be referred to a Judge of the Supreme Court.

As your Committee is of the view that the appropriate method for dealing with matters which amount to contempts of the Parliament should be left to the Parliament both for reasons of accountability as well as propriety, your Committee considers that the "offences" under s 11 and ss 7 and 8 should be regarded as matters dealing with the privilege of the Parliament.

Therefore, your Committee recommends that the Parliamentary Evidence Act 1901 be amended to provide that-

(1) witnesses who are summonsed to give evidence before a parliamentary committee and who fail to do so without adequate excuse shall be reported forthwith, by the Chairman of the committee to the appropriate Presiding Officer who shall then refer the matter to the appropriate Privileges Committee; and

(2) any witness who refuses to answer a question, subject to exceptions in the proviso proposed to s 11, shall have that refusal reported to the appropriate Presiding Officer who shall refer the matter to the appropriate Privileges Committee.

PUNISHMENT AND CONTEMPT: WHO SHOULD ADJUDICATE?

Justice Michael Kirby perhaps best expressed the case in favour of leaving the powers to punish contempt with the Parliament when he conceded that the notion of using the courts was undoubtedly gaining in popularity:

> "But I must confess that it perhaps is my philosophy as a democrat rather than as a judge or law reformer that the High Court of Parliament is the supreme tribunal of a State and that it is for each Parliament to get its own system organized to provide redress without access to the courts."

Later his Honour observed with equal force why he was opposed to handing over the problems occasioned by privilege to the courts:

> "That is undesirable in constitutional theory, for it means that the courts become the guardians of the housekeeping of Parliament. That would be embarrassing to the courts and diminish all the authority, integrity and independence of the Parliament."

The Solicitor General raised fundamental doubts about the wisdom of giving this power to the courts because of its consequences for the separation of powers between the Legislature and the Judiciary:

> "It is inconsistent and inappropriate and it would be unfortunate to have the judiciary determining how Parliament should behave or what are the limits of its powers in this area."

Notwithstanding the criticisms of the House of Commons' penal power and whatever the claims about public opinion, the Select Committee on Parliamentary Privilege in 1967 recommended to the Commons that it preserve its penal power intact. The Committee brought down five rules for the guidance of the House in dealing with complaints of contemptuous conduct. They were:

> "(i) The House should exercise its penal jurisdiction (a) in

any event as sparingly as possible, and (b) only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its Officers from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions.

(ii) It follows from subparagraph (i) of this paragraph that the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its Committee.

(iii) In general, the power to commit for contempt should not be used as a deterrent against a person exercising a legal right, whether well-founded or not, to bring legal proceedings against a Member or an Officer.

(iv) In general, where a Member's complaint is of such a nature that if justified it could give rise to an action in the courts, whether or not the defendant would be able to rely on any defence available in the courts, it ought not to be the subject of a request to the House to invoke its penal powers. In particular, those powers should not, in general, be invoked in respect of statements alleged to be defamatory, whether or not a defence of justification, fair comment, etc., would lie.

(v) The general rules stated in subsections (iii) and (iv) of this paragraph should remain subject to the ultimate right of the House to exercise its penal powers where it is essential for the reasonable protection of Parliament as set out in subsection (i) of this paragraph. Accordingly, those powers could properly be exercised where remedies by way of action or defence at law are shown to be inadequate to give such reasonable protection, e.g., against improper obstruction or threat of improper obstruction of a Member in the performance of his Parliamentary functions." (Report from the Select Committee on Parliamentary Privilege pp xvi and xvii. House of Commons, Session 1966-67).

POWERS TO PUNISH CONTEMPT

Earlier, your Committee adopted the view that the New South Wales Parliament is invested with all the powers, privileges and immunities of the House of Commons as at 1856, including the penal jurisdiction to punish contempts, and while it is clear that the Houses have the power to imprison, admonish or reprimand, it is equally clear that there is no power to impose a fine.

It is noted that a majority of the Commonwealth Joint Select Committee on Parliamentary Privilege has observed that there is no power to impose a fine. This observation is included in its final report.

In a brief dissent to the recommendations of that Commonwealth committee, Senators Rae and Jessop opposed the suggestion of legislation to invest the Houses of the Commonwealth Parliament with a power to impose fines but that dissent, however, is on the basis that such legislation is unnecessary and that "the fact that the House of Commons has not exercised the power for many years does not mean that it is not a power adhering to the Australian Houses under s 49 of the Constitution. The Senate has asserted that it has the power to fine, and we believe this assertion to be correct".

The majority of the Commonwealth Committee, however, relying on discussion in the House in the Browne and Fitzpatrick Case of a decision of Lord Mansfield in 1762, have come to the conclusion that this power does not exist any longer in the House of Commons.

It would certainly not appear to have existed in the House of

Punishment of Contempt

Commons in 1856, the time of commencement of responsible government and the transmission of the then powers of the House of Commons to the then colonial legislature of New South Wales. Your Committee agrees that there is no doubt that the Houses of the New South Wales Parliament do not currently have the power to impose a financial penalty for punishment of contempts of the parliament.

Your Committee recommends that a power to fine be invested by statute to be used as an alternative to the power to imprison in appropriate cases.

EXPULSION BY THE PARLIAMENT OF ITS OWN MEMBERS

Having considered the question of the desirability of retaining a right to expel a Member as the ultimate sanction of a House to protect itself, your Committee recommends that this undoubted right be retained.

RIGHTS OF REPLY OF CITIZENS WHOSE REPUTATIONS HAVE BEEN DEALT WITH IN THE PARLIAMENT

While your Committee holds the view that nothing should be allowed to circumscribe the absolute freedom of speech a Member of Parliament enjoys in Parliament, nevertheless it is expected of Members of Parliament that they exercise this privilege prudently.

The former federal Leader of the National Party, the Rt Honourable J.D. Anthony contends that:

> "In these circumstances the House should consider whether it is the honest and reasonable belief of the accuser that his allegation is true;
>
> Secondly, whether all reasonable investigations have taken place before the accuser makes his allegations;
>
> Thirdly, whether there is an honest and reasonable belief that the allegations made were in the public interest; and
>
> Fourthly, whether the manner of communication chosen was one reasonably appropriate to the nature of the public interest involved."

It is acknowledged that in exercise of this privilege, Members of Parliament may from time to time libel a citizen.

Your Committee has considered whether a citizen, who considers himself so defamed, should have a privileged right of reply.

Your Committee considers this to be not practical, but draws attention to the remedies which are available to a citizen.

The former Clerk of the Senate, Mr J.R. Odgers, has set out step by step the lengths to which an aggrieved citizen can go if he is determined that a House of Parliament should hear his side of the case.

Right of Reply

It is set out in full because your Committee can see no practical objection to any aspect of it:

> "A difficult question is what to do about the abuse of the privilege of freedom of speech. I refer to the vilification of a citizen by a member of Parliament on the floor of Parliament. While a strong supporter of the principle of freedom of speech, I have never come to terms with the practice which allows a member of Parliament to say whatever he likes about a citizen but cannot make personal reflections on a fellow member of Parliament (excepting substantive motions). And that position is all the more odd when it is remembered that a fellow member of Parliament has the opportunity of reply and rebuttal - but not so the citizen.
>
> So a member of Parliament has protection against offensive words, personal reflections, etc., but not so the citizen. Is that altogether true? I do not think it is. I suggest that the procedures of Parliament already provide avenues for a maligned citizen to defend himself or herself. Let me explain that statement. Suppose, for example, that I considered myself unjustly attacked by a member of Parliament on the floor of the House. If I wished to reply, how would I go about it? First, I could see or write to the member who made the accusation, state my case and ask for a withdrawal or correction on the floor of the House. But what if the member refuses so to do? The next step would be to approach another member of Parliament and ask that member to raise the matter in the House and present my case.
>
> But, you may say, perhaps no member might take up my case, for whatever reason. So what would be the next step? I would prepare a petition to the House concerned, signed by myself and perhaps by others, stating the facts and praying the House to have my petition read and, if the circumstances warranted, praying that my petition be referred to the Privileges Committee for consideration, inquiry and report, at which inquiry I would pray to be called as a witness.
>
> I might even suggest to the member presenting my petition that he not only move for the petition to be read and referred to the Privileges Committee but also move that the petition be printed. I well know that one needs the numbers for motions, but not for the presentation of a petition (in the Senate).
>
> So what I am saying is that the procedures of Parliament already provide opportunities for the citizen to reply to charges made by a member of Parliament under privilege, and to seek redress, but perhaps such procedures are not generally known. If the procedures were once used and became known, I suggest that it may prove salutary with respect to any abuse of the principle of freedom of speech.

Right of Reply

But suppose no member would present my humble petition and therefore the further action suggested could not follow. What then? In that case I would write to the Presiding Officer setting out the facts and asking the Presiding Officer, as the guardian of the privileges of the House, to either present my petition or make a statement to the House.

If the latter course failed, I would release all the documents to the press and seek their help to assist a citizen in the presentation and redress of my grievance, pointing out that, although it is the privilege of any individual to petition Parliament to obtain redress of grievances, Parliament had denied me that historic privilege.

I like to think that my scenario would bring about second thoughts in the mind of a member contemplating any unfair charge against a citizen under the cloak of Parliamentary privilege.

Along the way, too, there could be an appeal to the Human Rights Commission.

So the citizen does enjoy some privileges; and it must never be forgotten that a member of Parliament is always subject to the discipline of his House for things said under Parliamentary privilege, even to censure or expulsion."

WORK TO BE DONE

Earlier in this Report, your Committee dealt with the problems of electronic broadcasting of the proceedings of parliament within the precincts of the parliament. Your Committee noted that the question of future broadcast, by the electronic media, of all or edited portions of the proceedings of the New South Wales Parliament needs to be considered.

Your Committee recommends that, as a first step towards permitting such broadcasting, a Select Committee of the Parliament examine this matter.

CONCLUSION

Your Committee, in this Report, has traversed the broad questions of the "undoubted powers, privileges and immunities" of the Parliament of New South Wales and issues of geography, mechanics and procedure associated with their expression and protection.

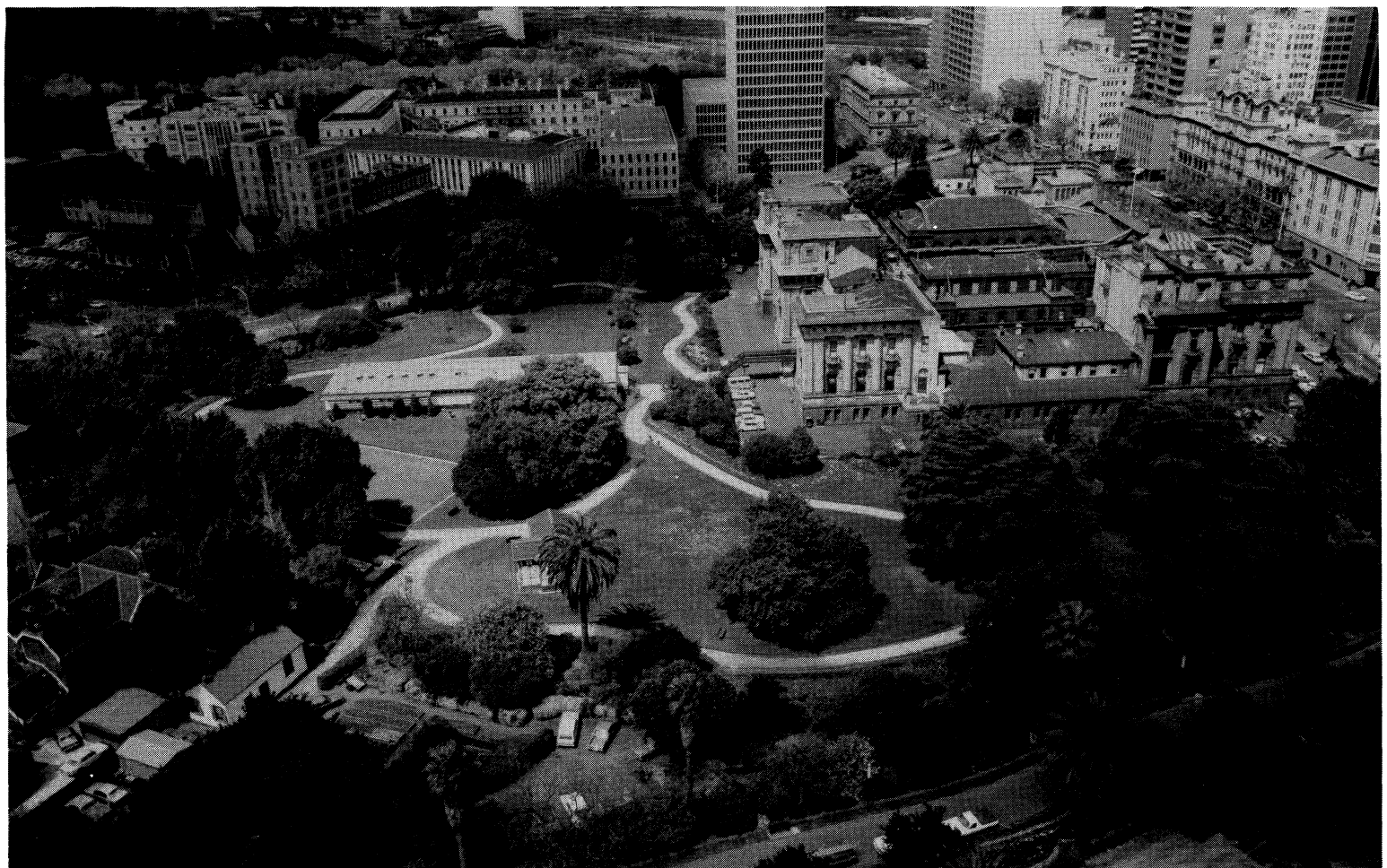
Your Committee has endeavoured to see the parliament as a living institution interacting with and responsible to the community it serves.

In finalising this Report, your Committee has endeavoured to propose recommendations which do not seek to further insulate your parliament from this community. Parliamentary privilege is a tool to permit Members to serve fearlessly those whom they represent and not to rule from a rarified and remote position alien to those community interests. Privilege exists to protect the community that Members represent.

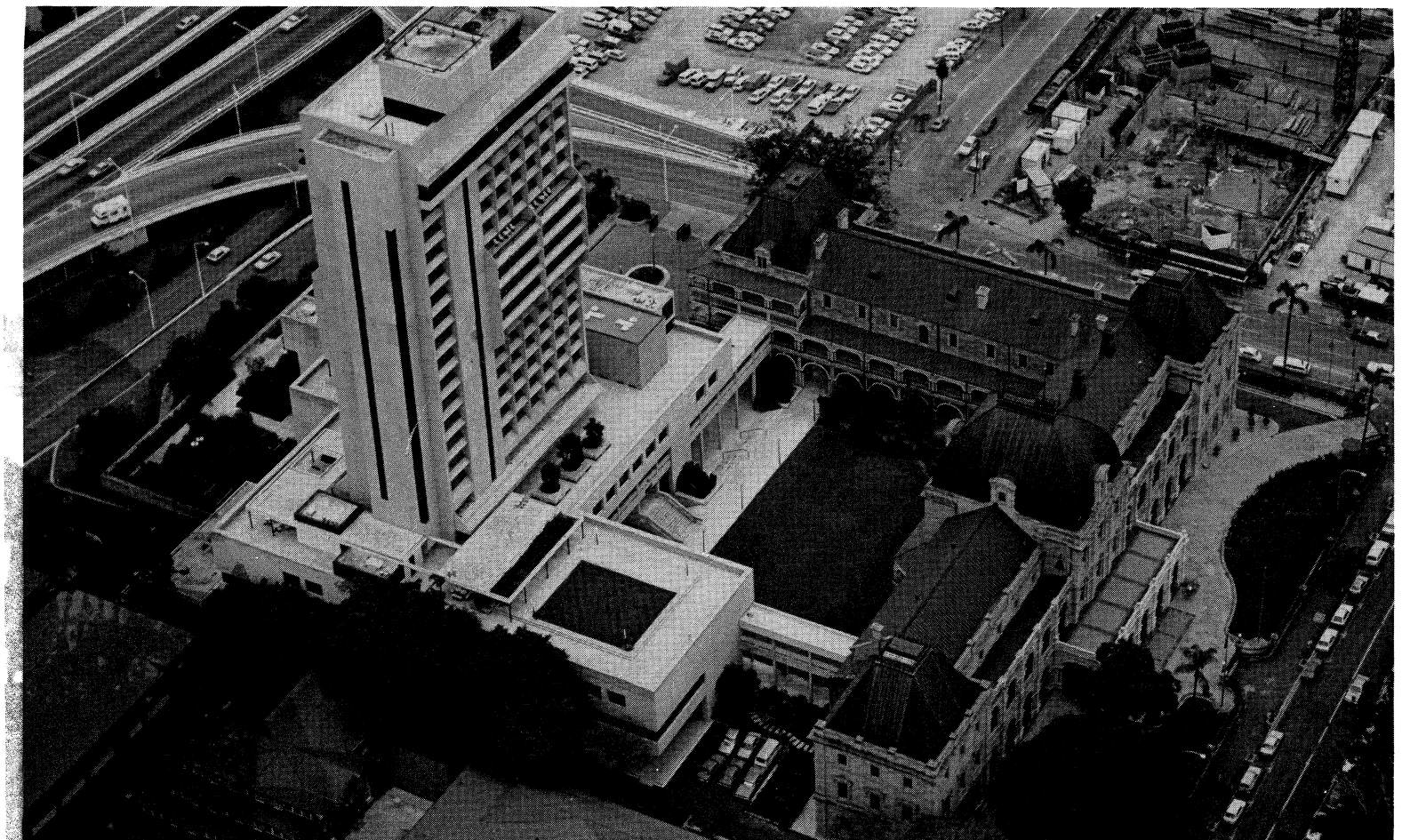
INDEX OF STATUTES

INDEX OF CASES

Parliament House, Tasmania, showing the drive, lawns and gardens fronting the Parliament.

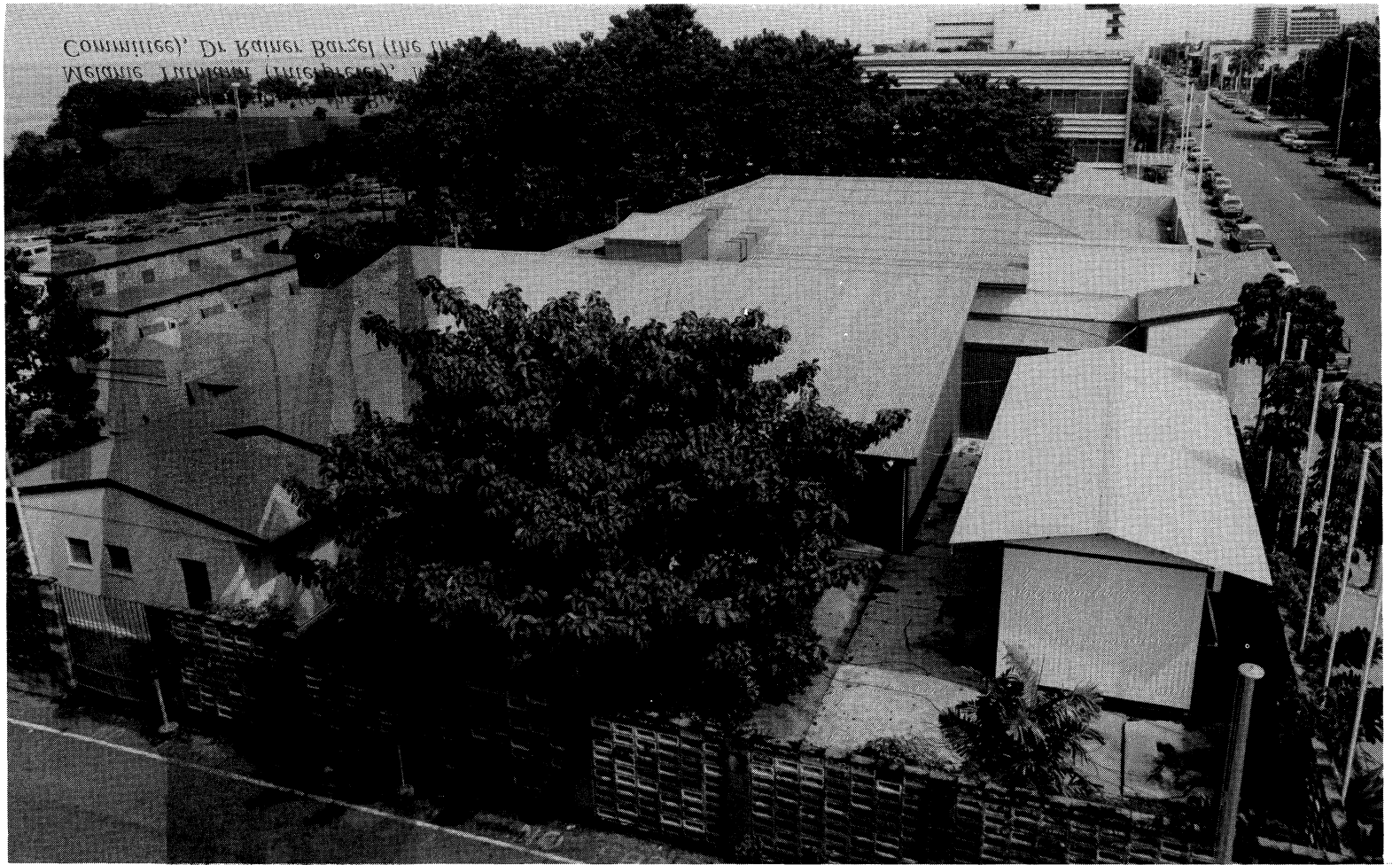


The incomplete Houses of Parliament in their five acres of gardens and lawns (Melbourne).



An aerial view of the precincts showing the original Parliament House, the Parliamentary Annexe and the car park obscured beneath the south-east freeway (Brisbane).

Latter-day Horatios defending the gates of the Parliamentary precincts (Sydney). Photograph by courtesy of John Fairfax and Sons.



An aerial view of the precincts showing the Chamber abutting the footpath and adjoining demountable buildings (Darwin).

Visit of the delegation to the Bundestag, Bundeshaus, Bonn, Federal Republic of Germany, 11 January, 1984. L to R: Frau Melanie Tutmann (Interpreter), Mr Grahame Cooksley (Clerk to Committee), Mr T. J. Moore, M.P. (Member of Committee), Dr Rainer Barzel (the then President of the Bundestag), Mr R. M. Cavalier, M.P. (Chairman), Dr Schwubbe (Chief of Protocol).

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

TUESDAY, 10 JANUARY, 1984

At Bundesrat, Bundeshaus, Bonn, West Germany, 11.00 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P., Chairman

Mr T.J. Moore, M.P. Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with the Director of the Bundesrat, Dr Ziller and Herr Albrecht Hassmann of the Bundesrat staff.

1. Dr Ziller stated that freedom of speech was the most important "privilege" of the Bundesrat. He emphasised, however, that a member of the Bundesrat enjoyed no protection concerning defamatory remarks he uttered in the plenary session. The record of debates was not authorised by the Director, and the printer and the editor enjoyed no immunity from a defamation action. Dr Ziller pointed out, however, that only the member of the Bundesrat would be liable for his remark under German law.

2. Dr Ziller also pointed out that members of the Bundesrat did not enjoy freedom from arrest or freedom from hindrance when attending upon the Bundesrat.

3. A Bundesrat member, however, has the right when summonsed as a witness, to be questioned in a court in Bonn for any action taking place anywhere in Germany.

4. Dr Ziller wished to emphasise, however, that in practice there was no inhibition on the freedom of speech in the Bundesrat, as the only topics that were discussed were of a governmental nature: private individuals were never the topic of debate.

5. Dr Ziller said that there were no normal question times in the Bundesrat. There had only been four or five question times since the establishment of the Bundesrat in 1949.

6. Dr Ziller stated that the committee meetings were not open to the public and that the records were confidential. Dr Ziller acknowledged that the confidentiality was difficult to protect.He said that penal provisions provided for the divulgence of confidential State secrets, but it was uncertain whether the provisions applied sufficiently to Bundesrat committees.

7. Dr Ziller pointed out that the immunity of the State (Land) Parliaments over-rode the confidentiality privileges of Bundesrat committees. Some Bundesrat members had breached the confidentiality of Bundesrat committees when speaking in the Landtags of various States and the Bavarian Landrat. But no "official" knowledge of this practice had been established. (Bundesrat members are members of the Länder Governments).

8. The record of the debates could be "editorialised". This did not take place, however, if the following member commented on a previous member's speech.

9. Dr Ziller pointed out that while the Bundestag has a police force, the Bundesrat does not. The President was responsible for the security of the Bundesrat and if he were absent the Director (i.e. Clerk) assumed the responsibility. The Bundesrat does not enjoy the police powers of the Bundestag and if a police presence is required the state police of North-Rhine/Westphalia must be invited. The federal police (Grenzschutz) protect the parliamentary buildings (Bundeshaus).

10. Dr Ziller pointed out that the North-Rhine/Westphalia police always maintained a presence in a police car outside the Bundesrat buildings.

11. Dr Ziller said that the hours of the Bundesrat plenary sessions were from 9.30 a.m. in the morning to about 2.00 to 3.00 p.m. in the afternoon. Plenary sessions took place on Fridays only. There were several commissions or committees in the Bundesrat and the chairman's decision was final as to the day and hour of sitting. Sittings of commissions were held only in daytime.

12. Dr Ziller pointed out the Bundeshaus was divided into two wings, one for the Bundesrat and the other for the Bundestag. He mentioned that the Bundeshaus prior to 1948 had been a technical university.

13. Dr Ziller pointed out that delegates from the states to the Bundesrat can be regular or substitute members. Each state has a certain number of votes, depending on its population. The votes must be given unanimously in a block.

14. Dr Ziller stated that provision was made for security on the floor of the Bundesrat when in session. Attendants were strategically placed and policemen in plain clothes were situated in the public galleries. The policemen were allowed to wear pistols in the Bundesrat upon the decision of either the President or the Director as to whether the bearing of arms was necessary. The President or the Director always followed the advice of the police in this regard.

15. Journalists have ready access to the Bundesrat. Journalists of the "electronic" media can wander throughout the buiding: they were not allowed on the floor of the Bundesrat (as opposed to the Bundestag). "Print" journalists, however, take pictures in the chamber of the Bundesrat during sessions. Plenary sessions are televised.

16. Members of Parliament, it is felt, do not enjoy the privacy rights of the ordinary German citizen. It is the convention in Germany that the right of public interest is paramount. This has heavily influenced the attitude of both the Bundesrat and the Bundestag to the presence and function of the press in the Bundeshaus.

17. The President is a member of the Bundesrat. A tradition has evolved that the President be a Premier of a state. The President is not partisan. As President of the Bundesrat he deputises for the President of the Federal Republic of Germany when the latter is absent.

18. Dr Ziller said that he wished to emphasise that members of the Bundesrat, according to the Basic Law, are permitted to speak in the Bundestag at any time, a privilege which is not granted to the members of the Bundestag in the Bundesrat. In addition to this, the Federal Executive is required to keep the Bundesrat constantly informed on the state of government affairs. Two different benches in the Bundestag are set aside for the members of the Federal Cabinet and members of the Bundesrat. The benches are of the same height to emphasise the importance of the Bundesrat in the Federal parliamentary system.

19. Dr Ziller presented a discursive outline of the position of the Bundesrat in the government of the Federal Republic of Germany.

The Basic Law provides that the Bundesrat must, in certain specific cases, have consented to laws passed by the Bundestag, before they can be enacted.

These include:

- laws amending the Constitution (a two-thirds majority is required),
- laws concerning the rights of the Länder (States) with regard to fiscal matters and taxation,
- laws affecting the rights and interests of the Länder in the course of the administration of federal laws.

The rejection of such laws by the Bundesrat cannot be overruled by the Bundestag.

In the remaining cases - that is those for which Bundesrat approval is not mandatory - the Bundesrat has the right of objection, though this can be overruled by the Bundestag. If Bundesrat and Bundestag cannot reach agreement, a mediation committee composed of members of both chambers must be convened, and this, in most cases, is able to work out a compromise.

In addition, the Bundesrat has also a "legislative initiative". It can itself prepare bills and submit them to the Bundestag, in the course of which process the Federal Government has to state its own views. The further treatment of such bills is precisely the same as that accorded bills entered by the Federal Government or the Bundestag.

Most ordinances and regulations introduced by the Federal Government are subject to the consent of the Bundesrat. This is one of its main fields of activity.

As mentioned above, the Bundesrat must be kept informed by the Federal Government of the conduct of government affairs. This obligation, imposed by Article 53 of the Basic Law, is of particular significance for the co-operation of the Bundesrat in federal legislation and administration. Accordingly, the Rules of Procedure of the Bundesrat give every Land the possibility to address questions to the Federal Government. These questions are not limited to points on the agenda of the current session but can also relate to other matters. This right of information assumes special importance in the Bundesrat Foreign Affairs and Defence Committees.

The Bundesrat meets every two to three weeks.

The Länder representatives sit side by side in eleven rows of seats arranged alphabetically according to Land. From the Speaker's rostrum views are expressed on the various items on the agenda, with each Land giving its reasons for accepting or rejecting a bill, or wishing it to be amended. The members of the Federal Government, who have the right, and at the request of

the Bundesrat also the obligation, to participate in sessions, sit to the right and left of the Bundesrat President: the Government bench is usually occupied by federal ministers, who follow their bills and explain points under discussion.

In the Bundesrat each Land has 3, 4 or 5 votes according to the size of its population. At present the Bundesrat has 45 members.

Sessions of the Bundesrat are, on principle, public, so the press and any person can follow the course of Bundesrat debates. Sessions can be recorded and relayed by radio and television. In every case a transcript is made of plenary sessions and verbatim reports are published. In addition, all debates are published in the annual Index of Subjects and Speakers.

Only members of a Land government with a seat and vote can be members of the Bundesrat.

The Länder governments usually send their Premiers and other Cabinet members corresponding to their number of votes. Every member has a corresponding alternate member. Most are heads of ministries, which means that the Bundesrat can benefit from their specialised knowledge and technical experience, but also that the membership of the Bundesrat can vary through a change of Land government or of its members, or through their retirement or election to the Bundestag. It is an unwritten law of the Constitution that simultaneous membership of the Bundestag and Bundesrat is not permissible.

The votes of each Land may only be cast as a bloc and only by members, or their alternates, who are actually present. Coalition governments must, therefore, agree on a common approach in the Bundesrat. The presence of but one Bundesrat member is sufficient, however, for the entire voting strength of his Land to carry weight, for he can cast all its votes. The members of the Bundesrat are bound by decisions of their Land government.

20. Dr Ziller mentioned the operation of the Bannmeile in German parliamentary life. The Bannmeile are restricted areas surrounding the Bundeshaus, the Federal Constitutional Court in Karlsruhe and the various parliaments of the states. Within the Bannmeile public outdoor gatherings, processions and demonstrations are banned. The Federal Interior Minister, in conjunction with the Presidents of the Bundestag and Bundesrat, may allow demonstrations within the Bannmeile surrounding the Bundeshaus.

Dr Ziller said that the protection of the parliament through a Bannmeile was first decided by the Frankfurt National Assembly in October, 1848 and became a tradition of subsequent German parliaments. The reason for this tradition is to keep mob rule from parliament and to preserve the independence of parliament.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

TUESDAY, 10 JANUARY, 1984

At the Office of the Representative of the State of Baden-Württemberg, Bonn, West Germany, 3.00 p.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Minister Anne-Marie Griesinger, representative of the State of Baden-Württemberg in Bonn and with Dr Zahn, Director of the office.

Dr Zahn informed the Committee that each state has a permanent representative (plenipotentiary) in Bonn. Their task is to bring the interests of the Länder to bear not only in the two legislative bodies but also within the Federal Government, and to keep the Land Government informed about all important parliamentary proceedings and about Federal Government business. These plenipotentiaries have access to all sittings of the Bundestag and its committees. As a rule, they attend meetings of their respective Cabinets so as to keep the members up to date on the situation in regard to legislative operations and other matters affecting the Länder Governments, that are dealt with by the federal ministries.

1. Dr Zahn stated that written constitutions operated in both the Federal Republic and the states.

2. Dr Zahn said that Baden-Württemberg was created in 1806 by Napoleon and existed as a Grand Duchy until 1918. In 1918 the former Grand Duchy was divided into two republics within the German Reich. This arrangement continued until 1945 when both republics were occupied by the western allied powers.

3. Under the Basic Law of the Federal Republic of Germany, which was established in 1949, a referendum was held in the two former republics in 1952. Baden-Württemberg was re-created in 1952 in its present composition. The Constitution of Baden-Württemberg came into force on the 19th November, 1953 and is still current. It is the latest and the last Constitution of the Federal states.

4. Dr Zahn said that the Basic Law of the Federal Republic of Germany incorporates many traditional elements of constitutional law modelled upon those of the United States, England and France. These traditional elements were reflected in the Constitution of the States.

5. The Delegation proceeded to consider immunities of deputies in the State Parliament of Baden-Württemberg. Dr Zahn pointed out that under the law of Baden-Württemberg "indemnity" refers to the freedom from prosecution of a member after he has cast his vote in the parliament. This indemnity lasts for the lifetime of the member, that is, even after he has ceased to be a member of parliament.

Dr Zahn said that a separate concept, that of "immunity", referred to the fact that a member could not be prosecuted without the consent of Parliament. This was Article 46 of the Federal Constitution and Article 38 of the Constitution of Baden-Württemberg.

6. Dr Zahn pointed out an important difference, however, between the operation of the identical Articles in both Constitutions.

Article 46 (Indemnity and Immunity of Deputies) applies as follows:

(i) A deputy may not at any time be prosecuted in the courts or subjected to disciplinary action or otherwise called to account outside the Bundestag for a vote cast or a statement made by him in the Bundestag or any of its committees. This shall not apply to defamatory insults.

Dr Zahn said that the last provision "this shall not apply to defamatory insults" was not part of Article 38, the Constitution of Baden-Württemberg. The reason for the continuing application of Article 38 to defamatory insults results from the "temperamental" nature of the Parliament of Baden-Württemberg. (The Chairman was tempted to draw a comparison between that Parliament and the Parliament of New South Wales.)

7. Dr Zahn noted that the provision for the restriction on "defamatory insults" had never been raised in the Bundestag. Harsh words had often been exchanged but no complaint had been lodged.

8. Mr Moore was informed that all members of the Bundestag and the Landtag of Baden-Württemberg had to wear identity cards. Dr Zahn pointed out that some members believed their membership of either the Bundestag or the Landtag gave them a right of absolute, unfettered and unrestricted entry to the chambers and precincts of parliament. Some members of the "Green" Party had attempted to ride bicycles into the chamber of the Bundestag.

9. The Chairman was informed that deputies had the right to refuse to give evidence. This was contained in Article 47 of the Basic Law of the Federal Republic of Germany and in Article 39 of the law of Baden-Württemberg.

Article 47 (Right of deputies to refuse to give evidence) follows:

> Deputies may refuse to give evidence concerning persons who have confided facts to them in their capacity as deputies, or to whom they have confided facts in such capacity, as well as concerning these facts themselves. To the extent that this right to refuse to give evidence exists, no seizure of documents shall be permissible.

10. Mr Moore was informed that members of the Parliament of the Federal Republic of Germany cannot take guns into the Bundestag. Such a procedure would be an offence against gun laws. The deputies, however, were never checked for weapons. Dr Zahn pointed out that such a tradition also existed in the Parliament of Baden-Württemberg.

11. Mr Moore was informed that there was an unwritten code for the standards of dress: there were no rules of procedure. Controversy had arisen since the arrival of the "Green" Party in the Bundestag, as several members of that party regarded conventional standards of dress an impingement upon the freedom of members.

12. Dr Zahn said that the press gallery operated in much the same manner in the Bundestag and the Landtag of Baden-Württemberg. He stated that the Federal Press Office gave licences to German and foreign correspondents. German correspondents belonged to the German Press Union and foreign correspondents belonged to the Foreign Correspondents Union. It was necessary to belong to either union to get cards of accreditaction. Thus the procedure involved first getting a card from the respective union and then getting a licence. There was no discrimination against either foreign or German correspondents: if accreditation were refused it could only be refused on the giving of specific reasons.

13. The Chairman was informed that the proceedings of the Landtag of Baden-Württemberg were filmed by television crews.

Dr Zahn stated that a valued privilege of the states was that the state representatives in the Bundesrat (both delegates and state officials) had the right of access to all committee meetings and meetings of the Bundestag. Prior access and arrangement had to be made, however, in the interests of orderly procedure. Dr Zahn pointed out that this right arose from Article 43 (2) (Presence of the Federal Government) of the Basic Law of the Federal Republic of Germany:

(2) The members of the Bundersrat or of the Federal Government as well as persons commissioned by them shall have access to all meetings of the Bundestag and its committees. They must be heard at any time.

14. Dr Zahn pointed out that the Premier of Baden-Württemberg, Herr Lothar Spath, had appeared twice before the Bundestag in the last year of his own volition.

15. Mr Moore was informed that since the advent of the Red Army Fraction (RAF) strict security had prevailed in the Landtag of Baden-Württemberg. Before terrorism had become a problem in the Federal Republic of Germany, security was not a subject of great interest. No provision was made in the Constitution of Baden-Württemberg for matters of security.

16. Dr Zahn pointed out the operation of the Bannmeile surrounding the Parliament of Baden-Württemberg. The entrance to the Parliament was strictly guarded and identification was absolutely essential in order to gain access. Dr Zahn pointed out the strict security controls operating at the Haus of Baden-Württembert in Bonn. He further emphasised that the members of the Parliament of Baden-Württemberg needed identification: this was not always asked for if the member was well known.

17. The Chairman was informed that the Parliament of Baden-Württemberg had 120 members. Baden-Württemberg had a population of 9.2 million and an area of 35,751 square kilometres. Mr Moore was informed that the Haus of Baden-Württemberg in Bonn did not enjoy the protection of the special guards employed at the Landtag in Stuttgart, the Land Capital.

18. The Chairman was informed that T.V. camera crews had the right to film plenary sessions of the Landtag of Baden-Württemberg at any time and from any aspect and any angle. The floor of the Chamber was open to camera crews. No editing of the television film was exercised by the Landtag.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

WEDNESDAY, 11 JANUARY, 1984

At Bundestag, Bundeshaus, Bonn, West Germany, 10.00 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P., Chairman

Mr T.J. Moore, M.P., Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation was met by Dr Schwübbe, Chief of Protocol. The Delegation then met with the President of the Bundestag,Dr Rainer Barzel. Talks followed with the Parliamentary Secretaries of the three main parties in the Bundestag: Dr Wolfgang Schauble (CDU/CSU); Herr Helmuth Becker (SPD); and Herr Torsten Wolfgramm (FDP).

The Secretaries are members of the Bundestag Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure. They are also members of the Council of Elders. This Council assists the President of the Bundestag in conducting parliamentary business. It is a body consisting of the President, as Chairman, and his Vice-Presidents, as well as another twenty-three members appointed by the parliamentary groups in proportion to their strengths.

The name of this body, however, is mainly symbolical: its members are not necessarily either the oldest or the longest-serving Members of the Bundestag. They are, however, particularly experienced parliamentarians, especially the Parliamentary Secretaries (whose function is similar to that of the "whips").

1. The Council of Elders performs, besides a number of administrative responsibilities, three important functions. It draws up the Bundestag's work programme and, even more importantly, the agenda for the plenary meetings. Settling the question of which subject is to be discussed; when; and at what length often means taking a preliminary political decision of great importance. Sometimes the plenary assembly itself has to decide on the agenda because unanimity is required for the decisions of the Council of Elders.

2. This also applies to its second important function, namely the working out of an understanding among the parliamenary groups on the distribution, at the beginning of each legislative term, of committee chairmanships and vice-chairmanships. This is effected in accordance with the principles of proportional representation and the relative strengths of the parliamentary groups - not an easy undertaking because these posts are often associated with considerable political influence.

3. The third major function consists in discussing, and, where possible, amicably settling points at issue with regard to the dignity and rights of the House or the interpretation of the Rules of Procedure.

The Council of Elders does not have the power to replace the plenary assembly as the final authority; it is a kind of steering committee which relieves the plenary assembly of many time-consuming formal decisions. At the same time, it serves as an effective channel of communication among the parliamentary groups and between them and the President of the Bundestag.

* * * * * *

Talks then continued with the Director of Bundestag, Dr Helmut Schellknecht and members of the Bundestag administration.

1. The Chairman enquired as to the status of the members of the Bundestag administration: were they employees of the Bundestag or employees of the Executive Government? The Chairman was informed that the employees are civil servants of the Bundestag: they are covered by special laws. Generally they are under the same rules as all civil servants. They are appointed by the President of the Bundestag: they enjoy the same titles and salaries as other civil servants in the Executive Government.

2. The Chairman then enquired whether it were possible for an employee to change from the administration of the Bundestag to the ministries within the Executive Government. He was informed that service within the Bundestag administration is generally seen as a life-time career.

3. Mr Moore was informed that the primary role of an employee in the Bundestag administration concerns advising the President and members of the Presidency upon procedure.

The President and his deputies form the Presidency. The Presidents and Vice-Presidents are elected for the duration of the legislative term. It is left to each Bundestag to determine the number of Vice-Presidents it wishes to elect. All Vice-Presidents are equal in rank and there is no such thing as a first or second Vice-President, although, as a rule, they deputise for the Pesident of the Bundestag according to their seniority. The Vice-Presidents are ex-officio members of both the Council of Elders and the Committee for the Internal Affairs of the Bundestag.

The employees of the administration also advise the Chairman and members of the various committees. They further advise as to the content of committee business.

The administration staff numbers approximately 650 people, although only a small part of this staff comprises procedural experts. Some of the procedural staff advise parliament directly while others are involved in administrative work.

4. The Chairman was advised that the function of the Directors (Clerks) is primarily supervisory. The main sphere of their work is directed towards the plenary sessions of the Bundestag. They oversee the legal preparation of the bills and Hansard. Hansard comprises 27 members.

The Directors have the further supervision of the parliamentary secretariat which deals with motions from members of the Bundestag and questions on notice. They are further responsible for the staffing of the various committees. They are responsible for conferences between members of the Bundestag and the various German Länder and for relations with the Common Market, the International Parliamentary Union and various bilateral parliamentary groups. They are also responsible for the Protocol Division of the Bundestag.

5. Mr Moore was advised that the press section of the Bundestag administration advises the President and the Presidency on its relations with the press.

6. The Chairman was advised that the committee meetings of the Bundestag are generally not public although they can be public if expert advice is being given.

7. Mention was made of the scientific and economic expertise available to members of the Bundestag committees. Any member of the Bundestag can get advice in all disciplines from the economic and scientific section of the Bundestag administration. This section has been enlarged considerably over the last twelve years.

8. Mr Moore was advised the the Personnel and Building Section was responsible for looking after the Bundeshaus. The Bundeshaus comprised 53 buildings.

9. Mr Moore was informed that the Bundestag itself must observe the rules and laws it passes. For instance, the Bundestag would have to obey the police if they had to evacuate the Bundeshaus because of safety laws. The Federal Assembly, in fact, had to meet in the Beethoven Hall rather than in the Bundeshaus because of safety restrictions.

10. The Chairman enquired as to action resulting from the hypothetical situation of a member of the Bundestag insulting a citizen on the floor of the House. He wished to know what would happen if the citizen filed a writ.

The Chairman was informed that the immunity provisions would arise. A motion from the Prosecutors or the court would be sent to the Immunity Committee of the Bundestag. The court has preliminary examination of the motion and then refers the motion to the Committee. The member of the Bundestag can also ask the Parliamentary Secretariat of the Bundestag Administration for advice.

11. The Chairman was informed that members of the Bundestag rely on the advice of the Parliamentary staff. There was no common law concerning immunity. It was important, furthermore, to distinguish between immunity in civil and criminal actions. If immunity was sought in civil cases, the ensuing publicity was generally bad. The Chairman was referred to the principles relating to immunities and cases of permission granted under Section 50 (3) of the Code of Criminal Procedure, and authorisations under Section 197 of the Penal Code. (See Annexure "A".)

12. Mr Moore was informed that there is no special collection of procedural rules such as May or Pettifer. The advice given by the Parliamentary Secretariat was based on the official experience. It was, therefore, given with reservations. One of the reasons, it was advanced, that a collection such as May did not exist was the influence of the German Civil Code system as opposed to that of the Common Law.

There is, however, a very comprehensive factual book on the statistics and data of the Bundestag: Data Handbook of the History of the German Bundestag, 1949-1982.

13. The Chairman was informed that in the last few parliamentary periods there had been a diminution in the importance of the privilege of immunity. This may have resulted from a change in proceedings concerning immunity. The main emphasis seemed now to be on political insults and the allowing of demonstrations within the Bannmeile zone.

14. It was pointed out that the Bundestag decides by resolution for the duration of each parliamentary period what the operation of the privilege of immunity would be. (See the translation of the Clerk at the end of Annexure "A" of the decision of the German Bundestag of 16 March, 1973, relating to the lifting of the immunity of members of the Bundestag).

15. A private citizen may be a witness before a Committee of Enquiry of the Bundestag. Mr Moore was informed that there was no legal basis for a private citizen appearing before a Committee of Enquiry, as a witness, although an article of the Federal Constitution provided that the collecting of evidence before committees would follow the same procedure as that of courts. Mr Moore was then informed that the situation of legal representation before committees was not clear.

16. Mr Moore was informed that there was no provision for cross-examination in the German code. Chairmen of Committees, however, allowed questions.

17. Mr Moore then enquired as to the punishment of uncooperative witnesses before committees. Mr Moore was informed that committees enjoyed quasi-legal powers: they could order witnesses to appear by subpoena. The subpoena would be served by the police and not by the committee. Committees are empowered to take evidence on oath.

Mr Moore then enquired as to the punishment of a recalcitrant witness. He was informed that a committee would refer a recalcitrant witness to a court by means of a written process. Only committees of investigation have the power to call for papers and people. Mr Moore was informed of the provision whereby a minimum of 25% of the membership of the Bundestag can call for the establishment of such a committee to investigate a given topic.

18. The Chairman was informed that neither the President nor the Presidency can establish a committee of its own volition. Committees of investigation are established in order to attempt a legal basis for investigation which it is hoped, will reduce the attendant political aspect. Neither witnesses nor the accused can be a member of the committee. The Chairman was informed, however, of a recent much-criticised Bavarian case (1983) wherein a member of the investigating committee was not only a witness and the accused but also a judge in his own cause.

19. The Committee of Defence, moreover, is not obliged to report its findings to the Bundestag.

20. Mr Moore then enquired whether there was provision for the presentation of petitions from citizens to the Bundestag. Mr Moore was informed of the existence of the powerful Petitions Committee. A special law had been passed to strengthen this Committee. It can call for witnesses, papers and make visits of inspection.

21. Mr Moore asked whether the returns of the petitions were recorded in the record of the debates. He was informed that they were printed only in the Committee report: it was very rare for a petition to be discussed in a Bundestag sitting.

22. Mr Moore enquired whether a private citizen could petition concerning the remarks of a member in the Bundestag. Mr Moore was informed that in theory this could be done but in practice it would be inhibited by the indemnity provisions: furthermore, petitions were not published.

23. Mr Moore was informed that a member of the Bundestag could only raise a claim of intimidation in the courts. There was no special criminal offence for attempting to intimidate a member in the course of his duty. It is only when the Bundestag, as such, is threatened that action can be taken.

24. Mr Moore then enquired what would the reaction be if a citizen claimed that members were habitually drunk in the Bundestag. He was informed that a member of the "Green" Party had made a similar observation. The Bundestag had not felt threatened by the observation which was dealt with by the Council of Elders. The claimant presented a substantially revised version of his story when he met with the Council of Elders. It was pointed out that a real insult against the Bundestag was punishable by law. Mr Moore was informed that one always had to assess the political reality of pursuing a remedy in court: prosecution often led to adverse publicity. Mr Moore was informed that the Council of Elders could take no legal steps to censure the member of the "Green" Party: the mere request for a member's attendance before the Council of Elders, however, is regarded as a salutary admonition.

25. Mr Moore was informed that a member of the Bundestag who wishes to refer an incident to the Council of Elders has an automatic right so to do. He must, however, go through the President or through a member of the Council of Elders, of his Party.

26. Mr Moore enquired as to the outcome of an insulting remark about the Bundestag by a member of a state parliament in the state parliament. Mr Moore was informed that such a matter had never arisen: one could not predict the outcome with certainty.

27. The Chairman enquired as to the legal status of a member of the Bundestag with regard to his privileges.

The Chairman was referred to Articles 46, 47 and 48 of the Basic Law of the Federal Republic of Germany. These Articles provide:

Article 46 (Indemnity and immunity of deputies)

(1) A deputy may not at any time be prosecuted in the courts or subjected to disciplinary action or otherwise called to account outside the Bundestag for a vote cast or a statement made by him in the Bundestag or any of its committees. This shall not apply to defamatory insults.

(2) A deputy may not be called to account or arrested for a punishable offence except by permission of the Bundestag, unless he is apprehended in the commission of the offence or in the course of the following day.

(3) The permission of the Bundestag shall also be necessary for any other restriction of the personal liberty of a deputy or for the initiation of proceedings against a deputy under Article 18.

(4) Any criminal proceedings or any proceedings under Article 18 against a deputy, any detention or any other restriction of his personal liberty shall be suspended upon the request of the Bundestag.

Article 47 (Right of deputies to refuse to give evidence)

Deputies may refuse to give evidence concerning persons who have confided facts to them in their capacity as deputies, or to whom they have confided facts in such capacity, as well as concerning these facts themselves. To the extent that this right to refuse to give evidence exists, no seizure of documents shall be permissible.

Article 48 (Entitlements of deputies)

(1) Any candidate for election to the Bundestag shall be entitled to the leave necessary for his election campaign.

(2) No one may be prevented from accepting and exercising the office of deputy. He may not be given notice of dismissal nor dismissed from employment on this ground.

(3) Deputies shall be entitled to a remuneration adequate to ensure their independence. They shall be entitled to the free use of all state-owned means of transport. Details shall be regulated by a federal law.

28. The Chairman was informed that a member of the Bundestag is not solely the representative of his constituency nor is he the deputy of his political party but a representative of the whole people.

He is not bound by orders and instructions, but is subject only to his own conscience.

In order to secure the efficient working of Parliament - not as a personal privilege - the deputy is granted *immunity* through the Basic Law. This means that he may be called to account and be arrested for a punishable offence only with the permission of the Bundestag, unless he is apprehended while committing the offence or in the course of the following day. The permission of the Bundestag is also required in respect of any other restriction of the personal liberty of a deputy.

Beyond this there is what is termed *indemnity*. This right means that the deputy may at no time be subjected to court or disciplinary action, or otherwise called to account outside the Bundestag, on account of a vote cast or a statement made by him in the Bundestag of any of its committees, with the exception of defamatory insults.

Another important point is the right granted to a deputy to refuse to give evidence. He is entitled to refuse to give evidence concerning persons who have confided facts to him in his capacity as deputy, or to whom he has entrusted facts in this capacity, as well as concerning those facts themselves.

In order to guarantee the independence of the deputy, the Basic Law lays down that he is entitled to adequate remuneration. This ruling must be considered in the light of the fact that a deputy hardly has the time necessary to follow a regular profession. For that reason, every deputy received a monthly allowance of DM 2,970, as well as daily expenses and travel allowances. He is also entitled to use all State-owned transport free of charge.

Deputies and their Professions: Apart from their mandate, deputies can retain their professions. This is hardly possible, however, with the normal work-load of a deputy. Civil servants and soldiers who become deputies in the Bundestag must go into retirement for the period of their Parliamentary service because of the principle of the division of authority, according to a legal ruling.

29. The Chairman further enquired as to the privileges and powers of the committees of the Bundestag.

The Chairman was informed that there are twenty committees in the Bundestag: the committees carry out a major part of the work done by the Bundestag. As a rule, the committees correspond to the field of activity of the federal ministries. In addition there are a number of sub-committees to deal with specific and important spheres of activity. Exceptions are: the Committee for the Scrutiny of Elections, Immunity and the Rules of Procedure ; the Petitions Committee; and the Budget Committee. The committees have the right to summon and put questions to representatives of the Federal Government. Their meetings are not open to the public; by a majority it can be decided, however, to admit the public. Furthermore, public hearings are held in which questions are put to experts and representatives of interest groups.

The Bundestag may set up *committees of investigation* in order to clarify the factual background of events which give rise to major political controversy; in such cases evidence is usually given in a meeting open to the public.

Committees of inquiry, which also include persons who are not members of the Bundestag, are set up in order to prepare reports on wide ranging and important issues.

30. The Chairman then enquired as to the functioning of the Petitions Committee. He was informed that the right of petition is enshrined in Article 17 of the Basic Law. The Petitions Committee of the Bundestag prepares reports, together with a recommendation in each individual case, on requests and complaints addressed to it, which are submitted to the Plenary Assembly of the Bundestag for its decision.

As regards complaints, the Petitions Committee is empowered itself to clarify the factual situation. The Federal Government, the authorities subordinate to it and the corporations, institutions and foundations incorporated under public law and subject to its supervision are obliged, upon request, to produce files, provide information and grant access to their facilities. The courts and the public administrative agencies are under an obligation to provide administrative assistance to the Petitions Committeee.

31. Mr Moore then enquired as to the functioning of Question Time.

He was informed that Question Time was usually held on Wednesday and Thursday of a sessional week and lasted 90 minutes. Questions previously submitted in writing by individual members of the Bundestag are answered orally by the competent minister or his state secretary. The questioner may put two additional questions to elicit further information, while any other member of the Bundestag may put one additional question.

If a group comprising at least five per cent of the members of the Bundestag (the minimum strength of a parliamentary group) wishes to obtain information on an important matter, it may submit either a "minor question" or a "major question".

"Minor questions" have to be answered by the government in writing within two weeks. "Major questions" are also answered in writing by the government, but are practically always used to open a debate.

32. Mr Moore enquired as to the protection of the fundamental rights of the private citizen.

Mr Moore was informed that the Federal Constitutional Court was set up in order to prevent the fundamental rights and freedoms of private citizens from being impinged upon by the legislature or by an unconstitutional interpretation of laws on the part of the courts. A citizen who believes that his fundamental rights have been infringed may lodge a constitutional complaint with the Federal Constitutional Court. As a rule he must previously have availed himself of all other legal remedies at his disposal. Where a citizen feels that a new law directly impairs his fundamental rights, he may in this case, too, lodge a constitutional complaint within the first twelve months following the effective date of the law concerned.

33. Dr Schellknecht mentioned the legal consequences of Affronts to the Bundestag, contained in sections 90b and 194, paragraph 4, of the State Legal Code. (As translated below by the Clerk to the Committee.)

Section 90b Disparagement of Constitutional Bodies Inimical to the Constitution. (State Legal Code)

(1) Whoever publicly defames or libels a law-making body, the government or the Constitutional Court of the Republic or of its constituent states, or one of their members, in that capacity, in a manner damaging to the authority and prestige of the State, and thereby

intentionally declares himself against the continued existence of the Federal Republic of Germany or its basic constitutional laws, will be liable for a term of imprisonment not less than three months and not more than five years.

(2) Such act will only be prosecuted with the consent of the impugned constitutional body or member.

Section 194, paragraph 4, Sentence for Affronts. (State Legal Code)

(4) An act impugning a law-making body of the Federal Republic or of its constituent states, or another political institution within the competence of this law, can only be prosecuted with the consent of the impugned institution.

The request of the investigating Public Prosecutor is to be directed to the President of the Bundestag, who in turn will present it to the Committee for the Scrutiny of Elections, Immunity and Rules of Procedure.

The passing of a resolution of the Bundestag is in the nature of a preliminary decision and is delivered by the Federal Minister of Justice to the investigating Public Prosecutor.

The following statistics (Annexure "A") encompass the cases of Affront to the Bundestag, dealt with by the Bundestag from 1949-1983. The source for the figures is the Committee for the Scrutiny of Elections, Immunity and Rules of Procedure.

A table of the immunity cases from 1949 to 1980 may be found as Annexure "B".

34. Dr Schellknecht mentioned the operation of the Bannmeile, which has already been discussed in the account of the visit of the delegation to the Haus of Baden-Württemberg.

Dr Schellknecht mentioned that the first Bannmeile law was enacted on 6 August, 1955. It was replaced by a new law of 28 May, 1969. The area of the old and new Bannmeile zones is shown on an attached map. The shaded area, which encompasses the Rhine, is the Bannmeile zone in force since 1969.

ANNEXURE

The following translation of the principles relating to immunities was given to the Delegation by officers of the Bundestag Administration. The translation presupposes an acquaintanceship with the relevant Codes. The Codes, which were not furnished to the Delegation, are too lengthy to incorporate for the purposes of this Report.

Principles relating to immunities and cases of permission granted under paragraph (3) of Section 50 of the Code of Criminal Procedure and authorizations under Section 197 of the Penal Code.

A. Principles relating to immunities

1. Right to request the lifting of immunity

The following shall be entitled to request that immunity be lifted:

(a) a public prosecutor's office, courts, professional disciplinary courts under public law and trade and professional associations exercising supervision by virtue of the law;

(b) a private prosecutor, subject to production of a copy of the private charge brought by him, and a creditor in executory proceedings where the courts cannot act without his request;

(c) the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure.

2. Filing of requests

Where the German Bundestag has given its approval, for the duration of a legislative term, to a preliminary investigation concerning members of the Bundestag for punishable offences, the President of the German Bundestag and, (insofar as this will not impede the process of ascertaining the facts) the member of the Bundestag concerned, shall be notified before the

proceedings are initiated; if the member of the Bundestag is not notified, the President shall be advised of the fact and the reasons therefor. The right of the German Bundestag to demand the suspension of proceedings (paragraph (4) of Section 46 of the Basic Law) shall remain unaffected.

In other cases, the requests of the public prosecutor's offices or courts shall be passed through the normal channels through the Federal Minister of Justice (item 200 of paragraph (2) of the Guidelines relating to Criminal Proceedings), who shall submit them with a request for a decision as to whether permission will be given to prosecute or restrict the personal liberty of a member of the Bundestag or to take any other measure contemplated.

The persons referred to under paragraph 1 (b) may address their request directly to the German Bundestag.

3. Position of the members of the Bundestag concerned

In matters of immunity the member of the Bundestag concerned shall not be given leave to speak on the subject before the Bundestag; no request made by him for the lifting of his immunity shall be entertained.

4. Appraisal of evidence

The Bundestag shall not enter into an appraisal of the evidence.

The privilege of immunity is intended to safeguard the smooth functioning and good name of the Bundestag. The decision to maintain or lift immunity is a political one and, by its very nature, shall not entail involvement in a pending action directed at the ascertaining of right or wrong, guilt or innocence. The essence of the political decision referred to lies in distinguishing between the interests of Parliament and those of the other sovereign authorities. There can, therefore, be no question of entering into an appraisal of the evidence for or against the commission of an offence.

5. Insults of a political nature

As a rule, insults of a political nature shall not entail the lifting of immunity.

In preparing a decision as to whether a request shall be made for permission to initiate criminal proceedings, the public prosecutor's office may notify the member of the Bundestag of the charge and leave it to him to express his views thereon. The findings of the public prosecutor's office as to the character of the person filing the charge, and any other circumstances having an important bearing on assessing the gravity of a charge, do not entail any "calling to account" within the meaning of paragraph (2) of Article 46 of the Basic Law.

Paragraph (1) of Article 46 of the Basic Law lays down that a member of the Bundestag may not be called to account either in the courts or through disciplinary action for a vote cast or statement made by him in the Bundestag or any of its committees, except in the case of defamatory insults (indemnity). This means, however, that criminal proceedings shall not be taken against him on the ground, for example, of an ordinary insulting statement made by him in Parliament. From this follows that where an ordinary insulting statement is made outside the Bundestag, immunity shall likewise not be lifted if the insult is of a political nature and not defamatory. An insulting statement made by a member of the Bundestag as a witness before a committee of investigation shall also be deemed to have occurred "outside the Bundestag", since a member of the Bundestag is on the same footing as any other citizen called as a witness.

6. Arrest of a member of the Bundestag in the commission of an offence

Where a member of the Bundestag is arrested in the commission of an offence or in the course of the following day, the initiation of criminal proceedings against him or his arrest

shall not require the permission of the Bundestag, provided that such a step is taken "in the course of the following day" (paragraph (2) of Article 46 of the Basic Law).

In the event of previous release and failure to deal with the matter on the following day, a new warrant for his appearance in court or for his arrest shall again require the permission of the Bundestag; otherwise this would amount to a restriction of personal liberty (paragraph (3) of Article 46 of the Basic Law) in no way connected with arrest "in the commission of an offence".

7. Arrest of a member of the Bundestag

(a) Permission to initiate criminal proceedings against a member of the Bundestag does not imply permission to arrest him (paragraph (2) of Article 46 of the Basic Law) or to issue a warrant for his appearance in court.

(b) Arrest (paragraph (2) of Article 46 of the Basic Law) means only preventive detention; arrest for the purpose of executing a sentence shall again require special permission.

(c) Permission to make an arrest implies permission to issue a warrant for appearance in court.

(d) Permission to issue such a warrant does not imply permission to make an arrest.

8. Execution of sentences of imprisonment or coercive detention (Section 96 of the Law relating to Offences against Public Order - OWiG)

Permission to initiate criminal proceedings does not imply the right to execute a sentence of imprisonment.

The execution of a sentence of imprisonment or coercive detention (Sections 96 and 97 of the Law relating to Offences against Public Order) requires the permission of the German Bundestag. To simplify matters, the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure shall be instructed to make a preliminary decision as to permission to execute; in the case of sentences of imprisonment, however, only where such sentence of more than three months is not imposed, or in the case of cumulation of sentences (Sections 74 and 79 of the Penal Code, Section 460 of the Code of Criminal Procedure) where none of the individual sentences imposed exceeds three months.

9. Disciplinary proceedings

The lifting of immunity for the purpose of taking disciplinary proceedings shall not apply to criminal proceedings initiated by the public prosecutor in the same case. Conversely, the lifting of immunity for the purpose of instituting criminal proceedings shall not apply to disciplinary proceedings.

No further permission is required from the Bundestag for the execution of disciplinary penalties.

10. Proceedings before professional disciplinary courts

Proceedings before professional disciplinary courts under public law may be initiated only after immunity has been lifted.

11. Proceedings in respect of traffic offences

Permission shall be granted on principle in the case of traffic offences. To simplify matters, the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure shall be instructed to make a preliminary decision in all such cases.

12. Proceedings in respect of petty offences

In the case of requests which, in the opinion of the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure, relate to a petty offence, the committee shall be instructed to make a preliminary decision (Paragraph 13).

13. Simplified proceedings (preliminary decisions)

Where, by virtue of authorisations granted to it (paragraph 8, 11, 12 and B), the committee has made a preliminary decision, this shall be notified in writing to the Bundestag through the President, without being placed on the agenda. If no objection is raised within seven days of its notification, the decision shall be deemed to be a decision of the Bundestag.

14. Need for permission in special cases

The permission of the Bundestag shall be required:

(a) for enforcement in the case of an omission or tacit sufferance in proceedings under Section 890 of the Code of Civil Procedure.

Where a judgment or interim order directed at an omission or tacit sufferance embodies the threat of a penalty in the event of contravention, such a threat shall represent a penalty norm. Testing whether this norm, aimed at obliging the offender to fulfil his future obligation in regard to the omission, is violated implies, therefore, "calling to account", within the meaning of paragraph (2) of Article 46 of the Basic Law, for committing "a punishable offence". In this connection it is immaterial whether the proceedings are aimed at imposing a sentence of imprisonment or a fine;

(b) for the execution of a warrant of arrest in proceedings for the disclosure of means under oath (Section 901 of the Code of Civil Procedure).

As only the execution of a warrant of arrest constitutes a restriction of personal liberty within the meaning of paragraph (2) of Article 46 of the Basic Law and therefore requires the permission of the Bundestag, the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure shall adopt the standpoint that the institution of proceedings for the disclosure of means under oath by a member of the Bundestag as debtor, and also the issue of a warrant for his arrest by the court to ensure that such an oath is taken, do not imply a "calling to account" and therefore do not require the permission of the Bundestag;

(c) for arrest or enforced appearance in court following non-attendance as a witness (Section 51 of the Code of Criminal Procedure and Section 380 of the Code of Civil Procedure);

(d) for arrest for unjustified refusal to testify (Section 70 of the Code of Criminal Procedure and Section 390 of the Code of Civil Procedure);

(e) for arrest directed at bringing about acts not capable of substitution (Section 888 of the Code of Civil Procedure);

(f) for arrest or other restrictions of liberty for the purpose of personal protective custody (Section 933 of the Code of Civil Procedure);

(g) for arrest as a penalty for an offence against public order (Section 178 of the Law on the Constitution of Courts);

(h) for enforced appearance in court and arrest of a bankrupt in bankruptcy proceedings (Sections 101 and 106 of the Bankruptcy Code);

(i) for interim confinement in an institution for treatment and cure (Section 126a of the Code of Criminal Procedure);

(j) for preventive and corrective measures involving deprivation of liberty (Chapter 1a of the Penal Code);

(k) for enforced appearance in court (Sections 134, 230, 236, 329 and 387 of the Code of Criminal Procedure);

(l) for arrest (Sections 114, 125, 230 and 236 of the Code of Criminal Procedure).

15. Protective measures under the Federal Law on Epidemics

Protective measures under the Federal Law on Epidemics are similar in nature to emergency measures. Measures under Section 34 et seq. of this law do not therefore require the lifting of immunity, whether they are taken for the protection of others against the member of the Bundestag or for the protection of the member of the Bundestag against others.

The appropriate authorities shall, however, be required to notify the Federal President immediately of the measures ordered to be taken against a member of the Bundestag. The Committee on the Scrutiny of Elections, Immunity and Rules of Procedure is empowered to check, or to have checked, whether or not the measures ordered are justified by the Federal Law on Epidemics. Should the committee regard these measures as unnecessary, or no longer necessary, it may demand, by way of a preliminary decision, that they be suspended.

Should the committee be unable to meet within two days of receipt of a communication from the appropriate authorities, the President of the Bundestag may accordingly exercise the rights of the committee. He shall inform the committee immediately of his decision.

16. Criminal proceedings pending

On the assumption by a member of the Bundestag of his mandate, all criminal proceedings pending as well as any arrest ordered, execution of a sentence of imprisonment or other restriction of personal liberty (cf. paragraph 14) shall be suspended by virtue of office.

Where proceedings cannot be stayed, a decision shall be obtained from the Bundestag beforehand, unless permission has already been given for a preliminary investigation into a punishable offence.

17. Handling of amnesty cases

The Committee on the Scrutiny of Elections, Immunity and Rules of Procedure is empowered in all cases where, owing to an amnesty already granted, criminal proceedings are closed because of the amnesty by stating that the German Bundestag would raise no objections to the application of the Law on Amnesties. Such cases shall not be required to be placed before the Bundestag in plenary sitting.

B. Principles relating to permission granted under paragraph (3) of Section 50 of the Code of Criminal Procedure and authorizations under Section 197 of the Penal Code

Permission for derogations from paragraph (1) of Section 50 of the Code of Criminal procedure, under which members of the Bundestag are to be interrogated at the seat of the Assembly, and authorization to prosecute under the second sentence of Section 197 of the Penal Code (insulting statements about the Bundestag) may be granted by way of a preliminary decision under paragraph (13) of the Principles governing immunities. Requests shall be transmitted by the public prosecutors' offices or courts through the normal channels to the Federal Minister of Justice (see item 223 of the Guidelines relating to Criminal proceedings), who shall submit them with the request that a decision be taken as to whether permission shall be granted under paragraph (3) of Section 50 of the Code of Criminal Procedure or authorisation under Section 197 of the Penal Code.

(Adopted at the fourth meeting of the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure of 24 April, 1970)

* * * * * *

Decision of the German Bundestag of 16 March, 1973 relating to the lifting of the immunity of members of the Bundestag

1. The German Bundestag grants permission, up to the expiration of this legislative term, for preliminary investigations to be conducted against members of the Bundestag for punishable offences, except in the case of insulting statements (Sections 185, 186 and paragraph (1) of Section 187a of the Penal Code) of a political nature.

   Before a preliminary investigation is initiated, the President of the German Bundestag and, insofar as this will not impede the process of ascertaining the facts, the member of the Bundestag concerned shall be notified; if the member of the Bundestag is not notified, the President shall be advised of the fact and of the reasons therefor. The right of the German Bundestag to demand the suspension of proceedings (paragraph (4) of Section 46 of the Basic Law) shall remain unaffected.

2. This permission shall not cover:

   (a) the bringing of a public action for a punishable offence and request for an order for the infliction of punishment or a summary sentence;

   (b) in proceedings under the Law relating to Offences against Public Order (OWiG), the direction of the court that a decision may be taken on the offence also on the basis of a penal law (second sentence of paragraph (1) of Section 81 OWiG);

   (c) measures taken in a preliminary investigation entailing a restriction or deprivtion of liberty.

ANNEXURE "B"*

	1. WP+ 1949-53	2. WP 1953-57	3. WP 1957-61	4. WP 1961-65	5. WP 1965-69	6. WP 1969-72	7. WP 1972-76	8. WP 1976-80
Immunity cases (altogether)	160	96	93	94	61	23	20	26
- allowed	100	71	69	88	48	13	8	17
- disallowed	60	25	24	6	8	10	12	8
- not dealt with or completed	0	0	0	0	5	0	0	1
Verbal offences	63	23	22	6	9	11	12	11
- allowed	25	2	0	0	1	1	0	2
- disallowed	38	21	22	6	8	10	12	8
- not dealt with	0	0	0	0	0	0	0	1
Traffic offences	33	58	61	80	46	12	4	10
- allowed	33	58	59	80	46	12	4	10
- disallowed	0	0	2	0	0	0	0	0
General Criminality	47	10	7	6	5	0	4	5
- allowed	25	8	5	6	0	0	4	5
- disallowed	22	2	2	0	0	0	0	0
- not dealt with as completed	0	0	0	0	5	0	0	0
Disciplinary Measures (Court of Honour Proceedings)	2	2	2	0	0	0	0	0
- allowed	2	0	2	0	0	0	0	0
- disallowed	0	2	0	0	0	0	0	0
Infliction of Punishment	2	2	1	2	0	0	0	0
- allowed	2	2	1	2	0	0	0	0
- disallowed	0	0	0	0	0	0	0	0
Detention for the Swearing of an Oath as to the true state of financial affairs	7	0	0	0	0	0	0	0
- allowed	7	0	0	0	0	0	0	0
- disallowed	0	0	0	0	0	0	0	0
Other Limitations upon personal freedom (imprisonment on remand, compulsory appearance)	6	1	0	0	0	0	0	0
- allowed	6	1	0	0	0	0	0	0
- disallowed	0	0	0	0	0	0	0	0

	1. WP+ 1949-53	2. WP 1953-57	3. WP 1957-61	4. WP 1961-65	5. WP 1965-69	6. WP 1969-72	7. WP 1972-76	8. WP 1976-80
Other cases	0	0	0	0	1	0	0	0
- allowed	0	0	0	0	1	0	0	0
Hearing of Witnesses	5	3	0	1	5	2	1	0
- allowed	5	3	0	1	3	0	1	0
- disallowed	0	0	0	0	1	0	0	0
- withdrawn	0	0	0	0	1	0	0	0
- returned to investigating authority	0	0	0	0	0	2	0	0
Number of affected Members	86	75	81	70	46	23	20	25
Affronts to the Bundestag	15	13	13	4	9	1	18	5
- prosecution authorised	11	0	2	1	2	0	8	0
- prosecution not authorised	3	13	11	3	7	1	9	5
- otherwise resolved	1	0	0	0	0	0	1	0

* As translated by Clerk to the Committee

+WP = Wahlperiode (term of Parliament).

3. To simplify matters, the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure shall be instructed to make a preliminary decision as to permission in cases falling under paragraph (2) arising from traffic offences.

The same shall apply to punishable offences which, in the opinion of the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure, are to be regarded as petty offences.

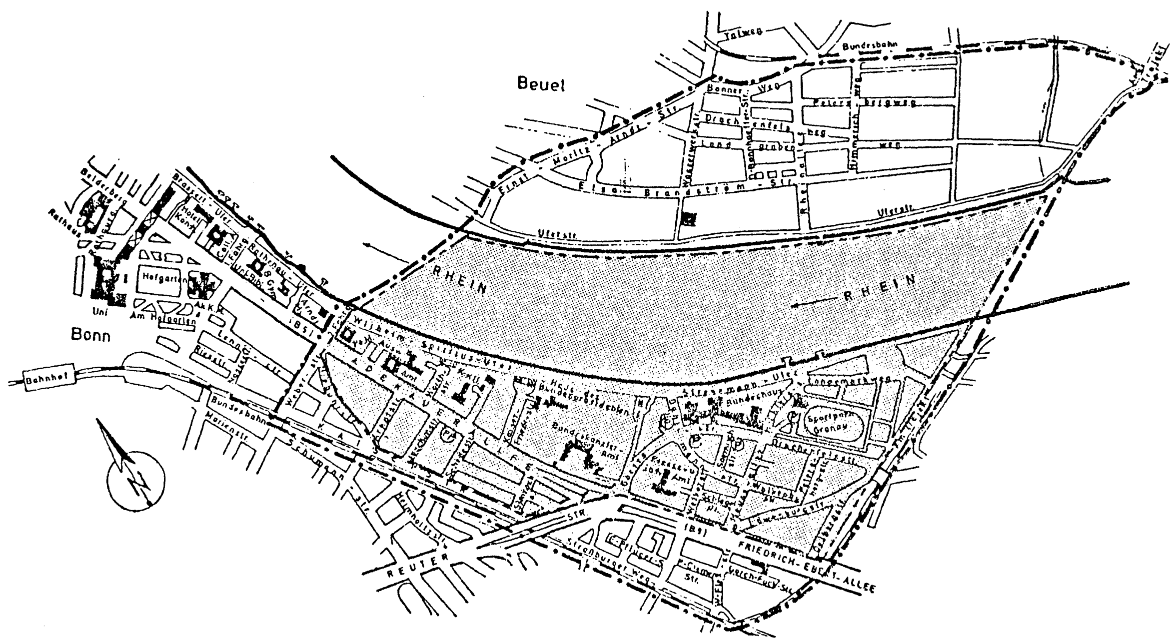
Authorisation to prosecute under the second sentence of Section 197 of the Penal Code in cases of insulting statements about the German Bundestag may be granted by way of a preliminary decision.

4. The execution of a sentence of imprisonment or of coercive detention (Sections 96, 97 OWiG) shall require the permission of the German Bundestag. To simplify matters, the Committee on the Scrutiny of Elections, Immunity and Rules of Procedure shall be instructed to make a preliminary decision as to permission to execute; in the case of sentences of imprisonment only where a sentence higher than three months is not imposed, or in the case of cumulation of sentences (Sections 74 and 79 of the Penal Code, Section 460 of the Code of Criminal Procedure) where none of the individual sentences imposed exceeds three months.

5. In the case of preliminary decisions, the decisions of the committee shall be notified in writing to the Bundestag by the President without being placed on the agenda. Unless an objection is lodged in writing with the President within seven days of notification they shall be deemed to be decisions of the Bundestag.

Boundaries of the Bannmeile 1955-1969

Boundaries of the Bannmeile and Zone since 1969



CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

THURSDAY, 12 JANUARY, 1984

At the Landtag, North Rhine - Westphalia, Dusseldorf, 9.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr John Van Nes Ziegler, President of the Landtag of North Rhine - Westphalia, together with several officers of the Administration of the Landtag.

The Delegation established that the principles relating to privilege in the Landtag of North Rhine - Westphalia were similar to the provisions operating in the Bundestag and the Landtag of Baden-Württemberg.

The Delegation was very interested to learn that the Landtag of North Rhine - Westphalia had been established by the British Military Government, and invite Members to share their interest in the evolution of a German Parliamentary process influenced by the Westminster system. The Landtag has many parliamentary innovations which the delegation believes will be of interest to Members of the Parliament of New South Wales. For that reason, your delegation decided to record the more pertinent and unusual procedural aspects as seen from a Westminster viewpoint.

* * * * * *

North Rhine - Westphalia is one of the Federal States of the Federal Republic of Germany.

The Land was established in 1946 when the British military government appointed the first Landtag of North Rhine - Westphalia to set up the basic democratic structures of a Land. It met for the first time on 2 October, 1946. The first elections to the Landtag followed on 20 April, 1947. The 201 Deputies of the Landtag of North Rhine - Westphalia are elected every five years in universal, and free elections. Following the Landtag elections on 12 May, 1985, the distribution of seats in Parliament is as follows: SPD 125 Deputies, CDU 88 Deputies, FDP 14 Deputies.

At the beginning of each new legislative period the Deputies elect the President of the Landtag, two Vice Presidents and 11 Parliamentary Secretaries, to form the Presidium of the Landtag.

The President then convenes the Landtag. The President, assisted in his duties by the Council of Elders, is also head of the (approximately) 230 employees of the Landtag Administration. He exercises the proprietary and police powers within the Landtag building and its precincts.

The Land Government comprises the Minister President (Premier) and ten Land Ministers. The Minister President is elected by the Landtag on the basis of an absolute majority. The Land Ministers are appointed by the Minister President.

The elected Deputies of the same political party form Parliamentary Parties in the Landtag and are represented in the Presidium, the Council of Elders and in Parliamentary Committees in accordance with the number of seats of their party in Parliament. Technical staff assist them in the preparation of parliamentary business.

Landtag Committees, in which Deputies are represented on the basis of the number of seats of their party in Parliament, meet in closed session to debate bills and prepare their resolutions for the Plenary. The Landtag has 19 Committees at present (1984).

The legislative scope of the Landtag covers the following areas in particular: culture, including schools, universities, adult education and broadcasting; the organisational affairs of the Land and local government; certain aspects of judicial organisation and the execution of sentences; the promotion of regional economic development.

The Presidium

The Presidium of the Landtag of North Rhine - Westphalia, as mentioned earlier, is elected at the first session of the new Landtag.

The President who is elected from the ranks of the largest political party in the Landtag, is the constitutional representative of the Land Parliament, both inside and outside parliamentary bodies. He performs his functions irrespective of party politics. The Landtag President is assisted by two Vice Presidents who chair parliamentary sessions with him in turn. The first Vice President is traditionally a member of the Opposition. The Parliamentary Secretaries elected from among all the Parliamentary Parties assist the President in chairing meetings.

The Council of Elders

In addition to the Presidium, another leading body is the Council of Elders, consisting of the leading and most experienced parliamentarians.

Apart from the President of the Landtag and his Vice Presidents, the Chairmen, Vice Chairmen and sometimes also the Parliamentary Secretaries of the parties generally sit on the Council of Elders. Their discussions provide their parliamentary parties with a sound basis for plenary sessions.

Parliamentary Committees

In the Parliamentary Committees the Deputies carry out the essential ground work in preparation for Landtag sessions. The number of Landtag Committees fluctuates between one legislative period and another; at the moment (1984) there are 19.

A Parliamentary Committee can best be imagined as a kind of team of specialists in a given field. All the Parliamentary Parties in the Landtag are represented at Committee level, roughly reflecting the break-down of seats in the Plenary.

Landtag Deputies are usually members of two or sometimes even three Parliamentary Committees.

The Landtag and its Committees can at any time request the presence of any Member of the Land Government at one of their sessions. The Landtag Deputies can not only obtain the required information directly but by raising questions and making demands can also apply powers of supervision.

Legislative procedure

A bill may be introduced by the Land Government, the Parliamentary Parties in the Landtag or a group of at least seven Deputies.

After consulting the Council of Elders, the President of the Landtag puts the draft bill on the agenda of a forthcoming legislative session. When the background and reasons for the bill have been explained in the Legislature in public session a generally brief debate of principle takes place. *This is known as the First Reading.* After the First Reading the bill is put

to the vote. A bill becomes null and void if rejected by a majority of the Deputies present, but bills are generally passed in First Reading and submitted to the appropriate Parliamentary Committee for further discussion. After technical and expert examination, the bill is drafted by the Committee in its definitive form.

The Committee can then make one of three recommendations to the Legislature: acceptance without amendment, acceptance with certain amendments or rejection of the bill. In *Second Reading* contentious points are thrashed out in the Landtag and at this stage further amendments may be tabled.

If certain points or even the entire bill are disputed, 50 Deputies or a Parliamentary Party can table a motion for a *Third Reading;* generally, however, the final vote is held at the end of the Second Reading when a simple majority is sufficient for the passing of the bill. Both the budget and bills amending the Constitution are exceptions: these require three Readings and, in the case of constitutional amendments, a two-thirds majority in the Legislature.

The Budget

The budget for a calendar year is submitted to the Landtag in the form of a bill giving a complete and exact run-down on all Land revenue and expenditure. Drafting the budget is the task of the executive. The draft is discussed at length at Committee level and frequently radically amended. The Landtag then adopts the budget as a law.

Question Time

Question Time takes place in the first plenary session of each month. Each private Member has the right to ask brief oral questions touching upon the direct or indirect scope of the government. The questions are answered in the Legislature by the appropriate Minister. The Member who has raised the question may ask up to three additional questions, and any other Member up to two. The Minister involved must give an immediate answer to all the questions there and then.

Topical Hour

A motion can be moved for a debate on a specific issue of topical interest to Land politics. This is known as the Topical Hour.

The motion must be tabled by a Parliamentary Party or a minimum of 20 Deputies.

Each Member may take the floor during the debate. The Deputy who has initiated the debate speaks first and may speak for up to ten minutes. Other Members' speaking time may not exceed five minutes. Although the total length of the debate is limited to an hour, this does not include speaking time allocated to the Land Government. The Topical "Hour" may therefore sometimes last for over two hours.

Private Members' Questions

Private Members' Questions are submitted in writing, answered by the government in writing and not discussed in the Legislature unless the government has failed to provide an answer within a deadline of four weeks.

In this case the Member can ask his question to be put on the agenda of the next sitting in order that he can address his question to the government orally.

The government can theoretically refuse to reply even at this stage - but in practice it will not do so for political reasons.

Private Members' Questions must relate to a specific issue, often of particular relevance to the Member's own constituency.

Interpellations

The main purpose of an interpellation is to initiate a political debate by asking the Land Government to outline its political views. Interpellations are a means of exercising control particularly favoured by the Opposition. An interpellation must be addressed by either a Parliamentary party or at least a quarter of all the Deputies in the Landtag.

In contrast to Private Members' Questions they consist of a whole range of questions on inter-connected issues, e.g."Interpellation on the situation of the disabled in North Rhine - Westphalia". The Land Government provides written replies to Interpellations within a deadline agreed with the President of the Landtag. Of high political interest, the issues are almost always discussed in the Legislature after the reply has been given. During the session a motion may be moved as a direct result of the debate, usually calling upon the Land Government to take steps to improve or remedy a given situation which has come to light following the Interpellation.

The constructive vote of no-confidence

One of the Deputies' supervisory powers embodied in the Constitution is the right to vote an elected Minister President out of office.

This is carried out by a vote of no-confidence which must be a "constructive" one, i.e. the Landtag can only move a vote of no-confidence against the Minister President by electing his successor. An overall majority of votes cast is sufficient.

A constructive vote of no-confidence has been passed in 1956 and in 1966.

Popular initiatives and Referenda

If at least one fifth of the total electorate join forces in a popular initiative this may lead to laws being decreed, amended or repealed. A citizens' initiative may also force something through against the will of the State authorities.

All formal legislation may be the subject of such an initiative. Popular initiatives are unlawful if their aim is the passing of a law which is unconstitutional or obviously nonsensical.

The initiative begins with the authorisation to draw up and publicize petitions. This is followed by the collection of signatures. If a sufficient number of signatures is obtained and the initiative is legally valid, it must immediately be submitted by the Land Government to the Landtag. If the Landtag rejects the initiative a referendum is held.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

TUESDAY, 17 JANUARY, 1984

At House of Commons, Westminster, London, 10.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier,M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation arrived at St Stephen's Entrance, Palace of Westminster, and was met by Mr John Sweetman, Clerk of the Overseas Office. After an introductory talk by Mr Sweetman, the Delegation met with Mr Kenneth Bradshaw, C.B., Clerk of the House of Commons and various officers of the House. Informal discussion followed.

1. The Chairman enquired as to whether the private lives of Members of Parliament were ever raised in the House of Commons. Mr Bradshaw replied that this was a most unusual course, that a substantial motion was required. Such a motion was instanced in the *Profumo* affair. Mr Bradshaw mentioned that Mr Profumo had denied all the allegations in the House on the following day. When it was revealed that Mr Profumo had deliberately misled the House, the House resolved that in making a personal statement which contained words which he later admitted not to be true, Mr Profumo had been guilty of a grave contempt. (*Profumo's case* CJ-1962-63 246).

2. The Chairman then enquired as to the privileges of the European Parliament. He was informed that the privilege of the European Parliament is established by international treaty. There is a protocol that members of the European Parliament are allowed to travel freely to and from the sittings of the Parliament, the exception being if the member is caught *flagrante*

delicto in the commission of an offence. If conflict arose, Westminster privilege prevailed.

3. Mr Moore enquired as to the election of the Chairman of the Press Gallery. He was informed that the Chairman was elected every year: that it was an honorary position, and that the Chairman had direct contact with the Clerk of the House of Commons if necessary. The Clerk alluded to a 1947 case wherein a member had fought with a journalist. Both people were censured by the Privileges Committee. The Clerk emphasised that the Press were licensed at Westminster: the Speaker could revoke the licence at will.

* * * * * *

The Delegation met with Mr Stuart Trotter, Chairman of the Press Gallery

Mr Trotter gave a brief outline on the history of the Press Gallery.

1. The Chairman was informed that there had not been many cases of privilege in recent years involving members of the Press Gallery. Mr Trotter mentioned a case in the 1976-77 session wherein an allegation was upheld that several Members of Parliament were "in bookmakers' pockets".

Mr Trotter mentioned the complaint by a Member, Mr Ogden, against the *Liverpool Free Press* wherein Mr Ogden claimed he had been defamed in a local newspaper. The Committee of Privileges recommended that it was not appropriate for the House to intervene. Only in special circumstances will the Committee be prepared to take up cases of defamation of individual Members. Mr Trotter further mentioned the *Economist* case, which also appeared in the eventful session of 1975-76. In that case a Mr Rooker had complained about the publication of an account of the Chairman's draft report before the Select Committee on a Wealth Tax. The Privileges Committee held that a serious contempt

had been committed by the person who supplied the draft (who remained unidentified) and by the editor and by the journalist. The Committee held that the journalist had aggravated his offence by refusing to name his source. The Committee recommended that the editor and the journalist should be excluded from the precincts for six months and that a Bill should be introduced to restore the power to impose fines. The House (on division) expressed regret at the leakage but did not consider that any action was called for.

2. Mr Trotter recalled that in 1971 the House of Commons officially decided that no action would be taken against the press for publishing reports of the debates of that House. He stated that a case of Breach of Privilege in relation to the press would only arise if *very* derogatory remarks were made about Member(s) of Parliament.

3. Mr Trotter stated that in his opinion the most grievous breach of privilege that the press can commit is to publish a document which has not yet been reported to the House. Mr Trotter said that the penalty was being admonished by the Speaker before the Bar of the House. He said that people who had undergone this admonition had reported that it was a "shattering experience". Mr Trotter acknowledged that forbidding a journalist access to the House of Commons was the most effective sanction.

4. Mr Moore enquired whether Members faced the problem of journalists pressing for unwanted interviews. Mr Moore was informed that lobby journalists had free access to Members and that most Members were willing to talk. Furthermore, political journalists were not involved in personal gossip. Relations between Members and the journalists were good. Mr Trotter added that a club-like fellow-feeling develops between Members and journalists: this cosy relationship, however, is open to criticism.

5. Mr Moore enquired whether there were "no-go" zones. Mr Trotter replied that no differing restrictions applied to either the electronic or the print media.

6. The Chairman enquired whether TV crews were allowed in the Palace of Westminster. He was informed that they are allowed only for the State Opening of Parliament. No television photos were allowed at all in the House of Commons, except by express invitation.

7. Mr Trotter referred to the convention whereby members of Parliament only go to the Press Gallery by invitation. There had been an occasion where a Chief Whip had intruded into the Press bar and had subsequently apologised for his action. Members, however, may invite journalists to their rooms.

8. The Chairman enquired as to the history of the Press Wing. Mr Trotter said that it was designated formally as such after World War II. The area of the Press Wing had been delineated specifically.

9. Mr Moore enquired whether a drop box system operated at Westminster. He was informed that such a system did operate and was worked by a pulley.

10. The Chairman enquired whether the House of Commons provides attendants for the Press Gallery. He was informed that four attendants man the lower gallery to the House of Commons and that a foyer was maintained for journalists. House attendants also could not enter the Press Gallery: thus was the independence of the Press preserved.

11. The Chairman was informed that a dining room, a bar and a cafeteria were open to the Press Gallery in the Press Wing.

12. The Chairman enquired as to the acoustics of the Press Gallery. Mr Trotter replied that they were not "super" but the BBC tapes recorded very well. No tapes were used by the Press journalists. There was no restriction on recording the House of Commons "live" or editing it.

13. The Chairman was informed that any journalist could get access to Hansard.

14. The Chairman then enquired whether access was available to the typescript or the rough drafts of Members' speeches. Mr Trotter replied that sometimes the press got copies of Ministers' speeches although it was rare to get the speeches of Opposition Members and Government back-benchers.

15. Mr Moore enquired whether a practice obtained of delivering texts of speeches to the Press Gallery. Mr Trotter said that it was rare and only occurred on important occasions, for example, Second Reading speeches or speeches concerning complicated Bills.

16. The Chairman enquired whether there was anything in writing concerning the election of the Chairman of the Press Gallery. Mr Trotter replied that no written instructions existed: the Press Gallery was a very *"ad hoc"* organisation. There was no authority over members of the Gallery, although the code of practice was expected to be observed (see attachement). The code had been established by the Gallery.

17. Mr Moore enquired whether an induction course was run by the Gallery. Mr Trotter replied that the Lobby and the Gallery had differing approaches. It was necessary for journalists to have a licence in order to be members of the Press Gallery. Such journalists were shown the code and then "thrown in". The Lobby, however, had a code of conduct and the Chairman gave a briefing. Mr Trotter pointed out that all Lobby correspondents were members of the Press Gallery.

18. Mr Moore enquired as to who could get into the Press Gallery. Mr Trotter replied that the space in the Press Gallery was allocated by the House. Preference was given to daily newspapers and weekly political magazines.

19. The Chairman enquired whether Members of Parliament could also be journalists. Mr Trotter replied that Messrs Crossman and Foot had been the exceptions to the rule. They had not been allowed to use the Press Gallery.

20. The Chairman enquired as to the procedure followed if the Clerk of the House of Commons referred a complaint about a journalist. Mr Trotter said that the Chairman of the Press Gallery would inform the journalist of the complaint: the matter would be referred ultimately to the journalist's employer, if the journalist persisted in offending. The extreme sanction was for the Serjeant-at-Arms to withdraw the licence of the journalist.

* * * * * *

The Delegation met with Major G.V.S. LeFanu
Serjeant-at-Arms, House of Commons

1. The Chairman enquired as to the reaction to demonstrations in the gallery in the House of Commons. The Serjeant replied that the doorkeepers removed the demonstrators as discreetly as possible. They were placed in the custody of police officers who were stationed outside the gallery. The police officers escorted the demonstrators to the Police Room, where they remained until the House rose. The Serjeant mentioned that demonstrators were occasionally fed if the House were engaged in any long sitting. He also mentioned that a separate detention room was maintained for women demonstrators, which was supervised by women police.

The Serjeant stated that there were sometimes up to fifteen simultaneous demonstrations. He would speak with the Party Whips, who tried to persuade the demonstrators to leave. Often it was difficult to get private details from demonstrators. Some experienced demonstrators utilised mothers and children as demonstrators, as they knew that the mothers and children would have to be released promptly from the Police Room.

2. Mr Moore enquired whether officers were indemnified against assault. The Serjeant said that the legal technicality was that they were servants of the House obeying an order of the Speaker. The Serjeant mentioned that a woman demonstrator, one Melissa Adams, had been hurt and had complained to her Member of Parliament.The Member complained to the Speaker, who accepted the Serjeant's report. The Speaker subsequently wrote to the Member concerned. The woman then tried to bring an action against the doorkeeper. Her solicitors had written to the Serjeant-at-Arms and to the Speaker's Counsel. The woman had been referred to the Treasury solicitor. The case as yet is unsettled (1984).

The Serjeant mentioned the problem that since Parliament technically was the highest court in the land, there was a further presumption that that which was done in Parliament, was correct.

3. The Chairman enquired as to the security of the House of Commons and its precincts. The Serjeant replied that he was responsible for the security of the precincts, which was the area within the doors of the Palace of Westminster. The Chief of the Metropolitan Police was responsible for security in an area within a one mile radius of the Palace.

4. Mr Moore enquired as to the constables within the Palace. He wished to know whether they were permanently retained or on rotation. The Serjeant replied that most constables spent a considerable time on duty at the Palace of Westminster, at their request. The Chairman asked if the Writ ran to the Annexes. The Serjeant replied that his Writ ran there, although the Writ was never exercised. If it were necessary, he would get the Metropolitan Police to intervene. If a Member of Parliament had been suspended from the service of the House, the Serjeant informed the Metropolitan Police.

5. The Chairman enquired as to the situation of a Member of the House of Commons seeking refuge in the House of Lords. The Serjeant replied that it would be highly likely that the police would get the help of the Usher of the Black Rod.

6. The Chairman enquired as to the fate of demonstrators. The Serjeant replied that those who were removed were banished from the House for seven years. He added that several demonstrators who had been expelled in 1977 would be eligible for re-admission to the precincts in 1984.

7. The Chairman then enquired as to the fate of a demonstrator who was subsequently elected as a Member of Parliament. The Serjeant replied that he would, of course, in that case be admitted to the House to swear his Oath.

8. Mr Moore enquired as to misbehaviour by a Member of the House of Lords in a gallery in the House of Commons Chamber and corresponding misbehaviour by a Member of the House of Commons in a gallery of the House of Lords. The Serjeant stated that he could not remember either such hypothetical incident ever having occurred.

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ATTACHMENT

Ratified at the Annual General Meeting
held on Monday, 25 June, 1979

PARLIAMENTARY PRESS GALLERY

CODE OF PRACTICE

The Press Gallery premises are open to all journalists holding permits from the Serjeant-at-Arms and the Lord Great Chamberlain. The Parliamentary Press Gallery Committee is the organisation set up by reporters in 1881 to safeguard the interests of Parliamentary reporters.

Your right to vote in the Annual Elections for three officers and ten Members of the Gallery Committee is governed by the payment of an annual subscription paid by your employer.

We have a Gallery Trust Fund from which grants can be paid to Members of the Press Gallery who are in need. The Fund's principal task, however, is to help retired Members or their dependents who may be in need. Please subscribe generously when any appeal is made.

1. Silence is essential at all times in the Gallery. If you must communicate with a colleague, write a note, or in a real emergency whisper the message. If you want to carry on a conversation, please go out.

2. When hand-outs of speeches are issued for checking against delivery, remove staples from the documents and so avoid turning over pages. A hundred pages being turned at the same moment makes a lot of noise and attracts the attention of MPs to the fact that we have a privilege not granted to them.

3. Never transmit a speech from a hand-out, unchecked, in advance of delivery. Hand-outs are an aid to reporting which can be (and have been) withdrawn. Use them with tact. Abuse, e.g. the description in print of deviations from a hand-out, can result in hardship to the whole Gallery.

4. Your Gallery colleagues will always be willing to help check your note if necessary and you should extend the same courtesy to others.

5. Do not block the entrances to the Gallery by standing in the passageways, or hinder people from reaching their places.

6. Always give up a seat to the ticket-holder if he should arrive to claim his allotted place when you happen to be sitting in it.

7. When bringing a visitor to the bar, dining room or cafeteria, a visitor's pass must be acquired. This does not apply to MPs or persons who work elsewhere in the building.

8. The television set in the lounge must occasionally be used to cover important speeches or interviews. Members should not object to a change of programme if a colleague wants to report such an event.

9. Press Gallery facilities are made available on the strict understanding that they shall be used solely for the dissemination of news to the general public through newspapers, news agencies, television, radio news magazines and the specialist press.

10. It is an abuse of Gallery Membership if Members pass information gained through Gallery facilities, and not available elsewhere, to interests outside journalism. In no circumstances should advance copies of documents or information be provided to such outside interests.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

WEDNESDAY, 18 JANUARY, 1984

At House of Commons, Westminster, London, 10.45 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr C.J. Boulton, Clerk Assistant of the House of Commons.

1. Mr Moore enquired whether a definition existed of "proceedings in Parliament". Mr Boulton referred to the 1967 Report of the House of Commons Privileges Committee wherein a statutory definition of "proceedings in Parliament" had been recommended. Mr Boulton stated that there had been no subsequent case: the matter was still a very "grey" area. He added that the hesitancy was the reluctance to extend privilege. No bill was envisaged: the issue was dormant.

2. The Chairman referred to the case mentioned by the Serjeant-at-Arms concerning the complaint by Melissa Adams as to the degree of force employed in her ejection from one of the public galleries. Mr Boulton said that the House of Commons maintained that the officer of the House was performing his duty at the direction of the Serjeant-at-Arms and was using all necessary force. The Serjeant-at-Arms had refused to give the name of the attendant, stating that the matter was parliamentary.

Mr Boulton mentioned the 19th century *Bradlaugh* case. Mr Boulton stated that Bradlaugh, an agnostic who had previously refused to take the oath, had been returned as a Member. Bradlaugh, in an attempt to get the Speaker to acknowledge the right of Members to take an affirmation, required the Speaker to call him to the Table for the purpose of taking the oath, as was required by statute. The Speaker, mindful of previous incidents, declined to do so. The House, upon motion, resolved "that the Serjeant-at-Arms do exclude Mr Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House".

Bradlaugh brough an action against the Serjeant-at-Arms praying for an injunction to restrain him from carrying out the resolution. The Queen's Bench Division held that, this being a matter relating to the internal management of the procedure of the House of Commons, the Court of Queen's Bench had no power to interfere. Mr Boulton mentioned that the Attorney-General had been briefed by the House to act for the Serjeant, who had leave to appear.

Mr Boulton emphasised that not everything that happens in the Chamber was necessarily "a Parliamentary proceeding".

Mr Boulton emphasised that a Member of Parliament must obey the ordinary law of the land. He referred to a recent incident where a Member of Parliament had refused to stop for police as he was in a hurry to get to Parliament. He had been subsequently fined for speeding.

3. Mr Moore asked about operations of MI6 in the House of Commons. Mr Boulton replied that MI6 did not operate in the House of Commons, unless at the discretion of the Speaker. And then only in the interests of national security. The Speaker had received an assurance that the telephones of Members of Parliament were never tapped.

4. The Chairman was informed that the electorate offices were not considered to be part of the Parliamentary precincts and were therefore not within the protection of Parliament. Mr Boulton said that in effect electorate offices are within the sphere of Party matters.

5. The Chairman enquired as to whether there are any statutory exclusions for Parliament. Mr Boulton replied that anything constituting a "proceeding in parliament" is not actionable nor is a Member liable outside Parliament. Mr Boulton referred to *Herbert's* case where the serving of refreshments in the House of Commons contravening statutory law was held to be within the proceedings of Parliament. The general rule was that unless an Act specifically applied to Parliament it would not otherwise apply.

6. The Chairman enquired as to freedom of speech and the republication of Members' speeches. Mr Boulton replied that Members can apply for copies of their speeches. The note for the application contained a warning that the publication of extracts from the official report is not protected by the absolute privilege which attaches to speeches made in Parliament and to reports, etc., published by order of either House of Parliament. It was further stated that the Controller of Her Majesty's Stationery Office reserved the right to decline to reprint any speech which might in his opinion expose the Stationery Office to proceedings for defamation.

Mr Boulton stated that qualified privilege applies to partial accounts of speeches in the press. He added that privilege was not a real problem in this regard.

7. Mr Moore was informed that a question on notice was privileged from the time it was submitted to the Clerk. A question on notice must be answered within one working week. The Clerks were empowered to sub-edit questions: the invidious use of a name was out of order. The Clerks were keen to preserve parliamentary privilege from abuse. There were approximately 30,000 to 40,000 questions on notice per year: only about 10 questions per year were directed to the Speaker.

8. Chairman enquired as to how the Clerks gained a "folk memory" of privilege. Mr Boulton replied that Clerks who displayed an "aptitude" for privilege were encouraged to take an interest in "Privilege", in *May*. This led to an involvement with the whole concept of privilege.

9. Mr Moore enquired as to the selection of the Privileges Committee. Mr Boulton replied that the normal selection process obtained, with the Whips officiating. The general membership comprised the Attorney-General, the Shadow Attorney-General, selective minority Party leaders, the Chairman of the 1922 Committee, and the Chairman of the Parliamentary Labour Party.

Mr Boulton made reference to the Select Committee on the Conduct of the Members of Parliament. As a result of the reports of this Committee one member had resigned and other members had been mildly condemned. The House of Commons had taken note of the reports.

10. The Chairman enquired as to the sources of information on privilege other than *May*. Mr Boulton replied that the two recent reports on privilege by the House of Commons Select Committee provided a fount of information. Members also consulted the Clerk of the Privileges Committee or himself concerning privileges matters. Mr Boulton referred the Delegation to the third report of the Committee on Privileges, 1976-77, HC417, with a special reference to matters suggested for Mr Speaker's consideration in deciding on precedence for complaint of privilege. The Committee suggested:

1.(a) Privilege should be invoked as sparingly as possible e.g. when necessary in order to avoid interference with the functions of the House (paragraph 4).

(b) Regard may be had to previous Reports of the Committee of Privileges (paragraph 4).

2. Mr Speaker may take into account other remedies which may be available to a complainant (paragraph 5).

3. Mode and extent of publication of the matter may be taken into account: contempts may be of such limited circulation that they are better ignored (paragraph 6).

4. In considering allegations against a Member or Members, truth, and the reasonable belief that the allegation was in the public interest, may be taken into account by the House in considering a complaint (paragraph 16); this could, therefore, also be considered to be a factor which the Speaker could on occasions take into account in deciding on precedence.

The House approved the Report of the Privileges Committee on 6 February, 1978, with the following effect:

1. A Member must give written notice to Mr Speaker's Office on a sitting day as soon as reasonably practicable after the matter has come to his attention. Whether the application is in time is a matter for the Speaker's discretion but the criteria are fairly strict (paragraph 10).

2. Mr Speaker then considers whether the matter merits precedence over other business. During this time, the Member may decide, after seeking advice or for other reasons, that he does not wish to pursue the matter (paragraph 9).

3. If Mr Speaker decides against giving precedence he informs the Member in writing. It is then not in order for the Member to raise it with Mr Speaker in the House (1) (paragraph 9). But it would still be open, in that event, for a Member to give notice of motion, though the motion would not be entitled to any kind of precedence.

4. If Mr Speaker decides to allow precedence, he informs the Member of the day he proposes to announce his decision (as soon as reasonably practicable) (2) (paragraph 9).

5. On the day of Mr Speaker's announcement, the Member tables a Motion to be moved by him on the following day. This Motion is given precedence over other Motions and Orders of the day (3) (paragraph 9).

Nevertheless, Mr Speaker may decide to make a statement on the matter if he considers it raises issues about which the House ought to be informed .

If, exceptionally, Mr Speaker considers the matter to be urgent, he will inform the Member that he will rule on it the same day (paragraph 9).

The form of the Motion is "To call attention to (the matter), and to move (normally, that the matter be referred to the Committee of Privileges)".

Mr Boulton also mentioned that a Member was free to write a letter to the Clerk seeking his comment.

Questions of privilege were resolved by a free vote in the House of Commons.

Mr Boulton made passing reference to the *Strauss* case. Mr Boulton said that considerable lobbying to gain backing for the Attorney-General had taken place amongst Members. Mr Boulton believed that the decision in the *Strauss* case showed the need for a statutory recommendation. Mr Boulton pointed out that privilege cannot be extended by resolution, it can only be extended by statute.

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The Delegation met with the Right Honourable John Biffen, Leader of the House of Commons and Chairman of the Privileges Committee

1. The Chairman enquired as to the current feeling about privilege.

Mr Biffen replied that there was less sensitivity about parliamentary privilege than fifteen years ago but it would only need one dramatic incident to re-kindle the interest. Parliamentary privilege was a serious matter in the House of Commons: there was no flippant recourse to it.

2. The Chairman enquired whether there was an induction course concerning privileges for Members of the House of Commons. Mr Biffen replied that he was never conscious of privilege being a problem for Members of the House of Commons: he first became aware of privilege as an issue during the first and second readings of the debate concerning the Bill for the United Kingdom to join the Common Market. During that time Mr Biffen (while a Member of the House of Commons) was the economic adviser to a firm of stockbrokers. One of the clients had threatened to withdraw his support from the firm because of Biffen's vote. Mr Biffen was advised of the privileges of a Member of the House of Commons but stated he thought the context too absurd to raise the issue.

3. Mr Moore questioned if the *Strauss* case rose again would a Member be likely to go to his Whip. Mr Biffen was of the opinion that he would, and was of the further opinion that a Member would likely consult the Leader of the House, as the Leader is regarded as the conciliator and arbitrator on issues affecting the House.

4. The Chairman enquired whether the non-partisan basis of the Privileges Committee was guaranteed by tradition. Mr Biffen replied that he could not recall more than two privilege committee meetings at which he had attended. He observed that the Privileges Committee was tolerably free of partisanship. In response to a query from the Chairman, Mr Biffen said no one would dream of a caucus meeting being called to pre-determine the vote in a privileges committee.

5. The Chairman enquired whether "privilege" was a staple of conversation. Mr Biffen replied that it was not; that privilege as a topic of conversation only arose when matters such as the *Strauss* case were current.

6. The Chairman enquired as to the behaviour of the media in Parliament House. Mr Biffen replied that he had never appeared before television cameras in Parliament House: his interviews were conducted in his ministry in Whitehall. He could not fairly comment on the behaviour of the media in the Palace of Westminster.

7. The Chairman enquired as to the role of television in the Palace of Westminster. Mr Biffen replied that he thought that television cameramen should be able to go to a Member's room in order to conduct an interview. He mentioned that the televising of debates in the House of Commons was a current (1984) lively issue.

8. Mr Moore was informed that the rights of witnesses before Committees had not arisen in the current Privileges Committee. Mr Biffen was aware of the issue.

He advised the Delegation to speak to Mr Joe Ashton, Labour Member for Ashfield, who had faced the House of Commons Privileges Committee. (Mr Ashton was unable to meet with the Committee). Mr Biffen further observed that he was reluctant to involve the Privileges Committee with the press and, indeed, the concept of privilege with the press.

9. The Chairman referred to *Sandys'* case. The Chairman pondered upon a potential conflict with the Leader of the House sitting in judgment on his Cabinet colleagues. Mr Biffen replied that anxiety always arises concerning the partial nature of privilege. Becoming *ex officio* Chairman of the Privileges Committee through his appointment as Leader of the House had added to the agony.

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The Delegation visited the Parliamentary Information and Reference Centre of the Commonwealth Parliamentary Association, Headquarters Secretariat

A general discussion on the theory of Parliamentary Privilege ensued.

1. Reference was made to the tight security restrictions now operating almost universally throughout the Parliamentary world. The most extreme case of a breach of Parliamentary Privilege in regard to security aspects occurred in the Parliament of Alberta, where a man invaded the Parliament, shot dead his former girlfriend (a Parliamentary employee) and then suicided. Stringent security restrictions have operated since.

2. Reference was made to Contempts of Parliament by Members. *Profumo's* case was broached: the *Quebec* case of Bryce Machassee was mentioned. Machassee, a Member of Parliament, was accused of taking a bribe to influence dealings on the Montreal Stock Exchange. Machassee denied the allegations. The Privileges Committee investigated the matter which lead to the Committee finding that Machassee had lied to the House. Machassee was then charged with the offence of accepting a bribe and subsequently convicted.

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The Delegation met with Mr Michael Wheeler-Booth, Reading Clerk and Clerk of the Journals, House of Lords

1. The Chairman inquired as to the incidence of breaches of privilege in the House of Lords. Mr Wheeler-Booth replied that there was a remarkably high level of tolerance in the House of Lords in debate. Fear of ridicule was the operative factor.

2. Mr Moore inquired as to whether a Privileges Committee existed in the House of Lords. Mr Wheeler-Booth replied that the Parliamentary Committee had been quiescent in the House of Lords for over 100 years. He mentioned that peerage claims were referred to the Committee for Privileges.

Mr Wheeler-Booth mentioned the Mental Health Bill which had been presented to Parliament. A constitutional Committee of the House of Lords had been established to consider the effect of the proposed legislation upon the privileges of the Peers.Mr Wheeler-Booth pointed out that the lunacy provisions under the existing legislation had never applied to Peers of the Realm. A burning question was whether the new legislation applied to or affected the privileges of the House of Lords under Standing Order No. 77 of the House.

3. The Chairman was informed that the problems arising from the *Strauss* case did not affect the Privileges of the House of Lords.

Mr Wheeler-Booth drew the attention of the delegation to the 1963 case of *Stourton -v- Stourton* (1963) I A11 E.R. which established the Privileges of the House of Lords.

Scarman J. stated that Stourton (Lord Mowbray) is a peer, entitled to sit in the House of Lords and, therefore, entitled to such privilege of Parliament as a Member of that House may enjoy.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

THURSDAY, 19 JANUARY, 1984

At the Office of Chief Superintendent Slessor,
House of Commons, Palace of Westminster

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Chief Superintendent Slessor.

1. The Chairman inquired as to the responsibility for security within the Parliamentary Chamber. Chief Superintendent Slessor replied that as far as the House of Lords was concerned the doorkeepers reported to the Usher of the Black Rod, who reported to the Lord Chancellor. As far as the House of Commons was concerned, the doorkeepers reported to the Serjeant-at-Arms, who reported to the Speaker. Chief Superintendent Slessor reported that the police took any demonstrator removed from the Chamber into custody until the rising of the House. He mentioned that a "scatty" demonstrator had been removed from the Gallery but was released immediately on the advice of the Serjeant-at-Arms.

Chief Superintendent Slessor mentioned that if a criminal offence were committed within the Parliamentary precincts, the perpetrator would be charged at Cannon Row Police Station, which was removed from the precincts. It was the custom, however, to wait for the advice of the Serjeant-at-Arms in all cases before leaving the premises.

Chief Superintendent Slessor mentioned a case where visitors carried ball-bearings in the Parliamentary precincts. The Police, fearing an incident in the Chamber, wanted to charge the visitors with carrying offensive weapons. The Speaker did not accede to their request, as he wished to avoid "fuss".

2. Mr Moore was informed that an average of 8,000 visitors per year visited the Houses of Parliament.

3. Mr Moore inquired as to the type of police officer favoured for duty at the Palace of Westminster. Chief Superintendent Slessor replied that police officers, mature in years, were favoured. Junior police regarded Parliament House as a backwater, although several young policemen regarded the overtime as attractive. Some policemen had stayed as Private Constables at Parliament House for some 20 years, because they regarded the conditions and terms of employment as attractive. Other policemen, of course, regarded duty at Parliament House as onerous.

4. The Chairman inquired as to the relevant ranking of a Chief Superintendent. Chief Superintendent Slessor replied that that rank was the rank held by policemen who were in charge of police stations. His position was Head of Security at Parliament House.

5. Mr Moore inquired for how long police has been stationed at the Palace of Westminster. Chief Superintendent Slessor replied the police had only been stationed at the Palace of Westminster since 1977.

Prior to 1977, security for the House of Commons had been the responsibility of the police while security at the House of Lords was the responsibility of the Custodian. As a result of I.R.A. bombings in London in 1977, a Joint Security Force was established following upon an inquiry. Some Custodians are still employed at the Palace of Westminster: they earn only 60% of the police salary.

6. Mr Moore was informed that police were not armed within the Palace of Westminster.

7. The Chairman was informed that Chief Superintendent Slessor reported to the Security Committee, which comprised 4 Members of the House of Commons and 4 Members of the House of Lords.

8. Mr Moore was informed that there is no system of alarms in the Chamber to summon police: only the attendants could be summoned at the direction of the Clerks. Chief Superintendent Slessor declined to comment as to whether he regarded this as being efficient.

Chief Superintendent Slessor stated he believed a perfect security system prevents the operation of Parliament. The ensuing problem is the search for balance.

9. The Chairman inquired as to the duties of the police at the Palace of Westminster. Chief Superintendent Slessor replied that at the commencement of each session, both Houses, by order, gave directions to the Metropolitan Commissioner of Police to keep the streets leading to the Houses of Parliament free and open and to prevent the passage of Members or Lords being obstructed. The police accordingly gave Members and Officers every facility to approach the Houses of Parliament and where necessary held up traffic for this purpose.

The police are also responsible for disbursing (on order) groups of people obstructing the thoroughfares, lobby or passages.

Chief Superintendent Slessor made passing reference to Acts (e.g. Petitioning Act, 1661, Seditious Meetings Act,1917) which require that no more than 50 persons shall meet together within the distance of one mile from the gate of Westminster Hall (except parts of the Parish of St Pauls, Covent Garden) to consider or prepare a petition or other address on any day on which the House shall meet and sit. Furthermore, not more than 10 persons under these Acts shall repair, together within the Houses of Parliament, for the presentation of a petition.

10. The Chairman inquired as to the staffing of the police force at the Palace of Westminster. Chief Superintendent Slessor replied that the force was understaffed on official figures and presented the delegation with a breakdown of the figures (see attachment).

PALACE OF WESTMINSTER DIVISION

WEEK ENDING: 8.1.84.

RANK AND GRADE	ESTABLISHMENT	STRENGTH	WANTING	OVERSTRENGTH
Chief Superintendent	1	1	-	-
Superintendent	1	1	-	-
Inspectors	3	3	-	-
Sergeants	6	6	-	-
Constables (Male)	110	103)	2	-
(Female)		4)	1	-
Variations (AID)				
Senior Security Officers	5	4	1	-
Security Officers (Male)	116	94)	14	-
(Female)		8)		
Fire Officer	1	1	-	-
Leading Firemen	3	3	-	-
Firemen	8	8	-	-
Ceremonial Adviser	1	1	-	-
Executive Officer	1	1	-	-
Clerical Officer	1	1	-	-

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

TUESDAY, 24 JANUARY, 1984

At the House of Representatives, Congress, Washington, 9.45 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr Benjamin Guthrie, Clerk of the House of Representatives. Mr Guthrie spoke briefly on the House of Representatives, stating that it comprised 435 Members. Each Member had a "press person" attached to his operation: there is no Press Department, as such, in the House of Representatives.

Mr Guthrie stated that the Press has full access to the Congress Building but cannot clog corridors. When there is a heavy concentration of the Press present in Congress, they are usually invited into the rooms where the meeting or function is taking place, e.g., the Ways and Means Committee recently invited the Press from the adjacent corridor into the meeting room.

1. The Chairman enquired whether permission for an interview was expected from a Congressman. He was informed that it was not and that Congressmen were always keen for interviews. Mr Guthrie added that TV studio facilities were available within Congress.

2. Mr Moore was informed that the Speaker controlled the precincts of the House of Representatives and consequent Press action therein.

3. Mr Moore enquired whether TV cameras would be congregating outside a Committee room if a newsworthy meeting were taking place within. Mr Guthrie replied that they would: that they would perhaps even be within the Committee Room, if the Committee so desired and that, further, live hearings of Committee meetings (with the permission of the Committee) were common.

4. Mr Moore then enquired if the proceedings on the floor of the House were televised. Mr Guthrie replied that they were televised "from gavel to gavel", that is, from the time of the Speaker's arrival until he departed from the Chamber.

5. Mr Moore enquired if the debates were edited. Mr Guthrie replied that any member of the public may buy 15-minute segments of the debates. They were not to be used, however, for political purposes.

6. Mr Moore then enquired whether Party political meetings took place before television cameras. Mr Guthrie replied that in the Democratic caucus shots of people coming into the lobby were allowed, although the cameras were never permitted within the rooms. Mr Guthrie emphasised again that television cameras were always welcome in Committee hearings. Mr Guthrie added that there were 22 Standing Committees and 155 Sub-Committees*(1) in the House of Representatives. An average of about 30 meetings of either the Committees or the various Sub-Committees was held daily.

7. The Chairman enquired whether there was a formally organised Press Gallery. Mr Guthrie replied that there was a Standing Committee which was elected by the Press.

8. The Chairman was informed that the President of the aforementioned Standing Committee did not enjoy a special status.

* See (1) Attachment

9. The Chairman enquired as to the outcome of criticism of the behaviour of a journalist accredited to the Standing Committee. Mr Guthrie stated that any complaints would be sent to the President of the "Gallery": he noted that the press enjoyed a largely self-regulating role.

10. The Chairman enquired as to how a request from the Press concerning facilities would be processed. Mr Guthrie stated that a letter detailing such request would be sent to the Clerk of the House. He added that a House employee (The Superintendent) runs the Press Gallery. The Superintendent is on the pay-roll of the House (i.e., the Clerk).

11. Mr Moore was informed that the media were not charged rent for the facilities at the Capitol building.

12. Mr Moore was informed that the Press paid for their "hot" telephone lines and long distance calls: telephone calls within the District of Columbia were paid for by the House of Representatives.

13. The Chairman enquired as to the security in the Capitol building. Mr Guthrie stated that the Serjeants-at-Arms of the Senate and the House of Representatives, the Capitol Police Board and the Architect of the Capitol were jointly responsible for security. Mr Guthrie mentioned that the Serjeants, and indeed the Clerks, were political appointees.

14. The Chairman enquired whether the FBI were on call. Mr Guthrie replied that they were but that the Capitol police, whose strength comprised 1,164 men, were charged primarily with security. The FBI were mainly involved in the security of foreign Heads of State. Mr Guthrie mentioned the existence of the Capitol Bomb Squad. The Chairman was informed that the Clerk could delegate the Capitol police anywhere within the United States of America if he felt the need to do so.

15. The Chairman was informed that the Capitol police was established by legislation in 1828: that it was viewed as a career by the members of the force. Mr Guthrie added that it was a fully professional force and was no longer subject to patronage. Recruits underwent a total training course with units such as the FBI and the White House Secret Service.

16. Mr Moore enquired whether the Capitol police were armed. Mr Guthrie replied that Capitol police were armed within the building. The police on the floor of the House of Representatives were not armed, although police stationed at the doors were. Approximately half a dozen armed plain clothes policemen were positioned in the public galleries.

17. Mr Moore was informed that there were approximately two disturbances in the public galleries per year. The number of disturbances depended on the contentious nature of the issues before the House.

18. Mr Moore enquired as to the measures that were taken to maintain order in the public galleries. He was informed that the Speaker would bang his gavel to remind the gallery of his status and their presence in the Chamber: if need be, the doorkeeper would ask the demonstrators to leave. There are no lock-up facilities in the Capitol. Demonstrators can be taken to the Holding Room if the misconduct is of a severe nature and if necessary, demonstrators can be charged with disorderly conduct.

19. Mr Moore enquired as to legal actions conducted against the demonstrators within the public galleries. Mr Guthrie mentioned that in 1954 five Congressmen in the Chamber had been shot by Demonstrator(s) in the public gallery. The Department of Justice had followed up the prosecution. Mr Moore was informed that the incident appeared in the Journals of the House as "a disturbance".

20. The Chairman enquired if there was a penalty imposed on a Congressman guilty of a disturbance. Mr Guthrie replied that the Speaker has the power to recognise Congressmen: he can ignore a Congressman, if necessary. This was a most effective power.

21. The Chairman then enquired as to the incidence of sanctions against Congressmen who were discourteous in the extreme. Mr Guthrie replied that in this case it would be open to the Speaker to order that the Congressman's words were not to be taken down in the Congressional Record.

22. The Chairman enquired as to the position of a Congressman guilty of a breach of law committed outside the House being prosecuted in the courts. He enquired whether any resolution of the House would be required to have the action proceed. Mr Guthrie did not think this would be necessary.

23. The Chairman enquired as to the grounds necessary for the expulsion of a Congressman. Mr Guthrie stated that the Supreme Court had ruled that a Congressman must be seated if he meets certain categories. The House could then vote for his expulsion. He referred the Delegation to the *Adam Clayton Powell* case.*(2) Mr Guthrie added that censure motions were feasible but expulsion motions were rare.

24. The Chairman was informed that the Ethics Committee*(3) considered "transgressions" by Members. The membership was comprised of six Members from each of the parties. Any question concerning ethics was referred to the Committee from the floor of the House. Questions affecting frauds and irregularities were most common. The Committee meets on a bi-partisan basis; it meets frequently; it is a Standing Committee and has a concomitant staff. Mr Guthrie added that the members of the Ethics Committee were senior, respected Congressmen. The hearings were open to the public.

* See (2) and (3) Attachment

25. The Chairman enquired whether any body or committee existed in the House of Representatives akin to the Privileges Committee of the House of Commons. Mr Guthrie replied that there was none although the Judiciary Sub-Committee of the Congress was perhaps the body most analogous.

26. Mr Moore enquired whether there was any body that could collectively protect the dignity of the House. (Mr Moore mentioned the *Laurie Oakes* case). Mr Guthrie replied that the withdrawal of the Press Credentials was the ultimate and most effective sanction in such issues.

Mr Guthrie mentioned in passing that the Speaker of the House of Representatives held a daily press conference: that the Speaker's Aides know all the correspondents by name and that transcripts are kept of the press conferences. This relationship ensured a certain comity.

27. The Chairman enquired as to the Congressional privileges. He was informed that they were co-extensive with the Speech and Debate Clause of the Constitution.

28. The Chairman enquired as to the office accommodation for Congressmen. Mr Guthrie stated that up to three offices were provided for each Congressman in each district. There was no special protection for the offices.

29. The Chairman was advised to ask the Counsel whether an offence committed against a Congressman in his district office would be counted as a Federal crime.

30. The Chairman enquired as to how the Serjeant-at-Arms enforced discipline within the chamber of the House of Representatives. Mr Guthrie replied that the Speaker would direct the Serjeant-at-Arms to take the Mace to the offending Congressman: this was always interpreted as a rebuff. A persistent offender would be requested to step into the Well to apologise. (This is most rare - the last instance occurring 25 years ago (1984)).

31. The Chairman enquired whether Congressmen were prevented from taking weapons into the House. Mr Guthrie replied that there was no weapons check on Congressmen with a magnetometer.

32. Mr Moore enquired whether Congressmen were subject to the same security checks as everybody else entering the Capitol building. Mr Guthrie repeated that there were no weapons checks on Congressmen, and that they were subject to the same security checks as staff wearing badges.

33. Mr Moore was informed that Congressmen do not wear security cards or lapel badges.

34. The Chairman enquired as to parking facilities for Congressman. Mr Guthrie replied that staff and Congressmen used the Capitol garage. The vehicles of both Congressmen and staff were not searched. Mr Guthrie emphasised that it was unlawful for people other than Congressmen to enter the Capitol building carrying arms. Mr Guthrie added that when the President delivered his State of the Union Address there was still no weapons check on Congressmen.

35. The Chairman enquired whether the House enjoyed a right of attendance upon the President. Mr Guthrie replied that the President (Executive) presents an invitation enquiring whether the Speaker could go to the White House at a mutually convenient time. Mr Guthrie mentioned the leadership of the Congress breakfasts every Tuesday morning with the President at the White House. Mr Guthrie also noted that the President has the Presidential Room at Congress for his use.

36. The Chairman was informed that neither individual Congressmen nor individual Senators have a right of access to the President.

37. Mr Moore was informed that the officers of the House were elected for two years by the majority Party in the House. The officers elected were the Clerk, the Serjeant-at-Arms, the Doorkeeper, the Postmaster and the Chaplain.

38. Mr Moore enquired whether there were limits on Congressmen's mailing lists. Mr Guthrie replied that there were: Congressmen could only have free mailing up to "X" number of weeks before election day. The mailing provisions, however, were fairly generous.

39. Mr Moore enquired whether a private citizen would have any rights of redress if he were traduced on the floor of the House by a Congressman. Mr Guthrie replied that a citizen's only recourse would be through the media. Anything said on the floor of the House is covered within the Speech and Debate Clause. A Congressman can, therefore, say practically anything: he cannot refer, however, to Senators.

40. Mr Moore was informed that once the remarks were in the transcript there was no limit on the reproduction of the speech.

41. The Chairman was informed that there was no restriction on Congressmen attacking the President, the Vice-President or Supreme Court Judges.

42. The Chairman enquired whether it was the tradition for Congressmen to be called "honourable". Mr Guthrie replied that it was the tradition. Congressmen retained both the title and the right to go on to the floor of the House after they retired. They continued to enjoy complete access to all facilities. Mr Guthrie further mentioned that former House officers also retained the right of access to the floor.

43. Mr Moore asked whether a Congressman could "edit" the Congressional Record. Mr Guthrie replied that this could only be done with the unanimous consent of the House. Mr Guthrie added that in this case the copy would be handed back to the Congressman for correction. A Congressman cannot change his speech if it is inter-connected with the speech of another Congressman. Mr Guthrie noted that Congressmen have the right of making a further statement to amplify an earlier remark. If revision was sought of Congressmen's remarks in Congress it would only be allowed to the particular speech by the Congressman: a revision must be returned to the Clerks within an hour of adjournment of the House.

44. The Chairman asked what was the primary recording system. Mr Guthrie replied that shorthand and back-up tapes were used. Mr Guthrie stated that only one shorthand stenographer operated at any one time.(The stenographer is the main reporter). Mr Guthrie added that the reporters of the Congressional Record and the televised recording of the proceedings of the House were under the control of the Clerk: the printing of the Congressional Record was under the control of the Public Printer.

* * * * * *

The Delegation met with Mr William Hildenbrand
Secretary of the United States Senate

Mr Hildenbrand gave a statement concerning the Senate. He said that under the terms of the Constitution a Senator or Congressman could not be arrested coming or going from a session in the Capitol.

1. The Chairman alluded to the incident in the House of Commons where a Member was arrested and fined whilst speeding to a sitting. Mr Hildenbrand said that theoretically the police would not proceed with the action in a speeding matter. The question arose within the judicial system as to what "coming and going" actually meant. So far no Senator or Congressman has been arrested coming or going to the Capitol.

2. The Chairman enquired as to the outcome, as far as the Senate or House of Representatives was concerned, of a Senator or Congressman being indicted for a felony while Congress was in session. Mr Hildenbrand said that the indictment may proceed. He mentioned the case of a Senator from New Jersey who is now in prison as a result of an indictment. This Senator had resigned: if he had not resigned he would have been expelled by the Senate.

Mr Hildenbrand added that some Senators had been elected while in gaol to the U.S. Senate. Senators so elected have had to complete their prison terms before entering the Senate.

Mr Hildenbrand mentioned the existence of the Committee of Ethics*(3) of the Senate. It was the practice of this Committee to ensure that a convicted Senator was "removed" from Congress before incarceration. Mr Hildenbrand stated further that the Ethics Committee always investigated motions for expulsion of Senators and indeed all complaints concerning Senators. The Committee, which is bi-partisan in operation, was formed in 1963-64 to investigate Senator Dodd of Connecticut who had failed to report the receipt of money on his income tax return. The Committee had been re-organised in 1976. Membership now comprised three Senators from the Republican Party and three Senators from the Democratic Party.

* See (3) Attachment

3. Mr Hildenbrand mentioned the Rules Committee of the Senate which concerned itself mainly with irregularities in elections. Mr Hildenbrand cited the 1970 New Hampshire case where the results were very close. A new election was called at the behest of the Committee.

4. The Chairman enquired if the Rules Committee had a "privileges" aspect in the Westminster sense. Mr Hildenbrand replied that it did not. Apart from irregularities concerning elections, the Rules Committee busied itself with office expenditures and staff allowances: it was more concerned with the perquisites of Senators.

5. Mr Moore enquired as to whether the late Senator McCarthy had been investigated by any Senate Committee. Mr Hildenbrand replied that Senator McCarthy had been investigated by the Governmental Affairs Committee in 1953/54. Senator McCarthy had been censured by resolution on the floor of the Senate. (Mr Hildenbrand stated that it was the consensus of the Senate that the Senator had brought the Senate into discredit). The Governmental Affairs Committee had been superseded by the Ethics Committee. A Senator would have to be guilty of almost an indictable or semi-criminal offence before his conduct would be brought to the attention of the Committee. Personal peccadilloes were left for the determination of the electors.

6. Mr Moore enquired as to the rights of citizens against investigation by a Senate Committee. Mr Hildenbrand replied that the United States Senate would not take action against a private citizen.

7. The Chairman enquired as to the Congressional Record. Mr Hildenbrand said that the Senate and the House of Representatives each have their own reporters to cover the debate. The Senate reporting staff was entirely separate from that of the House of Representatives. There was no television reporting of the proceedings of the Senate.

8. Mr Moore enquired as to the right of Senators to have their speeches reproduced. Mr Hildenbrand said that Senators have the untrammelled right to have their speeches printed and mailed through the U.S. mail. It was the convention that no personal remarks were uttered on the floor against other Senators or Congressmen or the Senators or Congressmen of the various states.

9. The Chairman was informed that the President and the Judges of the U.S. Supreme Court are considered "fair game".

10. Mr Moore enquired as to "editing" of the Congressional Record. Mr Hildenbrand stated that "un-parliamentary" language was not recorded in the Record. However, "un-Parliamentary" language could be reported in the press. A Senator did have the right to edit his speeches. Mr Hildenbrand emphasised that there was no inhibition whatsoever on the reproduction of extracts from the Record.

11. The Chairman enquired as to the degree of privilege attached to the Congressional Record. Mr Hildenbrand replied that a clause from the United Kingdom Bill of Rights covered all stages of production of the Congressional Record. This clause was now embodied in the "Speech and Debate Clause" of the U.S. Constitution which covered speeches on the floor of the Senate and the House of Representatives. Mr Hildenbrand mentioned that there is a current court case in which four Congressmen are suing the editors of the Congressional Record concerning the practice of not reporting *verbatim* speeches in the Record. Mr Hildenbrand further mentioned the case of Senator Proxmire (who had gained certain notoriety by his "Golden Fleece Awards" on the floor of the Senate for Governmental Financial Mismanagement) wherein Senator Proxmire was sued for libel. The courts had held that his "Award" was a political action, as he had mailed the Record and it could not be held to be an operational part of the Government.

12. Mr Moore enquired as to the composition of the Senate reporting staff. Mr Hildenbrand said that the staff comprised seven stenographers (reporters). There were no tape transcripts of the Senate debates and, as mentioned earlier, no television.

13. The Chairman asked who had decided that the Senate should defend Senator Proximire in the court action. Mr Hildenbrand replied that in 1974 the Senate had sued for common cause. The Senate had briefed an outside Counsel. This had led to the formation of the Senate Legal Counsel within the Senate, with the Counsel being overseen by the Senate Leadership Group. The Legal Counsel reports concerning his actions to the Group. No documentation or individual relating to the Senate may appear in court without the leave of the Senate.

14. Mr Moore was informed that petitions to the Senate for the production of documents were not acceptable *per se:* the documents could only be obtained by Resolution of the Senate.

15. The Chairman enquired whether immunity was given to Transcribers' notes.

Mr Hildenbrand said that no court case had established immunity but the convention was that the Transcribers' notes enjoyed immunity. He also mentioned that Transcribers' notes were kept until the bound Record was issued.

16. Mr Moore enquired generally as to freedom of speech. Was it limited to utterances on the floor or did it extend to letters written by Senators or Congressmen to the Executive?

Mr Hildenbrand was of the opinion that defamatory matter in letters from Senators to the Executive Government would probably be actionable. He would demur to the opinion of the Senate Legal Counsel. Mr Hildenbrand added that if the Senate Legal Counsel requested permission of the Senate to defend a Senator, the Senate would acquiesce. The Legal Counsel had originally been under patronage, although the new Majority Leader had retained the then Senate Legal Counsel.

17. The Chairman enquired as to the function and office of the Secretary of the Senate. Mr Hildenbrand stated that the President pro tempore*(4) of the Senate was ultimately responsible for certain functions of the Senate Secretary although in fact the President pro tempore and the Secretary never met officially. The Secretary was nominated by the caucus of the Majority Party and was presented to the Senate. The Secretary was answerable to the Majority Leader (of the Majority Party).

The Vice-President of the United States is the official President of the Senate (as opposed to the President pro tempore) but he has no role in the Senate. The only Vice-President in recent memory to seek an active role in the deliberations of the Senate was Vice-President Agnew.

18. The Chairman asked Mr Hildenbrand about his staff. Mr Hildenbrand replied that his staff comprised 188 people, all of whom were personal appointments of the Secretary. All but two of the staff were reappointed by Mr Hildenbrand to their former positions when he assumed the Secretaryship. He had, however, changed the former Parliamentarian.*(5) Mr Hildenbrand added in passing that there were over 7,000 employees on the total staffs of the Senate.

19. The Chairman enquired as to the rights of a Senator visiting his State Capitol. Mr Hildenbrand replied that it depended upon the particular rule and practice of each State.

20. The Chairman enquired whether the Senators, as a body corporate, could request an interview with the President of the United States. Mr Hildenbrand replied that they could. Whether the President acceded to the request depended on the particular President. The Majority Leader, however, has the right of access.

* See (4) and (5) Attachment

21. Mr Moore was informed that the courtesy of addressing the Senate is extended to former Presidents of the United States. Former President Ford is the only President to have availed himself of this courtesy.

22. Mr Hildenbrand also mentioned that former Senators have the right to come on to the floor of the Senate: they may not, however, speak on the floor. This right had led to a problem of former Senators who had become lobbyists seeking to lobby on the floor.

23. Mr Moore enquired as to the doctrine of the separation of powers and the rights of the citizen. Mr Hildenbrand instanced a recent case where a U.S. citizen is suing the Senate Secretary concerning the payment of the Senate salaries to Senators who were absent during the session. Mr Hildenbrand added that U.S. courts always say that a declaration in such matters is not within the power of the courts. Mr Hildenbrand also mentioned a U.S. Act of 1913 which said that no payment would be made to absent Senators. The terms of this Act had not been followed by the successive Senate Secretaries.

* * * * * *

The Delegation met with Mr Steven R. Ross, General Counsel to the House of Representatives

Mr Ross referred the Delegation to the Basic Law of the Constitution of the United States (Article 1, Section 6 (1)*(6) - "The Speech and Debate Clause" which guarantees freedom of speech on the floor of the Senate and the House of Representatives. Mr Ross said that this clause is read widely by the Courts and has included anything done in the legislative session: the quintessence is legislative activity. (N.B. Senator Proxmire's "Golden Fleece Award" libel case).

* See (6) Attachment

1. The Chairman enquired as to the immunity of Congressmen. Mr Ross stated that the immunity of Congressmen was a controversial area and comprised the vast majority of privilege cases. Article 1, Section 5 (3)*(7) of the Constitution - "The Publications Clause" ensured the rights of the Congressional Record, the right of publication and the right of secrecy. Mr Ross added that attempts to expand privileges underwent close scrutiny by the courts.

2. The Chairman enquired if there could be a statutory grant of privilege in the United States. Mr Ross replied that opinion was divided. Some commentators believed that this was possible while others maintained that it was constitutionally impermissible. The fundamental question was whether Congress could impose duties on others and yet exempt itself from the General Law. It had been held that Congress could so do as expressed in the Equal Employment statutes. Opinion differed, however, whether such action was applicable to Congressmen, as one Congress cannot bind future Congresses. Mr Ross believed that the Congress could enact rules every two years to ensure that the privileges previously indicated were maintained.

3. Mr Moore enquired as to the protection of Congressional documents in the courts. Mr Ross referred the Delegation to *Proxmire's* case. Mr Ross elaborated on the facts of this case by stating that Senator Proxmire had been sued by a private citizen for remarks he had made in a speech on the floor of the Senate: his remarks had been supported by a media campaign. Senator Proxmire was indignant that the U.S. Government had granted funds for the study of aggression in monkeys. Senator Proxmire gave his "Annual Golden Fleece Award" to this contract as the most flagrant mis-use of governmental funds. Senator Proxmire's action had received wide publicity and the research was consequently characterised as trivial, eccentric and inconsequential. The scientist involved in the research sued,

* See (7) Attachment

stating the research was valid and well-intentioned. The U.S. Supreme Court decided that to the extent of disseminating information to the public at large Senator Proxmire's action was not debate and therefore not absolutely protected. The "Speech and Debate Clause" extended only to legislative activity. Senator Proxmire decided not to contest the case further and settled the action out of court. Mr Ross was of the opinion that perhaps a claim of privilege by Senator Proxmire describing his action as an official act of an officer of the Government would have been successful. He was aware that such an interpretation by the courts would be akin to an absolute privilege judicially created. Mr Ross stated the justification for such a judicially created privilege would be the need to protect a vigorous performance of the duties of government.

Mr Ross added that malice was the sole operative factor until June, 1982. The good faith of the Government official had been essential for his protection. Mr Ross stated that an objective standard now prevailed: the Government official would be protected "within the outer parameter" if he had not violated a clear Constitutional or statutory standard.

4. Mr Moore enquired as to who met the costs of the *Proxmire* case. Mr Ross replied that the Senate had met the costs of Senator Proxmire's defence although it was thought that Senator Proxmire had personally paid for the settlement from the profits of his books.

5. The Chairman enquired as to the effect of the application of the objective test. Mr Ross said that the objective test was desired as the previous subjective test had varied from court to court. Its application had not been really successful. Thus, under the objective test:

(1) the employee or official had to show that the activity was authorised; and

(2) the employee had to show that the authorised activity was not in violation of Constitutional or statutory law.

Mr Ross added that the Supreme Court "level" was more sympathetic than the District Court. The District Courts paradoxically were in effect more powerful as most actions were not appealable.

6. The Chairman enquired as to the legal representation of the Executive and Congress in light of the doctrine of the separation of powers. Mr Ross said that the Department of Justice represents the Executive. The conflict of interest had been avoided by Congress (House of Representatives) creating the Legal Counsel Branch. Mr Ross mentioned that conflicts between the Executive and Congress were increasing.

7. Mr Moore then enquired how a Congressman would approach Counsel if sued. Mr Ross replied that some Congressmen would go to the Majority or Minority Leaders, depending on their party adherence: some Congressmen would go to the Judiciary Committee while some Congressmen would go to the Library of Congress for all the relevant legal information and background. Ultimately, the matter would reach the Legal Counsel. An informal group had been appointed by the Speaker to consider proposed legal actions.

Mr Ross emphasised that the Legal Counsel acted at the behest of the Speaker.

8. Mr Moore enquired whether the Clerk of the House had been involved in legal action in the course of his duties. Mr Ross said that several years ago the Clerk had received a subpoena from a Grand Jury concerning a Congressman's record. Legal Counsel had invoked the "Speech and Debate Clause".

This was denied by the District Court. An appeal was made to the Court of Appeal which declined to stay proceedings. Resort was then had to a Judge of the Supreme Court who also disallowed a stay in proceedings. The whole judiciary process was later exposed by the press. There had been a strong reaction by Congressmen which led to a re-examination of the whole legal process by the House of Representatives. The rules and procedure had been changed as a result of a report by a Select Committee. The position now is that the Clerk of the House informs the Speaker of the receipt of a subpoena: the Speaker informs the House which briefs the House Counsel corporately if it so desires. The Counsel then considers whether compliance with the subpoena would be in accordance with the privileges of the House. The House is then informed as to whether compliance would be in accord with those privileges. The Counsel proceeds to comply with the subpoena, if it is in order, unless Counsel receives a direction from the House not to comply.

If Legal Counsel is of the opinion that the House should not comply with the subpoena, Counsel informs the Speaker to this effect. A Committee is then formed by the House to consider the subpoena. The Committee is addressed by the Congressman who has been subpoenaed.

9. The Chairman enquired whether Counsel ever received complaints about the legality or otherwise of the procedures, actions, etc., of the House of Representatives. Mr Ross said that a case was currently proceeding wherein three Congressmen and three citizens had lodged a complaint concerning the practice of editing the reporting in the Congressional Record of remarks made on the floor of the House. It was claimed that such editing was a violation of the Congressional rights.

Mr Ross added that the Committee Group mentioned earlier authorises the counsel informally to act in each case on which the Committee decides the Counsel should proceed.

10. The Chairman enquired whether the Watergate Affair had an effect on Congress' attitude to subpoenas. Mr Ross said that Congress cannot ignore subpoenas: they must file a motion with the relevant court to quash the subpoena or send a letter saying the subpoenaed records are not subject to discovery.

Mr Ross made passing reference to the case of *Benford v A.B.C.*, a case concerning insurance policies where the Clerk of the House of Representatives had been subpoenaed by the affected insurance company. Mr Ross also mentioned the case of in re *Benjamin Guthrie* (the Clerk of the House of Representatives Ed.) a Court of Appeal case wherein the Clerk has been subpoenaed. Mr Ross said there probably would be a move to dismiss the action.

11. Mr Moore enquired as to political allegiance of the abovementioned Congressmen who had complained that the editing of the Congressional Record was a violation of their Congressional rights. Mr Ross replied the Congressmen were very conservative in their political outlook.

12. The Chairman enquired whether the United States courts had resort to legislative history in interpreting the statutes. Mr Ross replied that they did: the practice was first to find an ambiguous statement and then to give an interpretation of the statutory intent.

13. The Chairman enquired as to the composition of the staff of the Legal Counsel. Mr Ross replied that there were three full-time lawyers, one legal intern and three clerical staff.

14. Mr Moore enquired as to whether the Legal Counsel would seek to transfer an action involving Congress to the District of Columbia or whether Counsel would arrange a local hearing. Mr Ross replied that the action would be heard locally. One of the three lawyers would go to the local court and litigate. Mr Ross added that 99% of legal actions were heard before Federal courts.

ATTACHMENTS (1) TO (7)

Standing Committees of the House and Senate, 97th Congress (1981-1983)

Committees	Size and Party Ratio		Number of Subcommittees
House			
Agriculture	43	(D 24/R 19)	8
Appropriations	55	(D 33/R 22)	13
Armed Services	44	(D 25/R 19)	7
Banking	44	(D 25/R 19)	8
Budget	30	(D 18/R 12)	9
District of Columbia	9	(D 6/R 3)	3
Education and Labor	33	(D 19/R 14)	8
Energy and Commerce	42	(D 24/R 18)	6
Foreign Affairs	37	(D 21/R 16)	8
Government Operations	40	(D 23/R 17)	7
House Administration	19	(D 11/R 8)	5
Interior	40	(D 23/R 17)	6
Judiciary	28	(D 16/R 12)	7
Merchant Marine	35	(D 20/R 15)	5
Post Office	26	(D 15/R 11)	7
Public Works	44	(D 25/R 19)	6
Rules	16	(D 11/R 5)	2
Science and Technology	40	(D 23/R 17)	7
Small Business	40	(D 23/R 17)	6
Standards of Official Conduct	12	(D 6/R 6)	none
Veterans' Affairs	31	(D 17/R 14)	5
Ways and Means	35	(D 23/R 12)	6
Senate			
Agriculture	17	(R 9/D 8)	8
Appropriations	29	(R 15/D 14)	13
Armed Services	17	(R 9/D 8)	6
Banking	15	(R 8/D 7)	7
Budget	22	(R 12/D 10)	none
Commerce	17	(R 9/D 8)	8
Energy and Natural Resources	20	(R 11/D 9)	6
Environment and Public Works	16	(R 9/D 7)	6
Finance	20	(R 11/D 9)	9
Foreign Relations	17	(R 9/D 8)	7
Governmental Affairs	17	(R 9/D 8)	8
Judiciary	18	(R 10/D 8)	9
Labor and Human Resources	16	(R 9/D 7)	7
Rules and Administration	12	(R 7/D 5)	none
Small Business	17	(R 9/D 8)	8
Veterans' Affairs	12	(R 7/D 5)	none

2. In 1945 Clayton Powell entered the U.S. House of Representatives. He was excluded from his seat in 1967 for alleged improper expenditure of government funds for private purposes. In a special election to fill his vacant seat, he was overwhelmingly re-elected. Elected again in 1968 he was seated in January, 1969, but deprived of his 22 years' seniority and fined $25,000. In June 1969 the U.S. Supreme Court ruled that the House had unconstitutionally excluded Powell from Congress. In 1970, he was defeated for renomination.

3. Both House and Senate in 1977 approved tough new ethics codes and strengthened the committees charged with enforcing them following the revelations of Watergate.

   Finding members for the ethics committees has never been easy for congressional leaders. And when there are disciplinary proceedings to be conducted, the difficulties are compounded. Senators and representatives agree there is little to be gained from serving on the committees.

   Senate leaders experienced such great difficulties filling Ethics vacancies in 1979 that the Senate in November abolished a committee rule intended to ensure a balanced membership.

   The rule had required two of the panel's six members to be freshmen, two to be in their second term and two to have completed two terms or more.

   SENATE COMMITTEE MEMBERS. As a result of the rule's abolition, five of the six Ethics Committee members in the second session of the 96th Congress were in their first term.

HOUSE COMMITTEE MEMBERS. Only four members of the House Standards Committee, which was to investigate the 1980 Abscam scandal (at least seven representatives and one senator were suspected of taking bribes from FBI agents posing as rich Arabs - had been members of the panel before 1977. Although he was to remain a member of the committee, John P. Murtha, D-Pa., said he would not participate in the committee's investigation, because he was one of the seven House members mentioned in the news reports of the bribery attempts. Murtha was replaced for the duration of the investigation.

ETHICS COMMITTEE MEMBERSHIPS, 98th Congress, 2nd Session (1984).

SENATE SELECT COMMITTEE ON ETHICS

Republicans:	Senator Ted Stevens, Alaska
	Senator Jesse A. Helms, N. Carolina
	Senator Dave Durenberger, Minnesota
Democrats:	Senator Howell T. Heflin, Alabama
	Senator David Pryor, Arkansas
	Senator Thomas F. Eagleton, Missouri

HOUSE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

Democrats:	Representative Louis Stokes, Ohio (Chairman)
	Representative Nick Joe Rahall II, W. Virginia
	Representative Ed Jenkins, Georgia
	Representative Julian C. Dixon, California
	Representative Vic Fazio, California
	Representative William J. Coyne, Pennsylvania
Republicans:	Representative Floyd Spence, S. Carolina
	Representative Barber B. Conable Jr, New York
	Representative John T. Myers, Indiana
	Representative Edwin B. Forsythe, New Jersey
	Representative Hank Brown, Colorado
	Representative James V. Hansen, Utah

4. The formal Presiding Officer of the Senate is the Vice-President of the United States, although he spends little time in the Senate. His importance in the body is usually limited to those occasions on which he has an opportunity to cast the deciding vote on a controversial measure because the senators themselves are evenly divided. This may happen only a few times during his four-year term. The Senate also elects a president pro tempore who is supposed to preside in the absence of the Vice-President. In reality, most presiding is done by junior senators.

5. Two of the most influential - and publicly unnoticed - Capitol Hill officials are the parliamentarians of the House and the Senate. Their roles extend far beyond that of mere arbiters of parliamentary practice.

   Consulted by White House legislation drafters, relied upon heavily by congressional leaders, and sought out for advice by experienced members of both parties, the parliamentarians' influence is greatest in the procedural mechanics that transform an idea into a piece of enacted legislation.

   The parliamentarians, serving unbroken terms in Congress after Congress, become masters of the legal and technical skills which are the backbone of successful legislating. They are acknowledged experts in routing a bill to the right committee, preparing it for floor debate and protecting it from opposition attacks.

   Parliamentarians are appointed by the leadership of the House and Senate, but because of their highly skilled, technical functions, the parliamentarians traditionally remain in office regardless of changes in political control of the two chambers.

6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same: and for any Speech or Debate in either House, they shall not be questioned in any other place.

7. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

WEDNESDAY, 25 JANUARY, 1984

At the Senate, Congress, Washington, 9.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr Mees,
The Assistant Serjeant-at-Arms (Senate)

1. The Chairman enquired as to the role of the Capitol Policemen outside the Capitol. Mr Mees replied that a Capitol Policeman would accompany a Senator to the Senator's home district, for instance, if there was a perceived threat to the Senator's safety. Capitol Policemen are authorised to operate throughout the Union should the need arise.

2. Mr Moore enquired as to the composition of the Capitol Police. Mr Mees replied that the Capitol Police comprise about 1,200 officers and men which guard both the Senators and Congressmen. The Capitol Police enjoyed good relations with the FBI, the Security Service and the Metropolitan Police.

3. Mr Moore enquired as to whether the number of perceived threats had increased. Mr Mees replied that a threatened attack on the State Department and a successful recent bomb blast in a nearby court had led to increased security in the Capitol Plaza. A Security Service detail was always present at the Capitol when the President or the Vice-President visited: Capitol Policemen, however, provided the main security.

4. Mr Moore was informed that Senators who are Presidential candidates received increased protection from the Security Service and not the Capitol Police. If Senators were under a particular threat, however, they received increased protection from the Capitol Police. Mr Mees added that Senatorial candidates for the United States Presidency reverted to being "mere Senators" when they returned to the Capitol and are afforded no particular protection by the Capitol Police Force.

5. The Chairman was informed that all Capitol Policemen wear guns when on duty as this was the American tradition.

6. Mr Moore was informed that the Police guards are rotated occasionally around the Capitol buildings in order that they may become acquainted with all the Senators and Congressmen. Mr Moore was further informed that the "boredom" factor was a major component which the Capitol Police had to contend with. (The area of the Capitol Grounds and Buildings has been increased periodically since 1935. The Capitol Grounds, as defined by Public Law 570, 79th Congress, approved 31 July, 1946, as amended, include 208.7 acres of lawn areas, sidewalks, streets, and roadways.)

7. The Chairman enquired whether there was in induction process for members of the Capitol Police Force. Mr Mees replied that the main criteria for selection were age, health and education. The selectees go to the Federal Police Academy in Georgia and then undergo a briefing on the requirements of work at the Capitol.

8. Mr Moore enquired whether Senators and Congressmen required security passes. Mr Mees replied that this had probably never been discussed and would most likely be unacceptable to Senators and Congressmen.

9. The Chairman enquired whether Senators wear lapel buttons. Mr Mees said that they did not: that the turnover of Senators was far less than Congressmen: that there were only 100 Senators appointed for 6 year terms: and that in 1982 only five new Senators had been appointed.

10. Mr Moore enquired as to access of the Press and the electronic media to the Senate section of the Capitol Building. Mr Mees replied that the media had to be approved by the Serjeant-at-Arms before they could gain access to the Senate. He mentioned in passing that on one occasion two of the TV networks wanted permission to film the new security procedures operating in the Capitol Building, but permission had been refused by the Serjeant-at-Arms. Other networks had stationed cameras outside the entrance to the Senate building and had filmed the security procedures undergone by visitors. This film was televised on the 30 networks on the night of the day on which the official request by the two aforementioned networks had been refused.

11. Mr Moore was informed that the new super-projection cameras and sound equipment were not permitted access to the Senate building. Sensitive meetings, however, were not held in "exposed" rooms. The Press had shown a certain self-discipline in the matter.

12. Mr Moore was informed that the same Press Gallery journalists did not serve the various Senate and House of Representatives Press Galleries. The Senate Press Galleries were composed of representatives of daily newspapers; periodicals; magazines; and radio and television journalists. Press photographers had a Senate Gallery only.

13. Mr Moore was informed that each Gallery has its own Election Committee which is known as a "Standing Committee".

14. The Chairman was informed that the Galleries "caucus" on common interests but were competitive. There was a keen rivalry between the Press and the electronic galleries.

15. The Chairman was informed that permission to film the activities of the various Senate Committees was obtained through the particular Committee officers. These officers notified the Serjeant-at-Arms of the permission and the date and time of filming.

16. Mr Moore enquired as to the outcome of a drunken and offensive Press Gallery correspondent calumniating the Senate. Mr Mees said that the correspondent would most likely be disciplined through his particular Press Gallery. If necessary he would be escorted from the Press Gallery, by the Serjeant-at-Arms.

17. Mr Moore enquired whether there were security checks on gallery correspondents by the Serjeant-at-Arms once the correspondents were accredited. Mr Mees replied that there were probably none: even the "underground" press meeting the criteria would be accepted into the Senate Galleries.

18. The Chairman enquired as to the Standing Committees of correspondents in the various Galleries. Mr Mees said that these Standing Committees were comprised of five members elected by their peers. Pressmen desiring to join the Galleries were vetted by the Standing Committees. The members were accredited by the Senate and House of Representatives. If either Serjeant-at-Arms thought that a prospective member was a security risk the matter would be put to the Standing Committee. The Committee would then decide on the issue by voting "yea" or "nay". If "nay", the respective Serjeant could pursue the matter with the Rules and Administration Committee.

19. Mr Moore enquired as to the procedure by which Standing Committees process Press Gallery applicants. Mr Mees stated that the Standing Committee would request an identification from the particular company desiring accredition for the correspondent

on the company letterhead. A second letter on company letterhead would be required enclosing clippings from articles written by the correspondent. Mr Mees added that the verbal assurances of the Chiefs of the Washington press bureaux of the various agencies would be accepted by the Standing Committee concerning local District of Columbia correspondents.

20. Mr Moore was informed that there are approximately 1,600 members of the daily Press Gallery.

21. The Chairman was informed that foreign correspondents were accredited through their respective Embassies.

22. The Chairman was informed that problems concerning behaviour by members of the Press Galleries would be handled by the respective Standing Committees. Mr Mees added that complaints by members of the Gallery against fellow members must be instigated by members of that Gallery. He mentioned that the Standing Committee cannot initiate investigations unless there are "criminal elements" involved. Mr Mees added further that as far as complaints about breaches of ethics were concerned, the offending member would receive an official reprimand. If this were insufficient the member's accreditation would always be lifted. Mr Mees mentioned an incident where an embargo had been broken by a member of a Press Gallery and a complaint with the Standing Committee had been lodged by a fellow member of the Gallery.

23. Mr Moore enquired as to the Rules Committee and its relation to press Gallery matters. Mr Mees instanced a case where a member had been denied accreditation of a Gallery as he was a lobbyist for the South African government, which was in breach of the applicable rules. The particular member later certified that he was no longer a lobbyist: he was accepted as a member, although his claim was checked.

24. The Chairman asked whether Senators had direct contact with a Standing Committee. Mr Mees instanced the case of a Senator writing to a Standing Committee, complaining that he had been misquoted. The Standing Committee replied that the appropriate course was for the Senator to write to the Editor of the newspaper concerned.

25. Mr Moore was informed by Mr Mees that there was no possibility of the "Laurie Oakes situation" arising in the U.S. Senate: the emphasis was strictly on political reporting. (Mr Mees added that the non-Capitol press took a lively interest in the private lives of Senators).

26. The Chairman was informed that media people can only operate in either the Senate or the House of Representatives Gallery - not both.

27. Mr Moore was informed that the Senate Superintendent and the House of Representatives Superindendent oversee the functioning of their respective Galleries. The Superintendents meet occasionally to consult on common issues. Mr Mees added that the office of the Serjeant-at-Arms approve Press "stake-outs".

28. Mr Moore was informed that there are various candidates for positions on a Standing Committee, although no one company can dominate, as there are far too many correspondents.

29. The Chairman enquired whether Senators could visit the Galleries. Mr Mees replied that they were encouraged to visit the Galleries and brief all the reporters simultaneously. This practice helped reduce congestion in the Senate corridors.

30. The Chairman was informed that the Superintendence of a Press Gallery is a career position: the Senate Superintendent had a staff of four assistants and two secretaries.

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The Delegation met with Mr Michael Davidson, General Counsel of the Senate

1. The Chairman was informed that the office of Senate Legal Counsel was created by legislation in 1978. The position was non-elective and non-partisan. The appointment of the Assistant Counsels was at the discretion of the Counsel.

2. Mr Moore was informed that it was necessary for the Senate Counsel to obtain the permission of the Senate to appear in an action.

3. Mr Moore enquired whether there had been complaints about the Congressional Record, instancing the New South Wales Hansard style and practice. Mr Davidson replied that the "Journal" of the Senate (i.e., Minutes) was referred to in the Constitution but there was no reference in the Constitution to the Congressional Record. He stated that the Congressional Record merely records speeches and its purpose is the recording of speeches only. The speeches given in the Senate, according to Mr Davidson, are more records of policy and are not meant primarily to influence the voting and outlook of Senators.

Mr Davidson mentioned the problem arising from the practice of subsequent defamatory material being inserted into the Record which was not spoken on the floor. Mr Davidson stated that the issue was not raised in *Hutchinson v Proxmire* as the matter inserted into the Congressional Record was also issued in the press release. The press release was considered by the court.

Mr Davidson pointed out to the Delegation that the "Speech and Debate" clause covered speeches and reports in Committees.

4. The Chairman was informed that the need for a Parliamentary Paper Statute had never arisen in the United States as it was always accepted that the Parliamentary proceedings would be public. Mr Davidson added that the Congressional Record dates from 1873.

5. Mr Moore enquired as to the immunity attracted to a Senator's notes. Mr Davidson said that the briefing paper prepared by a Senator for legislative purposes was covered by immunity: the wider the purposes for which a briefing paper is prepared the more immunity contracts.

6. Mr Moore enquired whether the "Speech and Debate" clause would cover a letter from a Senator to, for example, the Attorney-General of the United States concerning a member of the Attorney-General's staff. Mr Davidson replied that qualified privilege would be attracted, although the degree of privilege depended upon each case. Mr Davidson noted that governmental action attracts a special degree of privilege under the First Amendment. Mr Davidson further mentioned the immunity afforded to Government officials for acts carried out within the scope of their office. Mr Davidson added that a further qualification operated where the official would be sued on common law grounds (absolute privilege) or on constitutional grounds (e.g., violation of due process - immunity can be defeated).

7. Mr Moore was informed that authorised congressional and Committee investigations were covered by the "Speech and Debate" clause.

8. The Chairman was informed that U.S. Courts might regard a question on notice, similar to those frequently asked, including a number by the honourable member for South Coast, as being statements concluded with a question mark, and as such not questions within the legislative intention.

The Chairman was informed that the right to demonstrate outside the Capitol Building had been established by court judgments and statute. The precincts, which had been statutorily defined, were wide.

Mr Davidson added that the crucial test was the conflict between maintaining the security of the building and freedom to demonstrate.

Mr Davidson further mentioned the case of *Dellums v Powell* wherein the right to meet was upheld but *legitimate* security grounds took priority over the right of demonstration.

10. Mr Moore enquired whether groups required a permit to demonstrate before the Capitol. Mr Davidson said that groups did require a permit to assemble before the Capitol Building: the permit was obtained from the Capitol Police. Individuals, however, were freely permitted to assembly before the Capitol.

11. The Chairman enquired as to the costs in the Proxmire "Golden Fleece Award" action. Mr Davidson said that Senator Proxmire had paid damages of $10,000 but the Senate had paid Senator Proxmire's legal fees and expenses, which totalled over $125,000.

12. Mr Moore was informed that the Senate Counsel List received an annual appropriation of $500,000. The appropriation provided for contingencies in case the Senate was unsuccessful in maintaining actions.

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The Delegation met with the Director of the Official Reporters (Hansard)

1. The Chairman enquired as to the production of the Congressional Record. The Director stated that the stenographers (reporters) took down a verbatim account of the speech.

The stenographer dictated the copy to a typist.

The stenographer may correct slight grammatical errors; correct confusion over Congressional procedures; and change "you" into a reference to the Congressman's district.

The context, however, can never be changed.

The typed manuscript is then proof read by the stenographer; the copy is sent to the Congressman concerned.

The Director mentioned the "Revise and Extend" Rule. This rule required the consent of the Speaker, which is virtually automatic. About 90% of the Congressmen request permission to revise and extend their remarks made on the floor of the House.

2. The Chairman was informed that the effect of the "Revise and Extend" Rule was to amplify the Congressional Record drastically.

3. Mr Moore was informed that the Editor of the Congressional Record had never presented a submission to the Speaker to alter the rules under which the Congressional Record is prepared.

4. Mr Moore was informed that the copy was never checked after it had been proofed by the Congressman. The clerks in the Congressional Record Office sent the copy to the Government Printer, who printed it.

5. The Chairman was informed that obscenities uttered in debate would be printed in full, although the Congressman has a right to withdraw the remark subsequently.

6. The Chaiman enquired as to the use of "Hansard style" in the Congressional Record. The Director replied that unknown words were put in quotes (that is, words unknown and unrecorded in dictionaries and reference books kept in the office of the Editor of the Congressional Record: instant neologisms are similarly treated). The Director added that if organisations are referred to by initials, the initials were used.

7. Mr Moore enquired whether there was a handbook for reporters. The Director replied that there was a book on Congressional format and style which was based on the Rule Book of the House of Representatives.

8. The Chairman was informed that a "Hansard style" was not imposed: regional differences in the speech of a Congressman were preserved.

CIRCUIT OF THE JOINT SELECT COMMTTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

FRIDAY, 27 JANUARY, 1984

At the General Court of the Commonwealth of Massachusetts, State House, Boston, 9.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P., Chairman

Mr T.J. Moore,M.P. Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr Robert McQueen, Clerk of the Massachusetts House of Representatives, Mr George Kenneally, Associate Senate Counsel, Mr Paul Menton, Assistant to the House Counsel and Mr Al Kennedy, Assistant Press Secretary to the Speaker of the Massachusetts House of Representatives.

The Delegation proceeded to speak generally with the Officers of the State House of Massachusetts, with all the officers contributing to the discussion of the operation of privilege in the Commonwealth of Massachusetts.

1. The Chairman was informed that the "Debate and Arrest" Clause of the Massachusetts Constitution had been "watered down". Freedom of Speech, however, was still very much protected under both the Constitution of the Commonwealth of Massachusetts and that of the United States. The officers expressed surprise at the problems arising from the New South Wales defamation laws, problems which were alien to Massachusetts.

2. Mr Moore was informed that there was no transcription of debates in the State Parliament, although an official and unpublished record of Members' speeches was kept. A journal was kept of the proceedings of both the Senate and the House of Representatives: the journals, however, are akin to the Votes and Proceedings of the Legislative Assembly and the Minutes of the Proceedings of the Legislative Council of New South Wales.

3. The Chairman inquired as to whether everything said in the Chambers was protected in Massachusetts. The Chairman was informed that asides in the Chamber are actionable. It has been established that asides and remarks that are not part of the context of the speech and the debate on the floor are actionable.

4. Mr Moore was informed that newspapers are not protected by the legislative immunity. This had been established in the case of *Sullivan v State of New York*. Thus reporting remarks made on the floor of the House, that could be considered slanderous of persons who are "non-public", involves considerable risks for newspapers. It was pointed out that the Presiding Officers tried to prevent personal verbal assaults. House Rule 58 for the House of Representatives, for instance, prevents discussion of "personalities", i.e. individual Members of the House.

5. Mr Moore was informed that the reporting of a speech by a newspaper prior to its being spoken from the floor of the House could render the newspaper liable, although the Member would be protected.

6. The Chairman was informed that a Member can have a speech read into the record after the Member has spoken on the floor. The additional speech is protected. It is necessary to move by motion the insertion of additional matter into the record.

7. Mr Moore was informed that the privilege afforded to the Governor (his office is located within the State House) is not constitutional in origin.

8. Mr Moore was informed that a *Strauss* type situation in Massachusetts would not be protected. *Brewster's* case establishes that the publication of documents outside the Chambers is not congressional and is thus not protected.

9. The Chairman inquired whether a sense of the corporate dignity of Parliament existed in Massachusetts. He was informed that the offence of Contempt of Parliament did exist but it was difficult to enforce against newspapers because of the wide-ranging Freedom of Speech in Massachusetts. A slanderous disruption in the Chamber would be a possible Contempt of Parliament, although it would be difficult to maintain the action in light of the Freedom of Speech accorded to debate.

10. Mr Moore was informed that both Houses maintained the right to eject demonstrators from galleries. Members can also be ejected from the Chambers and can be charged with a breach of the peace, if necessary. This charge, however, is statutory rather than congressional.

11. Mr Moore was informed that the attendants had the right of use of reasonable and necessary force in ejecting demonstrators. This right has been established by litigation.

12. Mr Moore was informed that people can be brought before the bar of both Houses although the right has never been exercised.

13. The Chairman was informed that "informal" disciplinary powers are allowed in controlling demonstrators: demonstrators can be detained at the pleasure of the respective Houses.

Favourable reference was made to the practice in the House of Commons where demonstrators were temporarily detained in the House of Commons lockup. Demonstrators have been charged following civil arrest within the precincts of the State House.

14. Mr Moore was informed that the State House Police are armed when on duty within the precincts and the State House itself. The State House Police are employed by and are part of the Executive. The Serjeant-at-Arms, however, is unarmed. The Parliamentary Court Officers (i.e. the legislative police) can arrest Members and bring them to the State House at the direction of the Speaker. The Court Officers are unarmed and their powers extend only to the borders of Massachusetts.

15. Mr Moore was informed that there were no security arrangements at the State House of Massachusetts as they were thought unnecessary. It was thought that extreme security measures as instanced at the Capitol Building in Washington, produced security incidents.

16. The Chairman inquired whether there was an equivalent in Massachusetts to the Privileges Committee of the House of Commons. He was informed that in 1978 an Ethics Committee had been established in the House of Representatives. The Committee had power only to file a report. The House of Representatives could either accept or reject the report.

17. Mr Moore inquired whether a private citizen had any redress should he feel traduced by remarks made by a Member. Mr Moore was informed that a private citizen may file a complaint under House Rules 16 and 16(a). The House refers the complaint to the Ethics Committee. The same procedure is followed in the Senate where the Senate refers the Complaint to its Ethics Committee. (The Senate has five different Committees involving various matters, while the House has eleven Committees.)

18. The Delegation was referred to the Constitution of Massachusetts: Part 2, Chapter 1, Section 3, Article 10 concerning the judgement of disputed reference; the punishment of offences and the privileges of the State House.

19. The Chairman inquired whether permits were required by demonstrators. He was informed that there were massive demonstrations during the Vietnam War outside the State House. The side doors had always been locked, but the front doors were left open in order to show that the State House was always open for the citizens of Massachusetts. The demonstrators had climbed onto the columns of the State House but did not attempt to invade the building. No permits are required to hold demonstrations (as opposed to Washington). The problem had not yet arisen of the business of either House being interrupted by demonstrators: it was problematical as to the outcome of any such demonstration. It was pointed out, however, that demonstrators had assembled inside the building outside the Governor's office. This latter demonstration, however, was regarded as being directed to the Executive rather than the State House.

20. Mr Moore was informed that the precincts were supervised by the State House. The State House was directed by the Governor rather than the Parliament. The main day-to-day business in supervising the precincts was directed at breaches of the parking ordinances.

21. The Chairman was informed that some rooms in the State House were under the direct control of the Executive (the Governor's Quarters.)

22. Mr Moore was informed that a problem of determining the jurisdiction of either the Senate or the House of Representatives arose in contempts committed in the hearing rooms which were under joint jurisdiction.

23. The Chairman inquired as to the recognition of subpoenas issued by both Chambers. The Chairman was informed that each House must vote on the powers of each subpoena before the subpoena can be enforceable. The Chairman was further informed that a private citizen can be imprisoned by order of either House. This caused a problem concerning the specific separation of powers under Article 30 of the Massachusetts Constitution. The powers of the House to punish offenders was a contentious constitutional issue.

24. The Delegation was referred to the *Senate/Communist Party* case.

25. Mr Moore was informed that a defamatory matter published by either a Senator or a Congressman on the respective letterheads would not attract immunity: there must be a nexus with legislative intent.

26. The Chairman was informed that qualified privilege in Massachusetts extended only to the Governor, judges and lawyers.

27. Mr Moore was informed that the media were represented in the press gallery. Office space was provided within the State House, although no rent was charged. The President of the State House Press Association was responsible for organising the Press Gallery. Complaints would be directed in order of gravity to the Serjeant-at-Arms, the Speaker, or the House Rules Committee. The Press Association allots accreditation to applicants.

28. The Chairman inquired as to the dress standards of the Press. He was informed that press men usually wore shirts and ties. The Association relied on self-discipline in the matters of dress. The House Rules Committee, however, was the ultimate authority as regards dress within the House of Representatives' portion of the State House. House Rule 81 covers standards of behaviour.

29. The Chairman was informed that the media and television camera crews were allowed everywhere within the State House. They were even allowed in Committee rooms unless the proceedings were held in camera. Ambush by television was a common practice in the State House.

30. Mr Moore was informed that the television camera crews were allowed in the House of Representatives Chamber.

31. The Chairman was informed that the Press Gallery in the State House was divided into two units - Broadcasters Association and the Press Association. The rooms and telephone calls within Massachusetts were free. The typewriters were also serviced by the State House. It was pointed out that some media representatives preferred to pay for their typewriters and telephone calls in order to maintain their total independence.

32. Mr Moore was informed that each Association has a President, Vice-President, Secretary and a Treasurer. The Broadcasters Association (which incorporates T.V. newsmen) had a membership of 15, while the membership of the Press Association varied from 30 to 40 members.

33. Mr Moore was informed that each individual member in the Association worked separately and there was no real cohesion or collaboration. The independence of the Press was jealously guarded.

34. The Chairman was informed that the Speaker was not in the habit of giving news conferences: he had given occasional conferences but they were a recent innovation.

35. Mr Moore was informed that there were no regular formal meetings between the President and/or the Speaker and the President of the State House Press Association. The President of the Press Association generally saw the Press Secretary to the Speaker.

36. Mr Moore was informed that there were no food or bar facilities for the Press in the State House.

37. Mr Moore was informed that the Press men were almost never publicly drunk or offensive. Press men had only been drunk on two occasions and in both instances the offenders had apologised directly to the Speaker.

38. Mr Moore was informed that the President of the Press Association accredits new members of the Association. The accreditation card, however, must be signed by the Speaker.

39. The Chairman was informed that National correspondents wishing to cover the State House liaised directly with the Press Association.

40. The Chairman was informed again that it was the normal practice of television cameramen to hover in the corridors. The State of the State address by the Governor was filmed live in the House of Representatives. Joint sittings of the Senate and the House of Representatives were also televised. The "pencil" Press rely on their own reporting skills but can buy the unofficial, unpublished report of proceedings.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

MONDAY, 30 JANUARY, 1984

At the House of Commons, Ottawa, Canada, 9.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P., Chairman

Mr T.J. Moore, M.P. Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met Mr C.A. Lussier, Clerk of the Senate, Mr Richard Greene, Clerk-Assistant of the Senate, Dr C.B. Koester, Clerk of the House of Commons, Mr Marcel R. Pelletier, Law Clerk and Parliamentary Counsel, House of Commons, and Philip Laundy, Clerk Assistant (Administration and Procedural), House of Commons.

1. The Chairman inquired whether there was a body in the House of Commons comparable to the Privileges Committee of the House of Commons at Westminster. The Chairman was informed that the Privileges and Elections Committee would be the body most akin to the Westminster Committee. Dr Koester added that the privileges of the members of the Canadian House of Commons were not broad: they were essentially freedom of access to the Parliament, freedom of speech within Parliament and freedom from civil arrest while Parliament is in session.

2. Mr Moore was informed that the British North America Act of 1867 (the forerunner of the Canadian Constitution which was recently patriated to Canada) governs the privileges of the Canadian Parliament. The Senate and House of Commons Act had expounded upon the 1867 Act. The British North America Act had adopted the privileges of the House of Commons. The Canadian legislation incorporates the privileges of the House of Commons but has not defined them.

3. The Chairman was informed that under the 1867 Act the privileges of the United Kingdom House of Commons can be amended in Canada, although no new privileges can be created nor the existing privileges be extended.

4. Mr Moore was informed that the House of Commons relies on *May*, British practice and Canadian precedent.

5. Mr Moore was informed that there are few "real" cases of privilege in the Canadian Parliament: for some reason it has not been the tradition and practice for Members to raise questions of privilege. That may reflect the proximity of Canada to the United States, where cases of privilege are far less prevalent because of the wide ranging freedom of speech sections of the U.S. Constitution.

6. The Chairman was informed that there was no difficulty in identifying reference cases concerning privilege - the difficulty was adapting the precedents to the Canadian circumstances.

7. Mr Moore inquired as to how a case of privilege was raised in the House of Commons. The Member raises the issue in the House: the Speaker contemplates whether a prima facie case has been established, and if satisfied, allows the motion to proceed. The motion generally refers the matter to the Privileges Committee. The Speaker can, however, reflect on the matter in his Chambers if he so wishes. A matter of privilege must always be related to the House and its associated parliamentary proceedings.

8. Mr Moore inquired as to the functioning of the Privileges Committee. He was informed that the Privileges Committee meets and plans its schedule when a motion has been referred to it. As privileges motions are rare in the House of Commons, only two cases had been referred to the Privileges Committee in the last four years (as at 1984).

Mr Moore was informed that the Privileges Committee could interview witnesses. The Committee presents a report to the House. Provision is made for the House to debate any recommendations that the Privileges Committee may make in its report. Debate cannot be recalled on the report. (The recall is a device intended to give an electorate a direct control over its representative by voting for his resignation. It has never been used in the Commonwealth although it has been used in United States). The Privileges Committee is comprised of 10 Members. Five Members support the Government, the Chairman is non-partisan. Three Members support the official Opposition and one Member supports the NDP Party.

9. Mr Moore inquired as to the rights of a witness before a Committee. Mr Moore was informed that the witnesses had the right to have counsel present. Counsel cannot speak for a witness: they are present in an advisory capacity only.

10. Mr Moore then asked in the case of the "leakage" of a Parliamentary Report whether a journalist involved would have the right to silence or whether his refusal to speak would be regarded as a further contempt of Parliament. Mr Moore mentioned that in the United Kingdom such a leakage would be regarded as a contempt. Mr Moore was referred to the *Martin O'Connell* case where a draft report had been leaked to the Press. The member of Parliament who had made the complaint had not named the specific people and the complaint had not proceeded. It is the practice in Canada in both the House of Commons and the Senate to get the matter on the record and then to let it rest. Privilege is thought to be a pitfall and both Houses prefer to consult their dignity. Both Houses regarded the experience of the United Kingdom House of Commons in the 1960s concerning findings of various Privileges Committees as daunting.

11. The Chairman inquired as to the effect of a *Strauss* type situation in Canada. He was informed that it was uncertain whether correspondence would be protected in Canada. It was thought that if correspondence were marked "personal and confidential" it would be privileged. If the correspondence were not so marked then the position would be very unclear.

Mr Moore was informed that one view would hold that if a letter were sent to the recipient, the recipient gets the legal property of the letter and the qualification "personal and confidential" would perhaps not be binding. A Canadian case was instanced when a letter written by the Leader of the Opposition was leaked by a Minister. So far as the House of Commons was concerned, the privilege aspects involved distinguishing between the political, legal and moral consequences of the Minister's action.

Mr Laundy stated that privilege arose basically if a letter in the above circumstances were libelous or if the Minister threatened to name politicians in the House with a view to intimidating them in the performance of their duties. The sticking point about the letter from the Leader of the Opposition was that it had been written when the Leader of the Opposition was not a Member of the House of Commons.

12. The Chairman inquired whether Hansard was privileged - if so, to what degree during its various stages of production. He was informed that the Hansard in the House of Commons was produced in two issues in French and English. The English language issue was prepared by a staff of nine English speaking stenographers (reporters) who each do ten minute takes.

The tapes are transcribed, then edited and forwarded to the translation bureau. The edited and translated transcriptions are then forwarded to the Government Printer and reprinted overnight.

The French language debates are taped and are then transcribed and edited before being forwarded to the Government Printer for printing overnight.

The production of Hansard in the Senate is undertaken by eleven shorthand reporters (nine of whom prepare the English language issue, with the remaining two reporters preparing the French language issue). The copy undergoes the same production process as the copy in the House of Commons although it is not returned with the same expedition.

A Member is entitled to review his speech while it is in the transcript ("blue")stage.

The "Hansardising" is limited to grammar and syntax in the reporting of the debates in the Senate. In the reporting of the debates in the House of Commons, colloquialisms are written although vulgarisms are softened. The reporting is essentially verbatim although the "blues" are sometimes edited by the particular Members.

The problem arises with conflict between the edited Hansard and the television tapes of the debates. This had lead to a problem concerning the privilege attached to Hansard. It had been recognised that the House of Commons could decide that "editing" of Hansard was a contempt of the House. If the House were so to decide, it would be unlikely that the matter would be referred to the Courts for adjudication. Both the Hansard and the TV tapes are supposedly privileged. The position of privilege and its ramifications in regard to the televised debates had not yet been canvassed.

The "blues" are held to be privileged.

13. The Chairman inquired as to whether the Press Gallery had access to any of the stages of Hansard. He was informed that the Press Gallery automatically gets the first copy from the Hansard reporter (i.e. the copy unedited by the Member). This first copy is regarded as being absolutely privileged. The Member's edited copy and the final version are also regarded as being absolutely privileged. The Chairman was informed that the situation could arise where three conflicting versions of what was said in the House can be absolutely privileged.

14. Mr Moore was informed that the Press checks their own notes first if the subject matter is defamatory.

15. The Chairman was informed that the media had wide-ranging access and that Press Conferences outside the Chamber known as "scrums" were a feature of Canadian political life. The "scrums" comprise a tight cluster of radio, television and print media journalists, sound technicians and cameramen around a Member of the House, who has made a statement of topical relevance, and take place immediately after he or she has left the Chamber and occur in the foyer outside the Parliamentary Chamber. The "scrums" occasionally also occur outside the Party meetings, but there are some areas, notably the Members' Lobbies, which are along the side of the Chamber, where they are not permitted to occur. From the brief evidence that the delegation saw of such an occurrence, the closest Australian parallel would be the interviews on the steps of Parliament House, Canberra. Certainly they are equivalent to the aggression evident in the scrums of both Rugby codes.

16. Mr Moore was informed that a guidebook was produced for reporters new to the Press Gallery and also for new Members.

17. The Chairman was informed that copies of speeches made in the House which were printed in booklet form and circulated privately were not privileged. The Press, however, in its reporting of debates in the House enjoyed qualified privilege.

18. Mr Laundy informed the Chairman that quotes from both the print and electronic media which were extracted with malicious intent were not privileged. Mr Laundy pointed out the anomaly between a television report of a Member's speech being shown and repeated (which televised report attracted absolute privilege) and circularisation of the Member's speech in booklet form which did not attract absolute privilege.

19. Mr Moore was informed that the Canadian defamation laws are within the provincial legislative sphere.

20. The Chairman inquired as to how the House of Commons dealt with disorder in the public galleries. He was informed that a demonstrator could be detained in the custody of the Serjeant-at-Arms and this detention could last for the rest of the session, if necessary. The incarceration of a demonstrator could only follow upon a resolution by the House to this effect. The last time the House passed such a resolution was in the latter half of the 19th Century. The Chairman was informed that a bomb had exploded and killed a demonstrator in one of the House of Commons lavatories. It was shown at the inquest that the demonstrator had been sold a five-second fuse instead of the five-minute fuse he had requested. A woman demonstrator had thrown cows' guts from the balcony into the Chamber. She had been led away from the House.

21. Mr Moore was informed that both Houses have the power to try people. Mr Moore was further informed that it was unlikely that either House would cede these powers to the Courts.

22. The Chairman was informed that the Canadian experience was that a Privileges Committee was the best venue for determining privileges issues. Mr Laundy mentioned that while it was desirable to have strict rules of evidence and the right of Counsel to appear for witnesses, if necessary, this could lead to a court-like procedure, which would not necessarily be in the best interests of Parliament. Mr Laundy added that the Canadian practice was influenced by the United States, and that the practices of the House of Commons at Westminster, such as in-camera proceedings, would be unacceptable in Canada.

23. Mr Moore was informed that it was unknown whether the Charter of Rights would override Parliamentary privilege. A test case was needed to establish a position.

24. The Chairman was informed that the Press Gallery was organised on a formal basis and comprised approximately three hundred members. The Gallery admits new members upon delegated authority from the Speaker. The Speaker retained, however, ultimate authority. An Executive Committee, which is elected annually, is responsible for the running of the Press Gallery. This Committee is responsible for maintaining discipline in the Gallery, which had often proved difficult. The Committee tries to escape acting as or being characterised as a "Kangaroo Court". (The Chairman preferred the term "Caribou" Court). It was noted that suspension from the Gallery was possible, although this was regarded as an extreme measure. The normal means of discipline was that of a "quiet word".

25. Mr Moore was informed that there was a formal relationship between the Press Gallery, and the Speaker, the Serjeant-at-Arms, and the Party Whips.

26. Mr Moore was informed that a complaint by a Member of Parliament concerning conduct of a member of the Press Gallery would be referred to the Speaker, who would in turn refer the complaint to the President of the Press Gallery. An enquiry would generally follow.

27. The Chairman was informed that there were "no-go zones" for the Press in Parliament. The presence of the Press in Parliament was regarded as a privilege and not as a right (although the Press would probably dispute this assertion). The Press are restricted from the Speaker's Quarter, the Senate and the House of Commons Lobbies and Members' Rooms (unless invited). The position of Press access to the corridors is a "grey area", but the Press are always keen to assert their presence.

The main problem had arisen with TV camera crews and their encumbering paraphernalia. The "pencil" Press caused far fewer problems of congestion. Parliament was faced with the difficult problem of being seen to favour one section of the media, if it were to disallow access by the electronic media, while maintaining access by the print media.

28. The Chairman was informed that TV camera crews had access to the Parliamentary precincts (the Chairman was also informed that all TV camera crewmen are members of the Press Gallery). TV camera crews cannot cross a certain line in the Lobby because of congestion but can interview Members, if the Members are within that restricted area of the Lobby. TV camera crews generally cannot go into Committee Rooms although it is possible for them to be invited. TV camera crews are allowed to congregate outside the doors of Caucus Meeting Rooms. Parliament is keen to impose limitations on the participation of TV camera crews in the "scrums".

29. The Chairman inquired as to the televised proceedings of the House of Commons. He was informed that there were no rules on editing but the TV proceedings were in fact an electronic Hansard. No reaction shots were allowed. The camera concentrated only on the Member speaking. The televised proceedings were generally regarded by the industry as being "bad" television. There was a general balance on TV News Programmes between the Government and the Opposition.

30. Mr Moore inquired as to the practice of personal television shots. He was informed that the practice of the "TV grab" was common in Parliament House although the human ethics of the practice were doubtful. It was noted that Members can escape from television crews fairly easily within the topography of Parliament House.

31. Mr Moore was informed that the possible effects of the Human Rights legislation on Parliament's rights over the parliamentary precincts had not yet been determined.

32. Mr Moore inquired whether there was a recognised special relationship between a Member of Parliament and his constituent which was akin to the privilege between priest and confessor. He was informed that this had been contested: that it definitely was thought to be equivalent to the privilege between a teacher and a pupil and a patient and a doctor. Mr Moore was informed that in Canada there is no privilege between a journalist and his source and that journalists have been jailed despite claiming journalistic privilege.

Mr Laundy mentioned a case in British Columbia where two criminals had wire-tapped a Member of the Provincial Legislature of British Columbia in order to attempt to bribe/blackmail him (in the unusual circumstances of the case). This attempt was held to be a breach of parliamentary privilege by the Committee of the British Columbia Legislature set up to investigate the incident.

33. The Chairman was informed that there are not areas in the precincts where demonstrators are not allowed. Mention was made of the "Peace Camp" outside Parliament House (up to ten demonstrators had been living for some months in "survival tents" Ed.). It was pointed out that the Royal Canadian Mounted Police cannot move the demonstrators as the demonstrators are located within the Parliamentary precincts and are therefore outside the jurisdiction of the Royal Canadian Mounted Police.

The immediate grounds surrounding the Parliamentary precincts are under the jurisdiction of the Department of Public Works which is regarded as a "no-man's land" so far as the demonstrators are concerned. Demonstrators who are within the lands under the jurisdiction of the Department of Public Works are held not be be breaching regulations and are deemed not to be trespassing under Ontario Law (which is applicable throughout the Federal parliamentary precincts). It is for this reason that the Royal Canadian Mounted Police cannot act against the demonstrators. It was pointed out, however, that Parliament would expel the demonstrator from the grounds upon both Houses passing a resolution to this effect.

34. Mr Moore was informed that armed soldiers had invested Parliament during the 1970 National Emergency. This occupation had been raised as a matter of privilege and the soldiers were consequently removed.

35. Mr Moore was informed that the constables within the Parliamentary Buildings are not armed although the Royal Canadian Mounted Police outside carry guns. It was mentioned that when President Reagan visited the Parliament the Secret Service were armed within the Parliamentary Buildings, which was a source of considerable unhappiness to many of the Canadian Members.

36. The Chairman was informed that matters relating to security and the protection of Parliament would automatically be bi-partisan.

37. Mr Moore was informed that the Privileges Committee tends to be partisan in outlook in contrast to other Committees.

38. Mr Moore was informed of the case when the House of Commons voted against a matter going to the Privileges Committee after the Speaker had found that a prima facie case of a breach of privilege existed. The Speaker had put the matter to the House and the House had decided not to send the matter to the Privileges Committee despite the request of the Member concerned *(Real Caouette Case)*.

39. The Chairman was informed that there was no conflict in Canada between the absolute freedom of speech in the Canadian provincial Legislatures and the claim of paramountcy of federal laws.

40. The Chairman was informed that there is no potential conflict between the Houses of the Federal Canadian Parliament in compelling Members of the other House to appear as a witness before that House. It is thought that one House could pass a resolution ordering a Member of the other House to appear before it. If the Member of the other House refused to appear before the House which has passed the resolution then that Member would be guilty of a contempt. If, however, the Members of the House to which the Member, who had refused to appear belonged, supported his refusal then a difficult constitutional conflict would arise. Mr Laundy stated that it was highly unlikely that such a constitutional conflict would arise: Mr Laundy thought that commonsense and a consciousness of the dignity of Parliament would prevail.

41. Mr Moore was informed that the Provincial Governments had contested the rights of the Federal Government regarding offshore fishing and mining. Constitutional rights between the Provinces and the Federal Government was a lively issue in Canadian politics. The issue of the supremacy of the privileges of the Federal Parliament vis-à-vis that of the Provincial Parliaments had not arisen.

42. Mr Moore was informed that the Press "scrum" was in fact restricted to Room 129 of Parliament House. The Press, however, had slowly extended the "scrum" into other areas. There was a "see saw" balance concerning this scrum which was tending to veer in the Press's direction.

43. The Chairman was informed that Members of Parliament are allowed into the Press Gallery.

44. The Chairman was informed that the Members of the Press Gallery were not charged for their offices at Parliament House and had free telephone access to anywhere in North America.

45. The Chairman was informed that the fundamental privilege of the Canadian Parliament was the right to speak freely in the Chamber. Mr Laundy instanced a case where a Canadian Minister of Consumer and Corporate Affairs had in the right of the Crown of Canada brought a case against certain sugar companies. The case was lost. There was evident collusion between the sugar companies. The Minister had made a comment about the judge in the case in the Parliamentary Building but outside the Chamber. The judge had charged the Minister with contempt. Ultimately the Minister had resigned, although the charge of contempt of Court was pursued. Interestingly, the Minister was returned at the following election.

CIRCUIT OF THE JOINT SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL AND LEGISLATIVE ASSEMBLY UPON PARLIAMENTARY PRIVILEGE, EUROPE AND NORTH AMERICA, JANUARY/FEBRUARY, 1984

TUESDAY, 31 JANUARY, 1984

At the Legislative Assembly, Queen's Park,
Toronto, Ontario, 9.30 a.m.

DELEGATION PRESENT

Mr R.M. Cavalier, M.P.
Chairman

Mr T.J. Moore, M.P.
Opposition Delegate

Mr G.H. Cooksley, Clerk

The Delegation met with Mr Roderick Lewis, Q.C.*(1) Clerk of the Legislative Assembly and the Table Officers of the Assembly

Mr Lewis said that privilege in Ontario was governed by Standing Order No 18 -

(a) Privileges are the rights enjoyed by the House collectively and by the Members of the House individually conferred by the Legislative Assembly Act and other Statutes, or by practice, precedent, usage and custom.

(b) Whenever a matter of privilege arises, it shall be taken into consideration immediately.

In addition to this particular Standing Order, resort was had to the Legislative Assembly Act and the precedents and usages of the Legislative Assembly.

The Chairman was advised that the Ontario Legislature is unicameral.

The attention of the Delegation was drawn to Sections 37, 38, 39, 40, 41, 42 and 43 of the Legislative Assembly Act, which follow:

* See (1) Attachment

37. A member of the Assembly is not liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before the Assembly or a committee thereof. R.S.O. 1980, c.235, s.37*(2)

38. Except for a contravention of this Act, a member of the Assembly is not liable to arrest, detention or molestation for any cause or matter whatever of a civil nature during a session of the Legislature or during the twenty days preceding or the twenty days following a session. R.S.O. 1980, c. 235, s.38.

39. During the periods mentioned in section 38, members, officers and employees of the Assembly and witnesses summoned to attend before the Assembly or a committee thereof are exempt from serving or attending as jurors in any court of justice in Ontario. R.S.O. 1980, c.235, s. 39.

40. No member of the Assembly shall knowingly accept or receive, either directly or indirectly, any fee, compensation or reward for or in respect of the drafting, advising upon, revising, promoting or opposing any bill, resolution, matter or thing submitted or intended to be submitted to the Assembly or a committee thereof. R.S.O. 1980, c. 235, s.40.

41. No barrister or solicitor who in the practice of his profession is a partner of a member of the Assembly shall knowingly accept or receive, directly or indirectly, any fee, compensation or reward for or in respect of any matter or thing mentioned in section 40. R.S.O. 1980, c. 235, s.41.

* See (2) Attachment

42. Every person contravening any of the provisions of section 40 or 41 is liable to a penalty equal to the amount or value of the fee, compensation or reward accepted or received by him and the sum of $500. R.S.O. 1980, c. 235, s.42.

43. Any contravention of section 40 is a corrupt practice, and a writ alleging the contravention may be issued within six months after the contravention in the same manner and the proceedings thereupon shall be the same as in the case of other actions under Part VIII of the Election Act. R.S.O. 1980, c.235, s.43.

The Chairman was informed that the Parliament of Ontario can punish contempts. Mr Lewis was not sure of the origin of this power but noted that the Legislative Assembly of Ontario was a Court of Record and this may be the source of its power to punish for contempt.

1. The Chairman enquired as to the general position of privilege in the provincial legislatures.

The Chairman was informed that the British North America Act provides that the provincial legislatures may exclusively make laws to amend their constitutions (save the Office of Lieutenant-Governor). Matters such as the independence of the assembly from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties are matters classed as part of the constitution of a province. Accordingly, each provincial legislature would have the authority to legislate much the same immunity as the Commons of Canada, and some (but not all) provinces have done so. On the other hand there is some question whether the authority of the Canadian Commons to provide its members -

1. with immunity from being called as a witness in a criminal proceeding; and

2. with freedom from criminal prosecution for what they say in debate -

lies with the provincial legislatures as well.

This was the view of the Court of Appeal of Ontario in 1978 in *Reference Re Legislative Privilege*,*(3) the reason given being the limits on the constitutional competence of the legislature.

One issue is whether the criminal law aspect is secondary to the aspect of the privilege of freedom of speech.*(4)

Furthermore, in *Fielding v Thomas*,Lord Halsbury pointed out that section 5 of the Colonial Laws Validity Act, 1865 enabled the pre-Confederation legislatures (such as Nova Scotia) to confer upon themselves the privileges of the U.K. House of Commons, and by s.88 of the British North America Act the constitution of the Legislature of the Province of Nova Scotia was (subject to the provisions of the Act) to continue as it existed at the union (1867) until altered by authority of the Act. Therefore, on that authority at least, the legislature of the province at the union in 1867 would seem to have the power to legislate the same privileges as those of the House of Commons in Ottawa.

2. Mr Moore enquired whether there had been any case law in Ontario concerning privilege. Mention was made of *Charlesworth's* case wherein Charlesworth, who was a newspaperman, had been brought before the Bar of the Legislative Assembly. The article which was the subject of the action by the Legislature was thought to be scurrilous and against the dignity of the House. A member of the Legislative Assembly had raised the matter as a matter of privilege. The then Attorney-General asked Charlesworth to appear voluntarily. Charlesworth was visibly shaking and trembling during his ordeal and proferred an abject apology. He was dismissed with a reprimand. There was never any question of the Legislative Assembly lacking the authority to summons Charlesworth before the Bar of the House.

* See (3) and (4) Attachment

3. The Chairman was informed, on enquiring whether a record of the debates of the Legislative Assembly was kept, that Hansard had been introduced into the Assembly in 1947 and that an essentially verbatim record of the debates was maintained.

4. Mr Moore asked how a matter of privilege arose in the Legislative Assembly. He was advised that the Speaker decides whether a prima facie case has been made out. If he is not satisfied that a prima facie case has been made out he can decide the question of privilege or otherwise on the spot. The Speaker has the right to reserve his decision as to the prima facie aspect. If the Speaker decided that a prima facie case has arisen the Member is then entitled to move a motion. The practice, however, is for Members not to move motions concerning privilege but merely to have the matter entered on the Record. Mention was made of the existence of the Procedural Affairs Committee. A Member could refer a matter of privilege to this Committee if he so desired. Mention was also made, in passing, to a case where a Member had taken exception to the remarks of a Parliamentary Officer made in the Committee. The Member moved a motion that the officer be brought before the Procedural Affairs Committee. The officer was duly brought before the Committee and no further action was taken. Further mention was made of *Riddell's* case wherein an attempt was made to serve a Member of the Legislative Assembly with a subpoena. The matter was referred to the Procedural Affairs Committee.

5. The Chairman was informed with regard to the security of the Legislative Assembly, that a Security Force for the Legislative Assembly had been established and trained by the Provincial police. A Security Officer maintains watch at each door of the Legislative buildings. The Security Force guarded the galleries during session. It was pointed out that the Security Force is not armed. The new Human Rights legislation had posed the problem as to the authority of the Security Force within Parliament House. A legal opinion was awaited from the Attorney-General. There had been no court cases as to the power and authority of the Security Force. Mention was made of an

incident wherein a failed "crank" candidate had walked into the Chamber, picked up the Mace and had claimed that the Liberal leadership was illegal. A quick witted, muscular attendant, acting on his own initiative, had replaced the Mace on the Table and had carried the intruder from the Chamber. The intruder was reprimanded and released.

6. In reply to a question as to the legal position of Queen's Park and the precincts of the Parliament, Mr Moore was informed that Queen's Park had been a park of the city of Toronto which had been leased to the Legislative Assembly under a 99 year lease. The city had later ceded the park to the Province and it was now a Provincial Park. The precincts, however, were only the Chamber, the lobbies, the landing, the stairways, the hall, front steps, members' offices and the offices of the Clerks.

7. The Chairman was informed, in reply to his question whether demonstrators were allowed access to Queen's Park, that they were allowed right to the front steps of the Parliamentary building. He added that disturbances in the park were under the control of the city police. The practice was for advance notice to be given to the Speaker of intended demonstrations. No licence or permits were needed for demonstrations. It was mentioned that in various demonstrations the entire Parliamentary building has been completely encircled by garbage trucks, taxis and tractors.

8. The Chairman enquired as to the practice of committing for contempt of Parliament in Ontario. He was informed that this practice had never been questioned in Ontario and furthermore that section 45*(5) of the Legislative Assembly Act over-rode the decision of the Privy Council in *Kielley v Carson*.(Section 45 provides that the Assembly has all the rights and privileges of a Court of Record for the purposes of summarily enquiring into and punishing ... breaches of privilege or ... contempts ...).

* See (5) Attachment

There is no appeal against the judgment of Parliament: persons found guilty of a breach of privilege or a contempt may be imprisoned for such time during the session as is determined by the Assembly. (Section 46).*(6)

Where the Assembly declares that a person has been guilty of a breach of privilege or a contempt and directs that the person be kept and detained in the custody of the Serjeant-at-Arms, the Speaker shall issue his Warrant for the Serjeant to take the person into custody. The Warrant of Committal directs that the Serjeant-at-Arms take the person found guilty of the breach of privilege or contempt into custody and deliver him to the Superintendent of a Correctional Institution. The Warrant commands the Superintendent to detain the person in custody in accordance with the Order of the Assembly. (Section 47).*(8)

The determination of the Assembly upon any proceeding under the Legislative Assembly Act is final and conclusive. (Section 48).*(8)

9. Mr Moore was informed that Section 49*(9) of the Legislative Assembly Act protects persons publishing papers by order of the Assembly: that Section 50*(10) provides for the production of papers to the court: Section 51*(11) provides for the defence of bona fide publications: and that Section 52*(12) provides for the saving of privileges inherent in the Assembly or Members.

10. Mr Moore was informed that a concession had been made to allow for the representation of witnesses before Committees. Representation, however, was not a right but a privilege which could be withdrawn at the direction of the Legislature. It is believed that there would be no concession made to a witness to allow representation at the Bar of the House.

* See (6), (7), (8), (9), (10), (11) and (12) Attachment

11. The Chairman was informed that a problem was envisaged arising from the new Charter of Rights in the Canadian Constitution which contained a "due process" clause. This conflict between the new Constitutional right and the practice of Parliament has yet to be tested.

12. The Chairman was informed that a *Strauss* type case would be regarded as an entirely departmental matter. Mr Lewis was uncertain whether qualified privilege exists in the defamation laws of Ontario.

(As mentioned in the Ottawa notes, defamation in Canada is within the constitutional sphere of the provinces.)

It was thought that the qualification of "private and confidential" would preserve the letter from reference in the Chamber by the Minister.

13. Mr Moore was informed that the routine of business was for answers to written questions to be tabled, which was followed by statements by the Ministers and then by oral questions. This part of the business preceded the Orders of the Day. The Oral Question period is limited to 60 minutes which includes supplementary questions and points of order. Under Standing Order 27 oral questions must be of urgent public importance: the Speaker shall disallow any question which he does not consider urgent or of public importance. If in the opinion of the Speaker, or Minister to whom the question is addressed, the question requires a lengthy answer, either the Speaker or the Minister may require it to be placed on the Notice Paper.

The Minister may take an oral question as notice to be answered orally at a later sitting but where any reserved answer requires a lengthy statement, the statement is given during Statements by the Ministry.

Mr Moore was further informed that the order of Oral Questions is provided for under Standing Order 27. Oral questions starts with two questions from the Leader of the Opposition, followed by two questions each from the Leader or Leaders of other Opposition parties in order of their membership in the House. All parties then rotate in questioning, starting with the official Opposition.

If a Member so wishes, he may give notice of an oral question directly to the Minister concerned.

The Speaker has the discretion to allow a reasonable number of supplementary questions arising out of a Minister's reply to be asked by any other member.

The Minister may refer an oral question to another Member who is a member of a board or commission to which the question applies.

A Minister may, in his discretion, decline to answer any question.

Parliamentary Assistants*(13) may direct questions to Ministers other than their own but may answer for their Ministers only when authorised by the Premier.

The Speaker's Rulings relating to Oral Questions are not debatable or subject to appeal.

14. Mr Moore was informed that the Government attempts to answer most questions. The Minister to whom the question is directed generally replies yes/no/unavailable within 14 days.

* See (13) Attachment

15. The Chairman was informed that Hansard was produced in the courts by leave of the House. The Editor of Debates would authenticate the records of the Parliamentary debates in court.

16. The Chairman was informed that the Clerk of the Legislative Assembly is occasionally subpoenaed to produce documents in court. The Clerk does not require the leave of the House to produce public documents in court. An instance of this practice arose when a lawyer claimed that a particular statute was different from the bill passed in the Legislative Assembly of Ontario. The Clerk was subpoenaed to produce the third reading copy of the bill, which he duly did without the leave of the House, as the bill was a public document.

17. Mr Moore enquired whether there had been moves to reform the practices and procedures of the Legislative Assembly of Ontario. Mention was made of the Ontario Commission on the Legislature, which produced five volumes of reports from May 1973 to October 1975 (the Camp Commission). Some of the recommendations had been carried out although some, e.g., the recommendation to remove the benches in the Legislative Assembly and to provide for double membership electorates, had been discounted.

* * * * * *

The Delegation met with Mr James R. Breithaupt, Q.C., M.P.P., Liberal Member for Kitchener, and Mr Richard L. Treleaven, Q.C., M.P.P., Conservative Member for Oxford

1. The Chairman made a general enquiry as to the role of privileges as seen by the Members of the Legislative Assembly of Ontario. Both Members said that privilege was generally viewed as a device to disrupt the workings of the House in order to make a point. While Members were well aware of the differences between a point of order and a claim of a breach of privilege,

most Members resorted to privilege in order to make a telling point of order. The Procedural Affairs Committee is considering the whole gamut of raising issues of privilege. A Member who wishes to raise a matter of privilege is given a time of 90 seconds to establish his prima facie case. This short time is used to allow the Member to "get the matter off his chest". Whenever a matter of privilege arises it is taken into consideration immediately under the provisions of Standing Order 18. (The practice in Ottawa, in contrast, is for privileges matters to be considered immediately after lunch). The Chairman was again informed that Members were conscious of the difference between a point of order and a matter of privilege: raising privilege was often the only way a Member could get to speak on an issue.

(2) The Chairman was informed that privilege matters are not pursued even if they are genuine. It is very rare for a motion to be pursued as the consequences under the Standing Orders of the Legislative Assembly can be severe for a person found guilty of a breach of privilege. The last time a person was summonsed before the Bar of the House was around 1905.

(3) The Chairman raised the issue of the *Strauss* case. He was informed that the correspondence of Members to Ministers was unprivileged in Canada. The general consensus was that qualified privilege was preferable. Members resorted to the use of the term "I have been advised that ..." in order to escape the consequences of a "Keith O'Connell" type situation. Both Members advised the Delegation, however, that such term ultimately would have no legal effect. Both Members added that qualified privilege in Canada was equated with the absence of malice.

(4) The Chairman canvassed the approach of Members of the Legislative Assembly of Ontario to the production of Hansard. The Members said that generally Members had a fair opportunity to check the transcript as the common practice was for Hansard to forward the transcript to the Member for the Member to check it. Members can challenge the Hansard for correction by moving a motion to that effect in the House. The Hansard in the Legislative Assembly was quintessentially verbatim. The main corrections were those of a grammatical nature.

(5) The Chairman broached the problems involved in the publication of Members' speeches in extract form. Both Members believed that speeches extracted from Hansard were privileged. The general practice, however, was to send the whole of the speeches concerning the particular debate with the Member's individual speech marked out for special attention.

(6) Mr Moore mentioned the incident wherein a Member of the Legislative Assembly of New South Wales issued a copy of his speech to the press before delivering it in the House and had thereby encountered legal difficulties. The Members said that it was not the practice to issue the copy before making the speech in Ontario, but nobody paid much attention to the fact of a speech being made prior to or subsequent to the distribution of written copy to the press.

(7) The Chairman canvassed the position of the media in the Parliament of Ontario. Both members said that Canadians accepted the "intrusion" of the media into all facets of life. As far as Parliament was concerned, the main attraction for the media was Question Time and/or "hot" issues in committees.

(8) Mr Moore enquired as to the practice adopted concerning interviews of Members by the media. He was informed that the general practice was for the media representatives to seek the permission of the Member for an interview. The media could, however, film and record the lack of consent by the Member concerned and any remarks or comments made by the Member in declining his assent.

(9) Mr Moore was informed that it was not the practice of the Ontario media to preserve an individual Member's "right of private agony" during a moment of severe political stress. Everything that happened within the political sphere was recorded as being newsworthy to a varying degree.

* * * * *

The Delegation met with Mr Peter Brannan, Editor of Debates

1. The Chairman asked Mr Brannan how Hansard was produced. Mr Brannan said that the debates were taped. There was no shorthand copy of the debates taken with the exception of interjections. The first draft was typed directly from the tapes by a transcriber who used a word processor. The first draft was distributed to the Members and the various governmental and parliamentary offices. The draft at this stage was unedited. The tapes were later re-heard to check the accuracy of the draft. The draft was edited only to ensure that the record was in a written as opposed to a spoken style. The record, however, remains essentially verbatim in nature. The Members checked the transcript and advised the Editor as to the need, in their opinion, for corrections. Any disputes as to the accuracy of the record were settled by listening to the tape.

2. The Chairman enquired as to whether there was "a Hansard style". Mr Brannan replied that with the use of anagrams, for instance, the organisation was mentioned in full the first time and then subsequently referred to by its initials. Hansard would keep an expression such as "Minister in charge of the Bill" instead of referring to the Minister by his Ministerial title, unless the reference to the Minister was very obscure in the context of the debate. Members are referred to in debate by their electorates but have their names inserted in parenthesis after the name of the electorate.

Mr Brannan mentioned that four-letter words are recorded unaltered and made-up words are written in quotes.

3. Mr Moore was informed that a style guide exists for Hansard transcribers: the aim of this guide is to achieve consistency in capitalisation, spelling, punctuation, etc.

4. Mr Moore asked Mr Brannan if he could give an outline of the function of the Hansard Reporting Service.Mr Brannan stated that the Hansard Reporting Service provides the Province of Ontario with the official record of proceedings of the Legislative Assembly. The Service operates as a Branch of the Office of the Assembly under the supervision and direction of the Editor of Debates.

Proceedings of all sittings of the House and all meetings of Committees of the House during consideration of Estimates make up the official printed Hansard Record.

Standing Orders of the Legislative Assembly further provide that all other business of Standing Committees must be recorded by Hansard and may be transcribed at the request of either the House or the Committee. These recordings do not become part of the official Hansard Record unless specifically ordered by motion of the Assembly.

With respect to Select Committees of the House, the Assembly may order that proceedings of a particular Committee be recorded and transcribed, in which case the Hansard staff provides the same service as is provided to Standing Committees not considering Estimates.

The Chairman of a Select Committee may also request coverage of Committee meetings by Hansard. If, in the discretion of the Editor of Debates, time and manpower commitments allow Hansard to provide this latter coverage, proceedings of the Committee are recorded and transcribed by the Hansard staff. If coverage is not feasible, either the Hansard office or the Select Committee itself may arrange for provision of outside reporting services.

As mentioned earlier, the Hansard Recording Service operates by means of a cassette tape recording system.

Each seat in the Chamber is equipped with a microphone, controlled by the Hansard audio operator. The operator also activates the standing microphone used by the Speaker to address the House. When the Speaker is seated on the dias, he uses a second microphone to recognize Members on the floor of the House. This microphone is controlled by the Speaker.

When the Speaker is addressing the House his standing microphone is activated and, as each Member is recognized by the Speaker and given the floor, the audio operator switches on his or her microphone. One track of the system records the remarks of each speaker as the various microphones are activated.

The audio operator identifies each speaker on a second track. As mentioned previously, assistance with identification and interjections is provided by Hansard shorthand writers stationed on the floor of the Chamber.

A similar 2-track recording system is in operation for coverage of Committee meetings. One track records all remarks spoken into activated microphones and the second track is used by the audio operator to identify the various speakers.

A draft transcript is produced within 2-3 hours of proceedings in the House. A computerised word processing system facilitates this production. This text may be viewed by members in the Hansard Office upon request. A copy of the draft transcript is delivered to the Clerk's Office, caucus research offices, the East and West Members' lobbies and the offices of all Cabinet Members and party leaders the day following the House proceedings.

Up to forty-eight hours is required to produce the draft transcript of Committee proceedings discussing Estimates, and copies are delivered as soon as possible after a meeting of the Committee.

If the Hansard editors feel remarks of a Member need confirmation or clarification, a correction or query sheet is sent to the Member asking for the necessary information. These sheets are distributed on the morning following the debate and should be returned to the Hansard Office by noon that day in order that changes can be made before printing. Acceptable changes are restricted to the correction of errors and essential minor alterations in the text. Any Member may examine the entire text of his or her contribution to a debate by reference to the unedited draft transcript made available as outlined above.

The draft is edited by the Hansard staff. If the text is to be printed, the edited draft is forwarded to the Queen's Printer for publication. If a transcript only is required, editorial corrections are inserted and a corrected transcript is produced.

The official printed House Hansard is distributed by the Clerk's Office to each member's desk in the chamber by 2.00 p.m., two days after the proceedings. It takes up to ten days to print and distribute the final Hansard for proceedings of Committees considering Estimates.

Copies of Hansard also go to Officers and employees of the Office of the Assembly and staff of the various caucuses. Hansard is distributed to the media and various libraries and tertiary educational factilities throughout Ontario, free of charge. Members of the general public may subscribe to Hansard for a prescribed fee.

If a Member of the Assembly requires additional copies of Hansard covering a particular speech or phase of the proceedings, the Hansard Office will provide a limited number on request, free of charge. If substantial numbers are required, copies will be printed at the Member's expense.

Each issue of Hansard is indexed by both speaker and subject. A cumulative index of previous issues of Hansard covering the current session is stored by the indexing staff on computer. Members may make use of this cumulative index.

Each member is entitled to receive one set of bound volumes of Hansard per session.

5. The Chairman was informed that the Hansard staff comprises 48 employees. 12 transcribers are employed full-time. 4 sessional typists are hired according to the needs of the session.

6. The Chairman was informed that debate was recorded on tape segments that run for 5 minutes. Each segment takes approximately half an hour to type. The typist who is going to type the segment sits in the gallery for the 5 minutes of debates in order that she has an idea of what transpired. The "Interjectionists" (the stenographers who record the interjections on the floor of the House) do 10 minute takes.

The Chairman was informed that interjections are included in the record if there has been a response to the interjection; if the Speaker intrudes; or if there is a subsequent complaint by a Member concerning the interjection within a certain time.

7. Mr Moore was informed that the master tape was kept for 18 months and that there was open access to the tape.

8. The Chairman was informed that Hansard had never been called upon to produce the tape in court.

9. The Chairman was informed that it is not the practice of the Hansard staff in Ontario to swear in the courts as to what happened in Parliament because no one officer is present for the whole of the debate, or often the whole of the speech.

10. If a Member objects to the record of his speech, the Speaker, the Editor of Debates and the Member listen to the debate. If Hansard is in error, the matter is raised on the floor of the House and a motion is moved that the printed Hansard be corrected.

* * * * * *

The Delegation met with Mr Claire Hoy of the Toronto Sun

1. The Chairman enquired as to the operation of the Press Gallery. Mr Hoy replied that the Press Gallery comprised approximately 60 members. Its operation was governed by a constitution. The Press Gallery accredits applicants for membership.

2. Mr Moore enquired as to the disciplinary function of the Press Gallery. Mr Hoy replied that discipline had a two-fold aspect. Complaints about material in a paper were generally directed to the editor, while complaints about the comportment of the members were generally addressed to the Speaker. Mr Hoy volunteered that he had been thrown out of the Press Gallery (within the Chamber) for drinking coffee (which was a time-honoured practice). The practice had been changed at the discretion of the Speaker. Mr Hoy had left the Press Gallery in the Chamber rather than follow the new policy of the Speaker.

3. Mr Moore was informed that the Press Gallery is delegated by the Speaker to allocate office space.

4. The Chairman was informed that membership of the Press Gallery has two components: full-time and associate.

5. Mr Moore was informed that legitimate publications always have the right to seek accreditation: partisan magazines, however, are refused.

6. The Chairman was informed that the press had access within the hour to the first Hansard draft. The press, however, was allowed to tape proceedings in the Gallery within the Chamber and this, to a great degree, obviated the necessity of consulting the Hansard draft.

7. The Chairman was informed that when the House is not in session approximately 40 full-time members of the Press Gallery are still stationed at Parliament House. This arose from the fact that the Cabinet meets at Parliament House and that both the Premier and the Leader of the Opposition have their offices at Parliament House.

8. Mr Moore enquired as to the televising of debates in the Ontario Chamber. Mr Hoy said that in the Ontario Legislature each TV channel has its own camera in the Chamber, unlike Ottawa where television is more or less limited to performing the role of an electronic Hansard.

9. The Chairman enquired as to the running of the Press Gallery. Mr Hoy said that the day to day running of the Press Gallery is based on the Press Gallery rules. These were adopted by the Press Gallery, although the ultimate supervision resided in the Speaker.

10. The Chairman enquired as to the career structure of a Press Gallery reporter in the Ontario Legislature. He was informed that most journalists who reported the political sphere began as roundsmen at City Hall. They were generally promoted to the Press Gallery of the Ontario Legislature and then to Federal Parliament in Ottawa. Many journalists, however, elected to return to Toronto because of the livelier atmosphere in Toronto itself and in the Ontario Legislature. Mr Hoy himself had preferred to cover the Ontario Legislature after having been stationed in Ottawa.

11. Mr Moore was informed by Mr Hoy that he had been a journalist for 20 years: that he had worked in every Press Gallery in Canada and that the practices in the Press Gallery varied from Parliament to Parliament.

Mr Hoy added that in Ontario the Legislative Services Branch of the Ministry of Government Services had established a media studio in the Legislature. The studio provides a facility for Members to record statements, commentaries, interviews and reports for broadcasting to their constituents by radio or cable television stations across Ontario.

12. The Chairman enquired as to the protection afforded to a newspaper report of the debates in the House. Mr Hoy stated that as he was not a lawyer he would not venture a legal opinion as to the degree of privilege but instanced two cases illustrating the hazards faced by newspapers in reporting the proceedings in the Legislature. The first case involved Mr Frank Dray, the Minister for Social Services. Mr Dray had named a woman in the House who had been mentioned in the Child Abuse Register. Although it is illegal to report the names of people mentioned in the Register, Mr Dray decided to reveal the name in Parliament. Mr Hoy's newspaper had reported the incident in Parliament as it believed Parliamentary privilege took priority over the statutes.

The second case concerned the *Proverbs* case. The Leader of the Opposition, who had asked a question two months previously about the *Proverbs* case, asked a question of the Premier concerning a remark by the Attorney-General in reply to the first question. The Attorney-General had stated in regard to the Proverbs tapes that allegations by Neil Cameron Proverbs of illegal actions by police and of corruption in high places were totally without any substance. The Leader of the Opposition said that within hours of the story hitting the news stands the Attorney-General had changed his mind and had called a press conference to announce an Ontario provincial police investigation into the whole affair. The Attorney-General was reported as having referred to Mr Proverbs as a "known con man" while the trial of Mr Proverbs was proceeding. A motion for mistrial was brought as a result of the Attorney-General's comment but was dismissed. The Presiding Judge referred to the Attorney-General's comment about Mr Proverbs as an unfortunate statement.

Mr Hoy said that although the Attorney-General's remarks were uttered outside Parliament, the fact that they had been repeated in Parliament by the Leader of the Opposition had led the newspaper to believe that the matter was covered by Parliamentary privilege and the matter was duly reported.

13. The Chairman enquired as to the running costs of the Press Gallery offices. Mr Hoy said that the Government of Ontario paid for the inter-city toll lines for the Press Gallery; for a photocopier; the office space and parking.

14. Mr Moore was informed that an informal induction course was conducted for new journalists.

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ATTACHMENT

1. The Honour of Queen's Counsel is distributed prolifically in Canada and does not enjoy the same prestige as in the United Kingdom and Australia.

2. Revised Statutes of Ontario, Chapter 235, Section 37.

3. The Court of Appeal of Ontario said that one would not expect to find in the Legislative Assembly Act of Ontario legislation protecting a member of the Legislative Assembly from testifying and disclosing in a criminal proceeding the existence, source, or content of a communication from an informant. The reason given was that a legislative assembly does not have legislative jurisdiction over criminal law and procedure in criminal matters.

   A legislative assembly, however, does have jurisdication over its constitution and this includes its privileges.

4. A member may with impunity by words spoken in a debate in Parliament otherwise breach any act requiring strict confidentiality, and the criminal laws; a repetition outside by the member or a report of the speech in the news may not be considered a breach of the aforementioned act since the element of "secrecy" would then be absent, the information having been made public when revealed in the House.

   A member is not protected by parliamentary privilege against criminal prosectution if he repeats outside the House remarks he made inside the chamber in debate, whether he gives it at large or to a constituent. Members of Parliament are amenable to the criminal law except in respect of words spoken or acts done in the transcription of parliamentary business. While a member of either House may participate in debate with irrelevant remarks, it is difficult to envisage a criminal act which would fit into or be part

of a parliamentary proceeding. Thus, there is "no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice." *(Bradlaugh v Gossett* (1884) 12 Q.B.D. 284). Such act in question would, while not part of a "proceeding in Parliament", have an aspect of contempt of Parliament which would be dealt with by the House, and the criminal aspect would be dealt with by the courts. In Canada any words spoken in Parliament or acts done that form part of a "proceeding in Parliament" could not be dealt with by the courts, at least not without the authority of an act of Parliament, or the permission of the House. While there has been no case of a member having committed a criminal act in Parliament since *Elliot's* case in 1629, incidents have occurred in the Canadian House of Commons which, while not forming part of the "proceedings in Parliament", occurred during a sitting of that House. (Such as a spectator hurling a container of animal blood from the gallery onto the floor of the chamber; or a group of persons chaining themselves to a seat in the gallery compelling the Speaker to suspend the sitting. The person who hurled the container pleaded guilty in provincial criminal court the next day to the charge of wilfully causing damage under the provisions of what is now s. 388 of the Criminal Code. In another case, a woman chained herself to a gallery seat and threw leaflets on the floor of the chamber; she was charged with causing a disturbance under s. 171 of the Criminal Code but was acquitted because the court said there was some doubt in the evidence that she attempted to disrupt the House.)

In each case, the House could have held the person in question in contempt of Parliament contemporaneously with criminal proceedings and the defence of double jeopardy would probably not prevail in the court proceedings because, among other reasons, the "proceeding in Parliament" in which the House may find the person in contempt could not be questioned in any other place.

5. 45. (1) The Assembly has all the rights and privileges of a court of record for the purposes of summarily inquiring into and punishing, as breaches of privileges or as contempts and without affecting the liability of the offenders to prosecution and punishment criminally or otherwise according to law, independently of this Act, the acts, matters and things following:

1. Assault, insult or libel upon a member of the Assembly during a session of the Legislature or during the twenty days preceding or the twenty days following a session.

2. Obstructing, threatening or attempting to force or intimidate a member of the Assembly.

3. Offering to, or the acceptance by, a member of the Assembly of a bribe to influence him in his proceedings as such, or offering to or the acceptance by a member of any fee, compensation or reward for or in respect of the drafting, advising upon, revising, promoting or opposing any bill, resolution, matter or thing submitted to or intended to be submitted to the Assembly or a committee thereof.

4. Assault upon or interference with an officer of the Assembly while in the execution of his duty.

5. Tampering with a witness in regard to evidence to be given by him before the Assembly or a committee thereof.

6. Giving false evidence or prevaricating or misbehaving in giving evidence or refusing to give evidence or to produce papers before the Assembly or a committee thereof.

7. Disobedience to a warrant requiring the attendance of a witness before the Assembly or a committee thereof, or refusal or neglect to obey a warrant mentioned in section 36.

8. Presenting to the Assembly or to a committee thereof a forged or false document with intent to deceive the Assembly or committee.

9. Forging, falsifying or unlawfully altering a record of the Assembly or of a committee thereof, or any document or petition presented or filed or intended to be presented or filed before the Assembly or committee, or the setting or subscribing by a person of the name of another person to any such document or petition with intent to deceive.

10. Taking any civil proceeding against, or causing or effecting the arrest or imprisonment of a member of the Assembly in any civil proceeding, for or by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before the Assembly or a committee thereof.

11. Causing or effecting the arrest, detention or molestation of a member of the Assembly for any cause or matter of a civil nature during a session of the Legislature or during the twenty days preceding or the twenty days following a session.

(2) For the purposes of this Act, the Assembly possesses all the powers and jurisdiction necessary or expedient for inquiring into, adjudging and pronouncing upon the commission or doing of the acts, matters or things mentioned in subsection (1) and for awarding and carrying into execution the punishment thereof. R.S.O. 1980, c.235, s. 45.

6. 46. Every person who, upon such inquiry, is found to have committed or done any of the acts, matters, or things mentioned in section 45, in addition to any other penalty or punishment to which he may by law be subject, is liable to imprisonment for such time during the session of the Legislature then being held as is determined by the Assembly. R.S.O. 1980, c.235, s.46.

7. 47. (1) Where the Assembly declares that a person has been guilty of a breach of privilege or of a contempt in respect of any of the acts, matters and things mentioned in section 45 and directs that the person be kept and detained in the custody of the Serjeant-at-Arms attending the Assembly, the Speaker shall issue his warrant to the Serjeant-at-Arms to take the person into custody and to keep and detain him in custody in accordance with the order of the Assembly.

(2) Where the Assembly directs that the imprisonment shall be in a correctional institution in the Judicial District of York, the Speaker shall issue his warrant to the Serjeant-at-Arms and to the Superintendent of such correctional institution commanding the Serjeant-at-Arms to take such person into custody and to deliver him to the Superintendent of such correctional institution to receive and keep and detain him in custody in accordance with the order of the Assembly. R.S.O. 1980, c.235, s.47.

8. 48. The determination of the Assembly upon any proceeding under this Act is final and conclusive. R.S.O. 1980, c.235, s.48.

9. 49. (1) Any person who is a defendant in a civil proceeding commenced in any manner for or in respect of the publication of any report, paper, vote or proceeding by such person or by his servant by or under the authority of the Assembly may bring before the court in which the proceeding is pending (first giving twenty-four hours notice

of his intention to do so to the plaintiff or his solicitor) a certificate under the hand of the Speaker or of the Clerk of the Assembly, stating that the report, paper, vote or proceeding in respect whereof the proceeding has been commenced was published by such person or by his servant by order or under the authority of the Assembly together with an affidavit verifying the certificate.

(2) The court shall thereupon immediately stay the proceeding and it and every writ or process issued therein shall be taken to be finally put an end to, determined and superseded. R.S.O. 1980, c.235, s.49.

10. 50. (1) If a civil proceeding is commenced for or in respect of the publication of a copy of such report, paper, vote or proceeding, the defendant at any stage of the proceeding may lay before the court the report, paper, vote or proceeding and the copy with an affidavit verifying the report, paper, vote or proceeding and the correctness of the copy.

(2) The court shall thereupon immediately stay the proceeding and it and every writ or process issued therein shall be taken to be finally put an end to, determined and superseded. R.S.O. 1980, c. 235, s. 50.

11. 51. It is good defence to any civil proceeding against a person for printing any extract from or abstract of any such report, paper, vote or proceeding that the extract or abstract was published bona fide and without malice. R.S.O. 1980, c. 235, s.51.

12. 52. Except so far as is provided by section 40, nothing in this Act shall be construed to deprive the Assembly or a committee or member thereof of any right, immunity, privilege or power that the Assembly, committee or member might otherwise have been entitled to exercise or enjoy. R.S.O. 1980, c. 235, s.52.

13. Parliamentary Assistants are Members of the Provincial Parliament who are appointed by Cabinet from Members of the majority Party in the Legislature as Assistants to Ministers. Each Minister has a Parliamentary Assistant. As there are 28 Ministers in the Parliament of Ontario there are correspondingly 28 Parliamentary Assistants. The equivalent office in the Parliament of Ottawa is that of Parliamentary Secretary.