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**The Role of a Clerk of the House of Representatives**

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**Address to Juris Doctor students of the University of Melbourne June 2002**

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**Ian Harris, Clerk of the House of Representatives**

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## **THE CLERK'S TALE**

There was also a Clerk from Oxford

His horse was lean as is a rake  
And he was not very fat, I affirm  
But looked emaciated and moreover abstemious  
His short overcoat was very threadbare

He spoke not one word more than was needed  
And that was said with due formality and respect  
And was short and lively, and full of elevated content <sup>1</sup>

Sir Clerk of Oxford, our Host said,  
You ride as demure as does a maid  
Who is just married, sitting at the banquet table;  
This day I heard not one word from your tongue.<sup>2</sup>

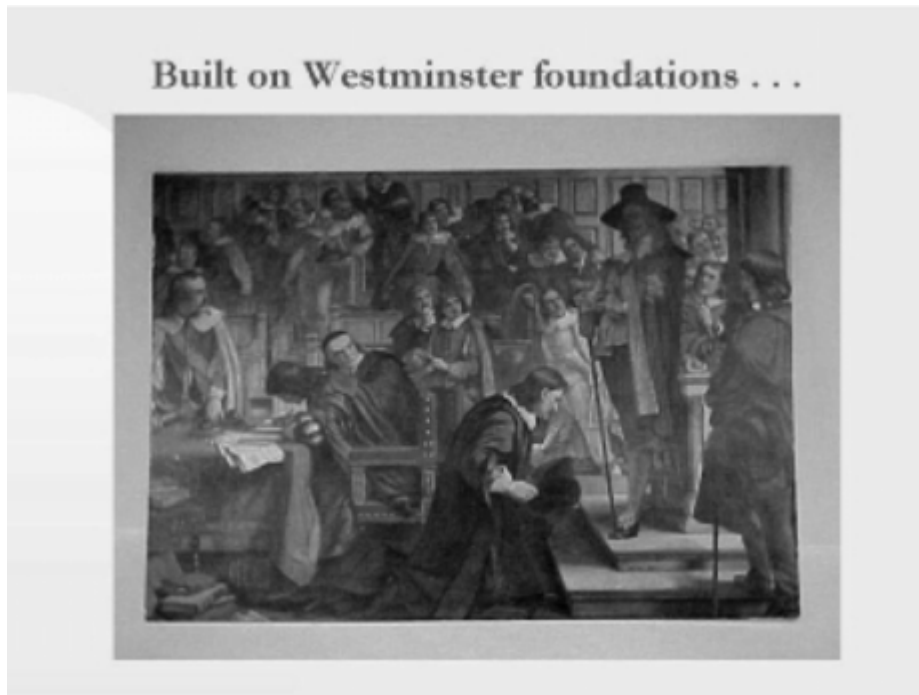
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<sup>1</sup> Geoffrey Chaucer, The Canterbury Tales, General Prologue

<sup>2</sup> Ibid, the Clerk's Prologue

Many of the characteristics of the Clerk described in Chaucer's *Canterbury Tales* remain appropriate today. The horse is not as lean, the coat not so threadbare. However, the Clerks of most legislatures would be content if the description of the language and the use they made of it were that ascribed to Chaucer's clerk over 700 years ago.

## THE DERIVATION OF THE TERM- CLERKS IN CHANCERY AND CLERKS OF THE UK HOUSE OF COMMONS



The use of the term to describe the office of Clerk of the House was one of those elements inherited from the United Kingdom House of Commons. An equivalent title was in force in the legislatures of the colonies that were to become States in the new federation. The need for a clerk, as someone who could read and write, to inform the largely illiterate membership, stemmed from the need to keep a minute record of decisions and proceedings, and to inform Members of what was going on.<sup>3</sup> The first appointment of an official to attend Parliament in a clerical capacity in the United Kingdom dates from 1315. In 1341, the Commons commenced deliberations apart. In 1363, twenty three years before Chaucer's *Canterbury Tales*, the Commons was sufficiently distinct from the Lords for the King to pay a Chancery Clerk to serve that House permanently. Robert Melton was the first recorded Clerk of the House. He was paid five pounds a year for life with the official title of Under-Clerk of Parliament. The first Speaker, Sir Thomas Hungerford, was elected fourteen years later, in 1377. Until the beginning of the sixteenth century, all of the subsequently appointed Under-Clerks were also clerks in Chancery. The term in use in bilingual Canada is 'greffier', which translates as 'clerk of the court', indicating a common origin of meaning. In Elizabethan times the Clerks were country gentlemen who, together with a few prominent Members huddled around the Chair. While the Clerk's duties included informing Members of what was happening, it appears that those out of earshot, or not sufficiently alert, did not know what was happening.<sup>4</sup> Being "out of the loop" was a factor even then.

During the Constitutional struggles of the 17<sup>th</sup> Century, it seems inevitable that the Clerks were associated with the conflict.

<sup>3</sup> HofR Infosheet

<sup>4</sup> HC Factsheets - General Series No. 16 - The Clerk of the House, page 3.

Clerk of the House John Wright was arrested in 1621 and his papers were impounded.. Henry Elsyng resigned on the execution of Charles I, and died in great poverty. Henry Scobell appears to have achieved what many regard as the ultimate in clerkly service; he annoyed both sides. (My preference would be to have all sides recognise the impartiality with which the advice was given). Scobell recorded the dissolution of the Rump Parliament by Lieutenant-General in 1653, and in 1660 faced the wrath of the briefly-recalled Rump. Nicholas Hardinge (Clerk from 1732) was regarded as the most eloquent Latin versifier of his day, and a minor Augustan poet. Thom<sup>5</sup>as Tyrwhitt (Clerk from 1762) was a Shakespearian scholar.

The scholarly/literary bent continued into modern times. One of the Assistant Clerks, Erskine Childers, who wrote the twentieth century thriller *The Riddle of the Sands*, was executed in Ireland after having been discovered with a revolver in his pocket.

The reputation of the office in procedural expertise is regarded to be dated from the times of John Hatsell, who became Clerk in 1768. He wrote a book on procedure still in use today. In fact, I made use of it myself recently in relation to advice to the Senate Select Committee on a Certain Maritime Incident (more on this subsequently). Shortly after, Sir Thomas Erskine May became Clerk, and by the time of his death in 1886 he had produced nine editions of his *Parliamentary Practice*, and his advice to committees on procedure significantly altered the way the House went about its business<sup>6</sup>.

## THE MEANING OF THE TERM "CLERK"

While the functions appear to be fairly clear, the terms "Clerk of the House", "Clerk of the Senate", "Clerk of the Legislative Assembly", "Clerk of the Legislative Council" can be misleading to the average citizen. In the State of Victoria some time ago, a citizen is reported to have telephoned Spring Street late on Friday afternoon and asked to speak to the Serjeant-at-Arms. The telephone operator indicated that the Serjeant had gone home, and asked if the caller wished to speak to the Clerk. The citizen replied "I don't want to talk to no clerk, I want to speak to someone important; I want the Serjeant."!



<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

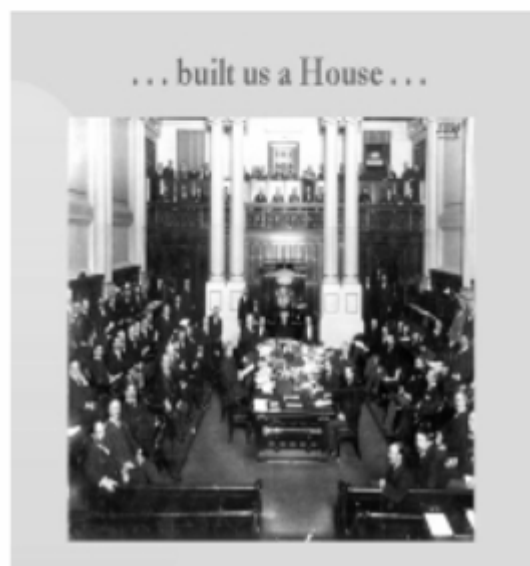
However, in modern parlance, the Clerk is the Agency Head of the Department of the House of Representatives. In many jurisdictions around the world, particularly those countries that are not members of the Commonwealth of Nations, the term "Secretary-General" is more appropriate, and the one I use in my dealings with them.

The predominant role of the Clerk remains a procedural one, and it is on procedural performance that the Clerk is primarily judged by the Prime Minister, the Leader of the Opposition, other Members and colleagues. I will therefore briefly describe the parliamentary system in which the Clerk operates. The Clerk has the responsibility for advising Members and others on the operation of the House, and for making suggestions for improvement of the procedures.

### **WESTMINSTER, WASHMINSTER OR AUSMINSTER?**

The term describing the agency head is just one of the elements we have inherited from the chief inspiration of our system, Westminster. Although our Parliament is clearly and proudly based on the Westminster system, local adaptations have occurred, not only to make the system more appropriate to the Australian temperament, but also to reflect the maturing national self-identity and the nature of contemporary society.

Even though the participants of the constitutional conventions in the 1890s took considerable inspiration from the Westminster tradition, there was a quite conscious global search to identify the most appropriate elements of other systems of government for the new nation.



At the Adelaide Convention on 23 March 1897, there were many references to the impact of international influence on the minds of those drafting the Constitution. Edmund Barton indicated that an elected Governor-General would bring the new nation nearer the condition of the South American republics.<sup>7</sup> Foreshadowing the adoption of the phraseology in the Constitution recognising the concept of responsible government, Barton indicated that he did not want his boots made in Germany, and that he did not want his Constitution made in Switzerland<sup>8</sup>. He thought that British forms of government, as adopted and adapted, were the best fitting. His boots clearly had always been made in Britain.<sup>9</sup> Sir Richard Baker, who was to become the first President of the Senate, responded: 'I want my boots made where I find they fit me best'. He believed that it was possible to learn lessons from other countries, and pointed to federations in Germany, Switzerland, America and to a limited extent in Canada.<sup>10</sup>

Well, the boots that were chosen have done a fair bit of walking. Westminster provided the main inspiration for our founding fathers. (Fathers they were, but there were some strong women beside them. South Australia only agreed to enter the federation on the ground that the franchise would be extended to women. We became the first country in the world to include women amongst those with the right to vote and to be elected to our Parliament.) We have gone from Westminster to Washminster to Ausminster. We have a Speaker's Chair, but no longer is it a replica of the one in London. We have a mace and a Serjeant. Our Chambers are in the traditional green and red, but they are the colours of the Australian bush. And we have Clerks of the Houses, but the current role has developed from the one performed in 1901.



The Clerk of the House sits at the Table of the House, to the right of the Speaker's Chair. Until 1995, we wore barrister's wigs and gowns. We now wear academic gowns, mainly to distinguish us from the Members who take their place on the floor as of elected right.

<sup>7</sup> *Official Report of the National Australasian Federal Convention Debates, Adelaide, March 22 to May 5 1897* (1897) 24

<sup>8</sup> Barton subsequently expressed the opinion that the Swiss method provided the best model for appointing the Senate. He recognised the irony (Ibid 26)

<sup>9</sup> Ibid 24.

<sup>10</sup> Ibid 29-30. Baker saw Canada as a partial federation because the Senate was appointed by a partisan leader.



### A SPEAKING ROLE

The Clerk of the House is the main non-Member to have a speaking role in the House. The Serjeant announces the Speaker at the start of each day's sitting, and announces Black Rod on opening day. However, the Clerk calls on the items of business, gives the Bill its first, second or third reading, and announces petitions lodged for presentation. This includes electoral petitions challenging the membership of a Member or members of the House. At the beginning of a Parliament, the Clerk chairs proceedings until the House chooses a Speaker. Normally, the Clerk does not otherwise have a speaking role in proceedings. However, Kim Beazley has mentioned an episode told to his father by former Clerk of the House of one Clerk who imbibed one night and came and sat on the Opposition front bench where he made repeated interjections. I understand he commenced alternative employment the next day.

### PROCEDURAL TEXT

The Clerk of the House also has the privilege of being the editor of the publication which describes and explains the body of the law and practice now applicable to the House and its committees, with a historical background as appropriate. This work, entitled *House of Representatives Practice*, was first published in 1981. The most recent edition (the 4<sup>th</sup>) was published in 2001 as one of the principal tasks in the centenary of federation year. My preface to that edition mentioned the comment attributed to Einstein that a hundred times a day he reminded himself that his life depended on the labours of other people, living and dead. He had to exert himself in order to return the same quantum of what he had received and was receiving. Nowhere are these remarks more appropriate than in parliamentary service.

### AUSTRALIAN QUALIFICATIONS REQUIRED BY LEGISLATION

The *Parliamentary Service Act 1999* (Clth)<sup>11</sup> requires in subsection 58(4):

A person is not to be appointed as the Clerk of the Senate or the Clerk of the House of Representatives unless the Presiding Officer is convinced that the person has extensive knowledge of, and experience in, relevant Parliamentary law, procedure and practice.

Termination of appointment occurs by

- resignation,

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<sup>11</sup> Act No. 145 of 1999

- retirement, or
- passage of a resolution of the House after 6 sitting days notice terminating the appointment on the ground of misbehaviour, physical or mental incapacity or insolvency<sup>12</sup>.

I am seeking legal assistance in recommending procedures for establishing whether grounds exist for termination of appointment. It is essential to have these grounds agreed and made known publicly, probably including publishing on the web site, while there is not an active case. Should invoking them subsequently become necessary, this should be able to occur without regard to personalities involved.

### **SOME LEGAL ASPECTS OF THE JOB**

A degree in law is not essential to discharge the duties of Clerk of the House, but it would be an advantage. I do not possess a qualification of this kind, but I have found it useful to study elements of law selected for their application to parliamentary duties. I will give some brief examples of the quasi-legal work undertaken by the Clerk of the House and those who assist the holder of the office. I also intend to refer to some of the dangers of allowing those not qualified in the law to make pronouncements without guidance where perhaps a little legal advice may not have gone astray.

### **PRIVATE MEMBERS' BILLS**

Staff assisting the Clerk provide Members of the House with assistance in drafting private Members' Bills. In the House, every private Member has the opportunity to present a Bill, providing it does not breach the requirements of the Constitution and the standing orders and to make a statement in support of it. While most proposals do not proceed to enactment, some do, such as the Bill which introduced compulsory voting or the Bill which banned euthanasia in the Australian Capital Territory and the Northern Territory. Others, such as one attempting to introduce daylight saving into Western Australia, pass the House of Representatives but not the Senate. Others may not have immediate effect, but pop up subsequently as part of the provisions of a Government Bill.

The Office of Parliamentary Counsel assists with the preparation of these Bills where the workload permits. Usually, it is such a hard-pressed office that the workload does not permit. In these instances, or where the Bill is considered to be fairly straight forward, senior staff of the Department draft them. Parliamentary staff also provide assistance to Members in the drafting of proposed amendments to Bills. On occasion, these amendments are successful in the House. On other occasions, they return to the House in the form of Senate amendments.

The Clerk and helpers also provide advice on parliamentary law, procedure, strategies and tactics. This may involve advising both sides on the same matter from a different perspective, and not revealing to the other side what has been advised in confidence.

The advice may be given inside or outside the Chamber. When it is given inside the Chamber, it is likely to be tested immediately. This is one of the most satisfying and one of the most challenging aspects of the job.

The giving of advice often leads to a close association with Members from all sides of the political spectrum. This is poignantly expressed in Frank Green's book covering his years as Clerk of the House:

...the House sat until midnight, and on my way home I entered the grounds of the Lodge and walked around until I met Curtin face to face. I asked him what was the matter, but he did not answer me. We stood in silence in the darkness for some minutes, and then he said: "How can I sleep with our men in the Indian Ocean among enemy submarines?" I tried to talk him into getting some sleep, but the best I could achieve was to walk with

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<sup>12</sup> Ibid, section 60

him up to the kitchen of the Lodge where I made some tea. After we drank the tea I went home to bed, while he kept on walking round the grounds in the dark.<sup>13</sup>

Unrelated to that episode, but shortly afterwards, Sir Robert Menzies penned the following lines:

Two wise old owls sat at the Table;  
Their wigs were grey, their gowns were sable  
They looked so sad, so melancholy,  
As if depressed by human folly.

Around them, carelessly displayed,  
Were all their dreaded tools of trade  
The standing orders, votes and motions,  
The statutes, May and such like notions.

The glass with sand so neatly piled,  
The rulings (wrong) so neatly filed.  
The bells to call the members in  
To tread the paths of verbal sin.

But wise old owls must sometimes think!  
Of what? Of women? Food/ or drink?  
Or are they, as they keep their places,  
As really vacant as their faces?

A reply, attributed to Frank Green, but for which authorship was subsequently claimed by a later Clerk, Alan Tregear, included the following verses:

If we look glum and vacant stare,  
When wigged and seated 'neath the Chair,  
Please do not think 'tis Nature's way,  
It's rather service for our pay.  
For if some thoughts we dare repeat,  
We'd find ourselves out in the street.

So time moves on; we leave the Muse  
And lend our ears to Members' views,  
We hear their claims, their wants, their quips,  
We see their moves and calls by Whips,  
But we don't talk, so who can label  
The inner thoughts of the Clerk at the Table?

The Speaker is the immediate and most frequent recipient of the Clerk's advice in this regard. The Clerk and the Deputy Clerk meet with the Speaker and the Deputy Speaker before every sitting day on events that might unfold during the course of a sitting day, and during the day or on non-sitting days, depending on the crises that may be unfolding.

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<sup>13</sup> *Servant of the House*, Frank C Green, Heinemann Melbourne, London, 1969 p128. The book's cover piece contains the Persian proverb "The dogs bark, the caravan moves on" frequently quoted by another Prime Minister.





### ADVICE ON RELATIONS WITH THE JUDICIARY

I would briefly like to comment briefly on advice from the Clerk in relation to the Judiciary. In this respect, I do not propose to comment on the relations between the Executive and the Judiciary, which was in the news again last week in relation to comments passing between the Chief Justice of the Federal Court, and the Minister for Immigration and Multicultural and Indigenous Affairs. In the same week that Mr Ruddock and Justice Black were passing pleasantries, I announced to the House the terms of petitions from Australian citizens praying that the House censure those judges who, by their public involvement in political issues, compromise the neutrality of the courts. I do not think it was Justice Black the petitioners had in mind.

Standing order 75 provides that no Member may use offensive words against, *inter alia*, any member of the Judiciary. Based on standing orders and practice, reflections cannot be cast in debate upon the conduct, including a charge of a personal character, of a member of the judiciary<sup>14</sup>. *House of Representatives Practice* indicates that judges are expected to be careful not to take sides in matters of political controversy; if a judge breaks this convention, a Member may feel under no obligation to remain mute on the matter in the House<sup>15</sup>.

The area where the Clerk has an active role to play is in advising the Chair in relation to reflections on the Judiciary in debate and other proceedings of the House. To discuss this matter by comparison, I wish to change the focus to the Senate in March this year, where allegations of an extremely serious nature were levelled by implication against a High Court Justice.

This action represented a huge abuse of privilege and was subsequently treated by the Senate as such. While I acknowledge that it is easier to be wise with the benefit of hindsight, I have absolutely no doubt that the path down which the Senator was heading was all too obvious. The Chair should have the benefit of advice against permitting comments to proceed down that path, for the benefit of the perception of the parliamentary institution, the judiciary and the Senator making the comments. I have

<sup>14</sup> *House of Representatives Practice*, 4<sup>th</sup> edition 2001, pp492-3.

<sup>15</sup> *Ibid*, p493.

no doubt that, had the events unfolded in the House of Representatives, I would have advised the Chair to name the offender, with the consequential motion to suspend the Member from the service of the House.

I should also add that most Members of Parliament respect the nature of privilege. Most would conduct as exhaustive inquiries into a matter as is possible and seek advice before raising it in the House. Most Members who benefit from the ability to act under privilege are aware that it is accompanied by a significant responsibility to see that it is exercised with discretion.

### **THE SUB JUDICE CONVENTION**

Another area of interaction between the House and the courts on which the Clerk might advise is in relation to the sub judice convention. The principle of the convention is that, notwithstanding its fundamental right and duty to consider any matter if it thought to be in the public interest, the House imposes a restriction on itself in the case of matters awaiting or under adjudication in a court of law. Such matters should not be brought forward in debate, motions, discussions, motions or questions in the House. The basic features in the House are:

- the application is subject to the Chair's discretion;
- matters before the criminal courts should not be referred to from the time a charge is laid until sentence, and apply again in the case of any appeal;
- matters before a civil court should not be referred to from the time a matter is set down for trial or otherwise brought before a court;
- the overlying consideration is the likelihood of prejudice to proceedings as a result of references in the House.

### **ADVICE TO OTHER LEGISLATURES**

Occasionally, the request for procedural advice comes from the Senate or from a source outside the Australian Parliament. Particularly since the advent of e-mail, Australian citizens have contacted my office seeking comment or advice on parliamentary matters. I am totally delighted with developments of this kind, and encourage them wherever possible. Overseas parliaments frequently seek advice on situations that are facing them. For example, in the last few weeks I have been asked for advice by an African and a Caribbean Parliament facing the election of a Speaker where the newly elected government does not command a majority. The advice in these circumstances must always be phrased in terms of what the Australian House of Representatives has done in a situation of this kind, or what I think it would do in a situation of this kind. It is not advisable to attempt to give advice as to what the parliament of the questioner should do in the circumstances described. Similarly, requests for information arise frequently from Australian State and Territory Parliaments.

### **ADVICE TO SENATE**

As I mentioned previously, sometimes the request for advice comes from a Senate or a joint committee, as well as from House committees. This occurred recently from the Senate Select Committee on a Certain Maritime Incident, known colloquially as "The Children Overboard Inquiry". The committee asked about the calling before the committee, as witnesses, former ministers and ministerial advisers. The views I forwarded to the committee verged on the nature of legal advice in what was, in many ways, uncharted waters, although there was some precedent (which I regard as a flawed precedent). Given the nature of the matter, I sought legal advice on my views before submitting them to the committee. The gist of my advice, with the benefit of legal guidance, in response to the committee's questions was as follows:

- Members of Parliament enjoy something closely akin to a legal immunity from being compelled to submit to examination by the House of which they are not a Member, or its committees;
- This immunity is soundly based on the powers of the Houses of the legislature under the Constitution. Sections 49 and 50 of our Constitution, amplified in statute and common law, provide for the complete autonomy of the Houses from each other.[I believe the same autonomy

prevails in respect of the Commonwealth and State Houses of Parliament, and to a lesser extent, to Territory Parliaments.] The powers of the House of Commons in 1901 become relevant by virtue of section 49 of the Constitution, and it was in this regard that I had recourse to former Clerk of the House of Commons, Hatsell, to which I referred earlier. Hatsell states that "...neither House can claim, much less exercise, any authority over a Member of the other..."<sup>16</sup>.

- This immunity most probably extends to former Members of Parliament. The basis of this consideration was that to regard the immunity otherwise would render it incomplete and defeat the essential objective of that immunity. A House could simply defer action to achieve that which it could not do until a Member retired, and this in turn could lead to friction between the Houses. There were also comparison of continued immunities that I felt were persuasive:
- ❖ Certain privileges such as freedom of speech do not lapse in respect of comments while a Member after retirement;
- ❖ Protection to witnesses extends beyond particular hearings;
- ❖ Comments by judges in determining a case do not cease to operate after a judge has retired;
- ❖ The immunities concerning discriminatory taxes on public servants in *West*<sup>17</sup> could have relevance.

There were views to the contrary expressed by the Clerk of the Senate and Brett Walker, SC. The matter is yet to be determined, and I am still receiving advice.

## PRIVILEGE

One major area in which the Clerk is called upon to give advice is in relation to parliamentary privilege. Privilege has long been regarded as an essential shield available to the parliamentary institution, and derivatively available to Members of the Houses individually, to enable the performance of their duties. Privilege has also been an effective sword in deterring reflections or other actions by those on the edge of the parliamentary process. Often, the mere mention of the "P" word has been more persuasive than logic and reasoning. Those who ascribe to this view often think their purpose is better served if understanding of privilege remains imprecise and less well-defined.

There is much misunderstanding, particularly among the media, of exactly what privilege involves. To the public perception, there is still an element of lurks and perks. I have even heard it said that parliamentarians have so many privileges, they need a special committee to look after them! Privilege is, of course, part of the law of the land and in providing an exemption from the law under certain circumstances, is one of the greatest professional perquisites possible. The term actually covers two distinct types of protection. Immunities constitute one type, the other sort resides in the power to punish as a contempt any act or omission which obstructs or impedes any Member or officer in the discharge of parliamentary duty. Sanctions may apply if either is breached.

The Commonwealth derives its privilege powers from section 49 of our Constitution. The original privilege powers were tested and confirmed by the High Court in the case of *Brown and Fitzpatrick*<sup>18</sup>. Acting in a way that I do not think would be acceptable today, the House gaoled two citizens for three months. I do not propose to go into details today, but a more complete account is given in *House of Representatives Practice*<sup>19</sup>. Section 49 of the Constitution also provides a head of power for enactment, and the Parliament has done this in the *Parliamentary Privileges Act 1987*<sup>20</sup>. This Act expressly provides that, except to the extent that the Act provides otherwise, the powers, privileges and immunities of each House as in force under section 49 immediately before the commencement of the Act, continue in force. However, the provisions of the Act have not been without controversy.

<sup>16</sup> *Precedents of Proceedings of the House of Commons* (1818), Vol 3, p67.

<sup>17</sup> *West v. Commissioner of Taxation* (NSW0 56 CLR 657 at pp 666, 668, 681 and 687.

<sup>18</sup> *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 168

<sup>19</sup> *Op cit*, pp 688-690.

<sup>20</sup> Act No. 21 of 1987.

## DILUTION OF SOVEREIGNTY

In some regards, I believe that the Privileges Act has had the effect of diluting the sovereignty of the Australian Commonwealth Parliament. In his recent scholarly work *The Sovereignty of Parliament: History and Philosophy*<sup>21</sup>, Jeffery Goldsworthy states a legislature has sovereign law-making power if its power to change the law is not limited by any norms concerning the substance of legislation. This is so, even if it is governed by judicially enforceable norms as to its composition, and the procedure and form by which it must legislate<sup>22</sup>. In commenting on the *Stockdale v. Hansard* cases, which led to the passage of the United Kingdom Parliamentary Papers Act, Goldsworthy indicates that the UK House of Commons has still not conceded the courts' jurisdiction to be the final arbiter of its privileges<sup>23</sup>.

The Privileges Act has made certain aspects previously within Parliament's sole jurisdiction to become potentially justiciable. The Act has consciously limited the capacity of a House to protect itself and its Members against what had previously been regarded as contempts. Essential elements of an offence have been defined, and contempts by defamation have been abolished. Section 4 provides:

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

[*emphasis added*].

Section 6 provides that words or acts shall not be taken to be an offence against a House by reason only that those words are defamatory or critical of the Parliament, a House, a committee or a member (although this does not apply to words or acts in the presence of a House or committee).

One possible unintentional effect relates to the Presiding Officer of each House. Previously, a reflection on the Speaker outside the House was treated and punished as a contempt. Now, such action would most likely be justiciable. The result has been to treat the matter as a matter of order, or to turn a blind eye.

### *Expansion of notion of parliamentary proceedings*

Observation of Article 9 of the Bill of Rights is essential for Members to exercise the privilege of freedom of speech. That article provides:

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

Section 16 of the Privileges Act gave some precision to the term "proceedings in Parliament". The section re-asserts the application of the Bill of Rights to the Commonwealth Parliament, and goes on to indicate that the term means:

- ...all words spoken or acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or committee, and, without limiting the generality of the foregoing, includes-
- (a) the giving of evidence before a House or a committee;
  - (b) the presentation or submission of a document to a House or a committee;
  - (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
  - (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

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<sup>21</sup> Clarendon Press, 1999.

<sup>22</sup> Ibid, p16.

<sup>23</sup> Ibid, p 242. For a more complete discussion of this work, see the forthcoming edition of the *Australian Journal of Legal Philosophy*, volume 27, 2002, for commentaries by G DeQ Walker, M R LL Kelly, Sir Anthony Mason, Geoffrey Lindell and myself, and response by Jeffrey Goldsworthy.

However, the use of the term “for purposes of or incidental to” the transacting of business may on occasion lead to a situation where a judgement is necessary. In 1997, in *O’Chee v. Rowley*<sup>24</sup> the Court of Appeal of the Supreme Court of Queensland was required to consider the application of subsection 16(2). The effect of its decision was that a Senator was not required to comply with an order to disclose certain documents the Senator claimed had come into his possession for the purpose of or incidental to the transacting of business in the Senate. The court held that the privilege articulated in section 16 had the effect that the documents did not need to be produced.

I draw attention in this regard to an excellent article by G M Kelly, barrister and solicitor, High Courts of Australia and New Zealand, published in *Australasian Parliamentary Review*, the journal of the Australasian Parliamentary Study of Parliament Group (edited by J R Nethercote). The article “ ‘Questioning’ a privilege; article 9 of the Bill of Rights” suggests that the current common law interpretation, as codified for the Commonwealth in the Parliamentary Privileges Act, is not consistent with the origins of the Article and not compatible with present community interests and needs<sup>25</sup>. The article also demonstrates the dangers of allowing those not trained and skilled in law to develop legal concepts. However that may be, the important consideration is what the term meant in relation to the United Kingdom House of Commons in 1901. I should also add that the Privy Council in *Prebble*<sup>26</sup> provided an interpretation of Article 9 consistent with the articulation in section 16 of the Privileges Act.

A report of the House Privileges Committee in 2000<sup>27</sup> on the status of records and correspondence of Members recommended that there should be no additional protection given, beyond that provided by the current law. However, it recommended that at the discretion of the Speaker, the House might intervene to assert the protection of parliamentary privilege in court proceedings in which records and correspondence might reasonably be argued to fall within the definition of proceedings in Parliament. In the case of *Crane v. Gething*<sup>28</sup> the Federal Court held that it should not decide whether certain documents were in fact protected by privilege, and the documents were sent to the Senate for determination of the matter. The Senate, by resolution, appointed a former public servant with legal qualifications to determine whether any of the documents were immune from seizure<sup>29</sup>. The Court took the contrary view to arguments that it was the responsibility of the court to determine the matter.

Moreover, as Professor Enid Campbell has indicated in an article *Reporting of Parliamentary Proceedings*<sup>30</sup> the fact that a document has been tabled before a House does not mean that the document will be a proceeding in Parliament for all purposes. This was confirmed by a recent case in the ACT Supreme Court, in which four Territory public servants challenged a report on disability services to the ACT Chief Minister. The Speaker of the Territory Assembly intervened on the basis that privilege prevented the court from using the report as it had been presented to the Assembly. (The Territory's powers and privileges are linked to those of the House of Representatives). Judgement was that there was no evidence that it had been prepared for the purpose of tabling in Parliament, or that it had formed part of the proceedings, despite having been presented to the Assembly.

In *Laurance v. Katter*<sup>31</sup> the Court of Appeal of the Supreme Court of Queensland considered the application of subsection 16(3) of the Privileges Act. The court held that subsection 16(3) did not prevent Mr Laurance from relying on statements Mr Katter had made in the House in the an action for defamation in the course of an interview in which Mr Katter said he stood by his comments, but did not repeat them. In the judgment, comments were made (obiter) of an improper interference with the courts, and it was held that the subsection did not validly operate with respect to defamation suits.

<sup>24</sup> [1997]QCA 401

<sup>25</sup> *Australasian Parliamentary Review* Vol 16, No. 1 (Autumn 2001), page 86.

<sup>26</sup> *Prebble v. Television New Zealand* [1995] 1 AC 321.

<sup>27</sup> PP 417 (2000).

<sup>28</sup> *Crane v. Gething* [2000] 169ALR 727

<sup>29</sup> *Senate Hansard*, 5/12/2000, p20668.

<sup>30</sup> *Constitutional Law & Policy Review*, December 2000, pp 5 and 12.

<sup>31</sup> *Laurance v. Katter* [1996] QCA 471

Professor Enid Campbell has questioned the validity of the subsection on more technical grounds<sup>32</sup>. She has also said that subsection 16(3) is more than a rule about exclusion of evidence. It is also a rule about the uses which may be made of admissible evidence<sup>33</sup>. The Queensland Court of Appeal decision was appealed to the High Court, but the case was settled before it was decided<sup>34</sup>. I share Mr G M Kelly's suggestion of disappointment that the case was not settled, in the interest of clarification of the law<sup>35</sup>.

Finally on this point, in *Rann v. Olsen*, the South Australian Supreme Court held that subsection 16 (3) would prevent Mr Olsen from maintaining and supporting certain defences in a defamation action. However it rejected submissions to the effect that the Act was invalid because it impermissibly infringed the implied constitutional guarantee of freedom of political communication<sup>36</sup>.

## **OTHER DUTIES OF THE CLERK**

### ***Administrative duties***

This description has concentrated on the procedural and traditional duties of the Clerk. The Clerk has an administrative role as well as being a specialist in the rules of parliamentary practice and procedure. As departmental head, the Clerk administers the Department of the House of Representatives under the general oversight of the Speaker of the House in the same way as the secretary of an executive department administers his or her department under a Minister. The discharge of this responsibility is subject to the continuing scrutiny of the Members of the House. Members of the House frequently exercise this scrutiny immediately after each question time when, pursuant to standing order 152, questions may be addressed to the Speaker on administrative matters.

The Clerk has responsibilities, as do all agency heads, under the Financial Management and Accountability Act. Under the Parliamentary Service Act, the Clerk is responsible for engaging and dismissing staff, concluding certified agreements with staff for salaries and other conditions of service, disciplinary matters, ensuring occupational health and safety, setting instructions to ensure a workplace free from discrimination and harassment etc.

As Agency Head, the Clerk is responsible for leading staff to a service based on principles rather than the prescriptive, rule-driven service that characterised the first one hundred years of our existence. Particularly due to the efforts of past staff, the Department established a firm position of corporate leadership as providing assistance to the parliamentary system of the highest calibre. We have now moved to a position of observing values set out in the Parliamentary Service Act. These are similar to those in the Public Service Act, but stress service to the Parliament rather than to the government alone. The department is an accredited Investor in People agency. Once accreditation is gained, it is necessary to be assessed on an annual basis to maintain that accreditation. My belief is that if all staff observe the Parliamentary Service values (and it is my statutory responsibility to promote awareness of them, and encourage their observance), and foster our professional working relationships, we will maintain our position of corporate leadership in the field of parliamentary support.

### ***International duties***

I have previously mentioned that the Clerk is called upon to provide advice to overseas administrations. There are growing significant international duties, mainly stemming from the membership of the Clerk in the Society of Clerks at the Table and the Association of Secretaries-General of Parliaments. In the year 2001, I was the secretary-general for one of our principal centennial tasks was to host an international Commonwealth Parliamentary Conference that followed the federation trail. It opened in Melbourne, travelled north via Albury/Wodonga and arrived in Canberra by steam train.

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<sup>32</sup> *Parliamentary Privilege and the Admissibility of Evidence* Enid Campbell, (1999) 27 FL Rev.No.3, pp367-90, cited in GM Kelly, op cit, p

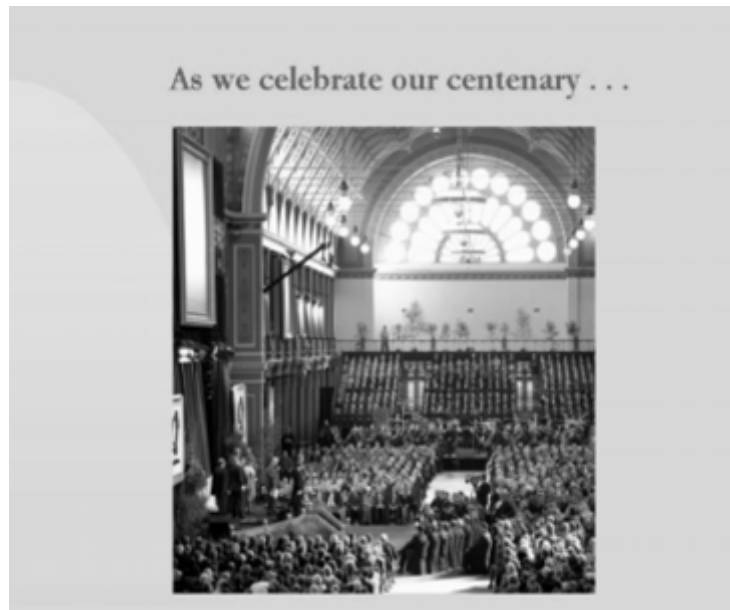
<sup>33</sup> 27 FL Rev.No.3 Website, page 5.

<sup>34</sup> *Laurance v. Katter* B69/1996 926 June 1997).

<sup>35</sup> G M Kelly, Op cit, p85

<sup>36</sup> *Rann v. Olsen* [2000] SASC 83.

I have also placed a growing emphasis on Australia's position amongst nations that do not follow the Westminster tradition. Staff of the department lend regular assistance to developing parliaments, particularly in the Asia/Pacific areas. Currently, one of our staff is part of a United Nations' team helping re-establish parliamentary democracy in Kosovo. I have been elected by my peers from national parliaments as Vice-President of the Association of Secretaries-General of Parliaments. In September this year I will commence acting as the Association's President. It has often been said that our country punches well above its weight in international forums. The acceptance my international peers have shown me in this regard largely flows from the generally favourable view other nations extend towards Australia. We are generally seen as an honest broker, coming with a frank attitude and bringing a breath of fresh air into previously musty corridors.



Last year, we celebrated 100 years of Australian federation by re-enacting the first sittings in the Exhibition Building and Parliament House, Victoria. However, while we have large regard for tradition and precedent, they do not bind us unreasonably. There are some extremely exciting events unfolding at the House of Representatives. One has been the establishment of our general purpose standing committees. These generally operate without the political emphasis given by other elements in our parliamentary system.

The other, perhaps one of the largest steps forward we have ever taken, was the establishment of a body currently called the 'Main Committee'. It represents one of the major advances in the way in which the House has developed the processes for dealing with certain items of business. (A recent report of the Procedure Committee has recommended that this body be called the Second Chamber.<sup>37</sup>)

In effect, the Main Committee creates a stream of parliamentary consideration parallel to that occurring in the House of Representatives Chamber. It cannot be a forum for the initiation of parliamentary business nor for final decision, but it can and does process everything in between. The meeting place is in a purpose-designed location, much smaller than the Chamber. All Members are members of the Main Committee, and its more intimate atmosphere leads to greater interaction in debate.

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<sup>37</sup> Commonwealth, *The Second Chamber: Enhancing the Main Committee*, Parl Paper No158 (2000): Commonwealth, *Votes and Proceedings*, House of Representatives, 14 August 2000, 1625.

Not everyone's happy with the result . . .



. . . so we try to find out why . . .



. . . to get the answers.



The opportunity is taken from time to time to try techniques and procedures in the Main Committee as a precursor to their introduction into the Chamber. For example, the application of electronic communication between the Chair and Clerks was first trialed there. The report of the Procedure Committee I mentioned earlier gave expression to the 'belief that the Main Committee is an appropriate laboratory for experiments which, if successful, might be extended to the Chamber'<sup>38</sup>.

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<sup>38</sup> Ibid 36.





Perhaps the greatest tribute paid to the work of the main committee is that the United Kingdom House of Commons has chosen to trial it in its operations. It has a different name, and slightly different functions, but the Commons freely admit that our body provided the model.

## CONCLUSION

In conclusion, I would like to express my appreciation for the opportunity to be here to talk to you today. When I first became Clerk of the House just under five years ago, I made a commitment to increase awareness of the role and functions of the House to all elements of Australian Society. To this end, we have begun publishing regular periodicals directed more at the person in the street. We have developed a much-visited web site. Very soon we will be releasing a series of documentaries in which Professor Saunders has participated regularly. We are about to launch a publication on images of the House – a 100 year photographic record. We have introduced an intern scheme, under which a sampling of tomorrow's leaders come to work in the House and hopefully will take knowledge of the House with them into their chosen careers. We will be releasing an interactive CD Rom, that I will demonstrate while we are having our subsequent discussion or you are asking questions.



Today's talk has provided me with an additional opportunity to discharge that commitment. I now look forward to your questions or comments, or to any that might arise in the future and are addressed to me by e-mail or other means.

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Photographs by courtesy of AUSPIC.