

Standing Committee on
Parliamentary Privilege and Ethics



LEGISLATIVE
ASSEMBLY

Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House



Report 2/57 – May 2022



Legislative Assembly

Standing Committee on Parliamentary Privilege and Ethics

Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House

Report 2/57– May 2022

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly. Standing Committee on Parliamentary Privilege and Ethics.

Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House / Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics [Sydney, N.S.W.] : the Committee, 2022. 1 online resource ([52] pages). (Report / Standing Committee on Parliamentary Privilege and Ethics ; no. 2/57)

“May 2022”.

Chair: Peter Sidgreaves, MP.

ISBN: 9781921686245

1. New South Wales. Parliament—Ethics.
2. Political ethics—New South Wales.
3. Legislators—New South Wales.
 - I. Sidgreaves, Peter.
 - II. Title.
- III. Series: New South Wales. Parliament. Legislative Assembly. Standing Committee on Parliamentary Privilege and Ethics. Report ; no. 2/57

(328.944 DDC22)

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

Contents

Membership _____	ii
Chair’s foreword _____	iii
Executive Summary _____	v
Findings and recommendations _____	ix
Chapter One – Suspension of a sitting Member charged with a serious criminal offence _____	1
Power to suspend a Member of the NSW Legislative Assembly _____	1
Suspension of the Member for Kiama – March 2022 _____	5
Previous proposals to withhold remuneration and entitlements _____	7
Comparative jurisdictions _____	7
Chapter Two – Imposing additional measures on a Member suspended under Standing Order 255 _____	9
Question #1: Does the Legislative Assembly possess the power to take any further action against a Member facing criminal prosecution (but not convicted), other than to suspend the Member from the proceedings of the Legislative Assembly and access to the parliamentary precincts? _____	9
Question #2: If such further action were being contemplated, what legislation or other action (if any), including amendments to the Constitution Act and Standing Orders, would be required? _____	9
Question #3: Whether if the Parliament were to legislate to remove any of a Member’s entitlements that would be a valid exercise of power and, if it were, whether such legislation could be seen to be punitive? _____	10
Question #4: Could Standing Orders provide authority for withholding a Member’s salary and other entitlements? _____	11
Consequences of a suspension under the Standing Orders _____	11
Chapter Three – Potential issues around further penalising a suspended Member _____	14
Possible issues with legislating to provide for punitive powers _____	14
Constitutional challenges _____	16
Chapter Four – Findings and recommendations _____	18
Appendix One – The July 1906 suspension of the Member for Blayney _____	20
Appendix Two – Terms of reference _____	30
Appendix Three – Conduct of inquiry _____	32
Appendix Four – Extracts from minutes _____	33

Membership

Chair	Mr Peter Sidgreaves MP
Deputy Chair	Mr Adam Crouch MP
Members	Mr Kevin Conolly (18 June 2019 -31 March 2022) Mr Alex Greenwich MP (from 31 March 2022) Ms Melanie Gibbons MP Mr Ron Hoenig MP The Hon. Wendy Tuckerman MP (18 June 2019-31 March 2022)
Contact details	Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics
Telephone	(02) 9230 2666
E-mail	Ethics.Committee@parliament.nsw.gov.au
Website	www.parliament.nsw.gov.au/laprivilegeandethics

Chair's foreword

The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics has inquired into the options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House, in accordance with the referral made to it by the House on 31 March 2022. The referral was made after the Assembly resolved on 24 March 2022 to suspend the Member for Kiama, Mr Gareth Ward MP, who is facing criminal charges.

I would like to emphasise at the outset, on behalf of the Committee, the importance of the presumption of innocence. The Member for Kiama is as entitled to this presumption as any other person.

This inquiry referral raised significant and complex constitutional, legal and procedural issues, which are fundamental to our system of government and the role of the courts. It required balancing significant considerations relating to: the constitutional framework within which the Parliament operates; the presumption of innocence and the principle of comity with the courts; principles of representative government; the duties and obligations of elected members; and the ability of the House to regulate its own affairs and determine matters essential to its effective operation and the performance of its functions.

Commensurate with the significance of these issues and the potential implications of any recommendations made by the Committee, the Members resolved to obtain independent legal advice and consult with experts in the area of constitutional law. In particular, the Committee benefitted from the expert opinion of Professor Anne Twomey AO, and legal advice from Mr Stephen Free SC and Mr Jackson Wherrett of Counsel.

I would like to thank my fellow Committee Members for the individual contributions they made to the inquiry. My colleagues were bipartisan and constructive throughout the deliberations, and their examination of the key questions before the Committee demonstrates the breadth of their knowledge and experience. I am grateful for their support.

The Committee also appreciates the considered advice provided by the senior officers of the House and the dedicated Secretariat on such a significant referral. The Clerk of the NSW Legislative Assembly, Ms Helen Minnican; Clerk-Assistant (Scrutiny and Engagement), Mr Jonathan Elliott; Manager (House and Procedure), Ms Elspeth Dyer; and Committee officers, Mrs Rickee Murray and Mr Ze Nan Ma, all provided valuable assistance. Dr Gareth Griffith, formerly head of the Parliamentary Library Research Service, also assisted the Secretariat during the course of the inquiry.

The Legislative Assembly is well served by the Members of the Committee and the officers who support them.

I commend the report to the House.

Peter Sidgreaves MP
Chair

Executive Summary

Suspension resolution

On 24 March 2022, the New South Wales Legislative Assembly resolved to suspend the Member for Kiama, Gareth Ward, who is currently facing criminal charges¹.

The motion, as moved by the Acting Premier, the Hon. Paul Toole, provided that the House:

- 1 Suspend the Member for Kiama from the service of the House until the verdict of the jury has been returned on the five criminal charges laid against him on 22 March 2022 or until it is further ordered.
- 2 Acknowledges the need to ensure the alleged victims in this matter have their day in court, and therefore cannot debate the alleged misconduct of the Member for Kiama contained within the said charges.
- 3 Notes that it does not have the power to withhold a Member's remuneration.
- 4 Notes that the Government has sought advice on options to effect the withholding of a suspended Member's remuneration, and all other entitlements.²

Legal advice obtained by the Government from the Crown Solicitor's Office had been tabled by the Acting Premier the previous day, when giving notice of the motion. The advice concerned legal risks to criminal proceedings against a Member of the Legislative Assembly arising from the expulsion, or alternatively, the suspension of the Member from the Parliament.³

The motion was subject to limited debate, with the Speaker drawing the attention of the House to the sub judice convention. He emphasised the need to confine debate to the motion before the House, to respect the judicial process and refrain from referring to, or reflecting on, the alleged conduct the subject of criminal legal proceedings.

In moving the motion, the Acting Premier stated that suspension of the Member was the strongest action that could be taken without prejudicing the criminal proceedings. He also foreshadowed the Government '[would] take any available action to suspend the salary and other entitlements of the member for the period of his suspension'.

¹ Mr Ward was charged with five criminal offences on 22 March 2022. The committal hearing was listed for 17 May 2022 in the Local Court at Nowra [R v GARETH JAMES WARD - NSW court lists | Online Registry](#),

² *Legislative Assembly Debates*, 24 March 2022, pp38-40, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

³ Tabled Papers Database, NSW Parliament website: <https://www.parliament.nsw.gov.au/tp/files/81758/Memorandum%20of%20legal%20advice%20-%20expulsion%20of%20a%20Member%20of%20the%20LA%20charged%20with%20a%20criminal%20offence.pdf> viewed 17 May 2022.

The Opposition supported the motion to suspend Mr Ward but called for the question of any further action to flow from the suspension to be referred to the Standing Committee on Parliamentary Privilege and Ethics. The suspension motion passed on the voices without dissent. Mr Ward was not present for the debate.⁴

Committee referral

A week after Mr Ward's suspension, on 31 March 2022, the House resolved to refer to the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics an inquiry into 'the options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House, and any other related matter'. The Committee was required to report on the inquiry by 12 May 2022. There was no debate on the referral motion, which passed without dissent.⁵ A one week extension to the reporting date was obtained on 10 May 2022.⁶

Relevant Standing Orders

The suspension of the Member was moved pursuant to Standing Order 255, based on an earlier Standing Order first introduced in 1906 and not used since that time. It does not involve any restriction on Mr Ward accessing his electorate office and other resources. Rather, the terms of the relevant Standing Order suspends the Member from the 'service of the House' (a term not defined in the Standing Orders):

Criminal trial pending

255. If the House decides not to proceed on a matter which has been initiated in the House concerning the alleged misconduct of a Member on the grounds that the Member may be prejudiced in a criminal trial then pending on charges founded on the misconduct, the House may suspend the Member from its service until the verdict of the jury has been returned or until it is further ordered.⁷

The consequences for a suspended Member involve exclusion from the parliamentary precincts and a prohibition on participating in parliamentary proceedings. Standing Order 253 provides:

Consequences of suspension

⁴ *Legislative Assembly Debates*, 24 March 2022, pp38-40, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

⁵ *Legislative Assembly Debates*, 31 March 2022, p46, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

⁶ *Legislative Assembly Debates*, 10 May 2022, pp3-4, NSW Parliament website: [HANSARD-1323879322-124391.pdf](https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1) viewed 16 May 2022.

⁷ NSW Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, May 2022, NSW Parliament website: [LEGISLATIVE ASSEMBLY \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1) viewed 17 May 2022.

253. A Member who is suspended from the service of the House shall be excluded from the Parliamentary precincts until the expiration of the suspension period including all intervening non-sitting days and cannot take part in any proceedings of the House or its committees.⁸

The inquiry referral and the role of the Committee

The Legislative Assembly's Standing Committee on Parliamentary and Privilege and Ethics comprises backbench Members, representative of the composition of the House. Established by resolution, the Committee's functions include inquiring into any matter of privilege or contempt referred to it by the House, in accordance with Standing Order 92. The Committee also conducts a review the Members Code of Conduct each parliamentary term, as required under Part 7 of the *Independent Commission Against Corruption Act 1988*.

The referred inquiry does not require the Committee to review the original decision of the House to suspend the Member for Kiama. The referral is also couched in general terms and concerns possible options regarding the 'withholding of remuneration and other entitlements of a Member, suspended from the service of the House'. However, the particular context in which the referral was made means that the Committee's findings and recommendations would be liable to be taken into account should the House move to consider the application of any additional measures upon the Member for Kiama arising from his suspension while facing criminal charges.

Conduct of the inquiry

The Committee obtained expert advice on the complex issues involved in the inquiry, in order to inform itself of important constitutional and legal principles, relevant precedents and case law, and the position across comparative jurisdictions. The information obtained in the course of its deliberations consisted of:

- Advice sought by the Clerk of the Legislative Assembly from the Clerks in each Australian State and Territory, the Parliament of Australia and the New Zealand Parliament, in relation to relevant cases and comparable procedures;
- Briefing to the Committee by Professor Anne Twomey AO, Professor of Constitutional Law, University of Sydney, on 27 April 2022;
- Memorandum of advice from Mr Stephen Free SC and Mr Jackson Wherrett of Counsel, dated 11 May 2022, on the power of the Legislative Assembly to take further action against a suspended member.

⁸ NSW Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament*, May 2022.

Conclusion

Drawing on the advice obtained, the Committee has compiled the following report which recommends against additional measures following suspension and identifies some matters for further consideration.

Findings and recommendations

Finding 1 – Remuneration and entitlements _____ 18

The Committee finds any additional measures that would involve withholding of remuneration and other entitlements of a Member suspended from the service of the House would require new legislation to be enacted.

Recommendation 1 _____ 18

Given the constitutional limitations, the Committee recommends against the enactment of legislation to withhold the statutory remuneration or entitlements, or access to the employment of staff, from a Member suspended from the service of the House.

Finding 2 – Parliamentary activities _____ 18

The Committee finds that any proposal to further restrict a Member’s participation in parliamentary activities, would require legislation. Absent legislation, the House may only take protective or defensive action reasonably necessary for the proper exercise of its functions, or via a Standing Order regulating the ‘orderly conduct’ of the Legislative Assembly under section 15(1)(a) of the *Constitution Act 1902*. It is doubtful that orderly conduct can form the basis of measures that are essentially punitive in nature. Hence, any Standing Order which provides for punitive action may be vulnerable to legal challenge as beyond power.

Recommendation 2 _____ 19

As a result of the constitutional requirements, the Committee recommends that a Member suspended from the service of the House should be able to continue to represent their electorate through the remaining mechanisms available to them as a Member of the Legislative Assembly which do not involve their actual participation in debates or proceedings in the House or Committees. Such mechanisms would include being able to access their electorate office resources and staff, make representations for constituents, and engage in parliamentary activities such as the lodging of questions on notice and petitions.

Finding 3 _____ 19

The Committee finds that in relation to the consequences of a suspension, there is a lack of clarity around the meaning of the term ‘any proceedings of the House or its Committees’ in Standing Order 253. (As noted, in Recommendation 2, it is the view of the Committee that the reference to proceedings in this context should not be construed so narrowly as to eliminate all parliamentary activities that a Member of the House may engage in as an elected representative).

Recommendation 3 _____ 19

As a consequence of Finding 3, the Committee recommends that the House consider delegating to the Standing Orders and Procedure Committee the ongoing role of reviewing the adoption of new procedures, including in response to technological developments, which may have implications for the operation of Standing Order 253.

Chapter One – Suspension of a sitting Member charged with a serious criminal offence

1.1 This chapter discusses issues of relevance to the suspension of a sitting Member of Parliament who is charged with a serious criminal offence, including:

- the power to suspend a Member of the NSW Legislative Assembly;
- a brief outline of the two occasions, in 1906 and 2022, when the NSW Legislative Assembly has suspended a sitting Member charged with a serious criminal offence; and
- the principles relevant to the suspension of a Member of Parliament.

Power to suspend a Member of the NSW Legislative Assembly⁹

1.2 There are two sources of power to suspend a Member of Parliament: the inherent right of the House to suspend, and suspension provided for under the Standing Orders of the House, made pursuant to s.15 of the *Constitution Act 1902*.

The inherent right to suspend

1.3 With regard to the inherent right to suspend, in *Armstrong v Budd* (1969) 71 SR (NSW) 386, the NSW Court of Appeal held that the common law provides each House of Parliament with the powers that are necessary to the existence of the House, and to the functions it is intended to execute.¹⁰ The Court held:

The Houses of the Legislature of New South Wales have inherent or implied power to exclude temporarily or permanently by suspension or expulsion members whose conduct is resolved to be such:

- (1) As to render them unfit to perform their high responsibilities and functions in the Council as Members.
- (2) As would prevent the Council and other members thereof from conducting its deliberations and exercising its functions with mutual respect, trust and candour.
- (3) As would cause to be suspect its honour and good faith of its deliberations.

⁹ The Committee gratefully acknowledges a written and verbal briefing provided to it by Professor Anne Twomey on 27 April 2022 about the principles relevant to the suspension of Members of Parliament which has been used in compiling and structuring this information on the principles relevant to suspension, and in identifying relevant case law.

¹⁰ See Griffith, G. 'Expulsion of Members of the NSW Parliament' *Briefing Paper No 17/2003*, executive summary, NSW Parliament website: [Microsoft Word - Expulsion Briefing Paper.doc \(nsw.gov.au\)](#) viewed 28 April 2022.

(4) As would tend to bring the Council into disrepute and would lower its authority and dignity unless it was so preserved and maintained.¹¹

1.4 Using its inherent powers, the House can suspend a Member for *disorderly conduct* but this cannot be done to punish the Member. It can only be done for self-protection of the House and the Member cannot be unconditionally suspended for an indefinite period.¹²

1.5 The House can also use its inherent, self-defensive powers to suspend a Member for certain conduct *outside* the House – where they have been charged with offences such as bribery and corruption.¹³ In *Armstrong v Budd* Herron CJ spoke of the self-protective nature of removing a Member for conduct that showed a lack of honesty and probity:

I have already indicated that in my view the power which arises out of necessity arises not only from conduct within the Chamber but may also arise from misconduct outside the House provided that it be held to be of sufficient gravity to render the Member unfit for service and requiring a decision on the facts that continued membership would tend to disable the Council from discharging its duty and one necessary for protecting that dignity essential to its functions. As to the latter it would seem that conduct involving want of honesty and probity of members is just as relevant a criterion as for example disorderly conduct.¹⁴

1.6 However, the power of suspension should be exercised within strict limits given the potential for abuse, as found in *Barton v Taylor* where it was noted:

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 some cases to excess or abuse.¹⁵

1.7 Similarly, in *Egan v Willis*, Kirby J stated that 'Difficult questions might arise where a longer or indefinite suspension...was attempted'.¹⁶

1.8 The possible adverse impact of suspensions on the affected Member's constituency are also a factor, as identified in *Barton v Taylor*:

The rights of constituents ought not, in a question of this kind, to be left out of sight. Those rights would be much more seriously interfered with by an unnecessarily prolonged suspension than by expulsion after which a new election would immediately be held.¹⁷

¹¹ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

¹² *Barton v Taylor* (1886) 11 AC 197 at 205.

¹³ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 393.

¹⁴ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 397.

¹⁵ *Barton v Taylor* (1886) 11 AC 197 at 205.

¹⁶ *Egan v Willis* (1998) 195 CLR 424 at 159.

¹⁷ *Barton v Taylor* (1886) 11 AC 197 at 205.

Suspension under Standing Orders of the House

- 1.9 Under section 15 of the *Constitution Act 1902 (NSW)*, the Legislative Assembly and Legislative Council can adopt Standing Rules and Orders regulating the orderly conduct of their respective Houses (and to regulate other internal matters of procedure). As noted by Professor Twomey, the power to make Standing Orders, which is statute-based, is not affected by the non-punitive limits placed on the common law inherent power. However, there is doubt as to whether Standing Orders for ‘orderly conduct’ could be used as the basis for punitive measures. The validity of a standing order and its interpretation is a justiciable matter.¹⁸
- 1.10 Legislative Assembly Standing Order 255, which relates to the suspension of a sitting Member who has been charged with a criminal offence provides:
- Criminal trial pending
255. If the House decides not to proceed on a matter which has been initiated in the House concerning the alleged misconduct of a Member on the grounds that the Member may be prejudiced in a criminal trial then pending on charges founded on the misconduct, the House may suspend the Member from its service until the verdict of the jury has been returned or until it is further ordered.¹⁹
- 1.11 Legislative Assembly Standing Order 253 provides for the consequences of a suspension:
- Consequences of a suspension
253. A Member who is suspended from the service of the House shall be excluded from the Parliamentary precincts until the expiration of the suspension period including all intervening non-sitting days and cannot take part in any proceedings of the House or its committees.²⁰
- 1.12 Standing Order 255 is based on a Standing Order 393A that was introduced on 19 July 1906 to suspend a sitting Member, William Patrick “Paddy” Crick, who was charged with a serious criminal offence, following a Royal Commission that found he had engaged in bribery and corruption.
- 1.13 The relevant Standing Orders at the time of the 1906 suspension were:

¹⁸ Written briefing provided to the Committee by Professor Anne Twomey, 27 April 2022, p1, referencing *Barton v Taylor* (1886) 11 AC 197 at 207; *Crick v Harnett* (1907) 7 SR (NSW) 126 at 133; and *Barnes v Purcell* [1946] St R Qd 87 at 95, 104 and 109-10.

¹⁹ NSW Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, 57th Parliament, May 2022.

²⁰ NSW Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, 57th Parliament, May 2022.

Consequences of a suspension

393. When a Member is suspended from the service of, or removed from, the House, he shall be excluded from all the rooms set apart for the use of the Members.

Suspension of a Member against whom a criminal trial is pending

393A. Whenever it shall have been ruled or decided (whether before or after the approval of this Standing Order) that the House may not proceed on a matter which has been initiated in the House affecting the alleged misconduct of a Member because thereby the said Member may be prejudiced in a criminal trial then pending on charges founded on such misconduct, the House may suspend such Member from the service of the House until the verdict of the jury has been returned or until it is further ordered.²¹

- 1.14 Standing Order 393A ‘Suspension of a Member against whom a criminal trial is pending’ existed in its original form from 1906 until 1994 when the current wording as per Standing Order 255 ‘Criminal trial pending’ was used for the first time.²²

Judicial consideration of the Standing Order

- 1.15 The significance of this earlier precedent lies in the subsequent judicial consideration of the validity of Standing Order 393A, which had been adopted urgently to enable the House to suspend Mr Crick until the verdict of the jury had been returned on the criminal charges laid against him. The NSW Supreme Court initially held that Standing Order 393A was invalid as it did not regulate the orderly conduct of the Legislative Assembly. The Chief Justice found that a criminal charge pending against a Member in no way affected or obstructed the business of the Chamber and did not affect or relate to the orderly conduct of the House. Such a suspension ignored the presumption of innocence and the rights of the Member’s constituents.²³
- 1.16 On appeal, the Privy Council overturned the Supreme Court decision and upheld the suspension as being self-defensive rather than punitive and, therefore, as being within the inherent power. The Privy Council accepted that Mr Crick’s conduct may have been considered ‘a deliberative insult and challenge to the whole House’. The nature of the charges in the Crick

²¹ *Standing Rules and Orders of the Legislative Assembly (Approved by the Governor, 11th June, 1894) [Reprinted with Additional and Amended Standing Orders, Adopted since 1894]; and Standing Rules and Orders of the Legislative Assembly (Approved by the Governor, 11th June, 1894) [Reprinted with Additional and Amended Standing Orders, Adopted since 1894]*, September 2022, reveal that as at 19 July 1906, the quoted Standing Order 391 Expulsion of a Member, Standing Order 393 Consequences of Suspension, and Standing Order 393A Suspension of a Member against whom a criminal trial is pending, were in place.

²² *Standing Rules and Orders of the Legislative Assembly (Approved by the Governor, 11th June, 1894) Reprinted with Additional and Amended Standing Orders 1982* – see Standing Order 393A; and *Parliament of New South Wales, Legislative Assembly Standing Rules and Orders Approved by the Governor 12 December 1994* – see Standing Order 295.

²³ *Crick v Harnett* (1907) 7 SR (NSW) 126, 135-6; also referred to by Professor Twomey during her briefing on 27 April 2022.

case concerned matters of corruption and dishonesty, which were seen to reasonably affect the conduct of the House.²⁴

- 1.17 A more detailed account of the 1906 Crick debates and suspension, and the related judgments can be found in Appendix One.

Suspension of the Member for Kiama – March 2022

- 1.18 On 24 March 2022, the NSW Legislative Assembly suspended the Member for Kiama, Mr Gareth Ward MP, who is facing criminal charges. The suspension of the Member was moved pursuant to Standing Order 255. As a consequence the Member cannot access the parliamentary precincts or participate in proceedings, and he is suspended from ‘the service of the House’. However, the Member is not prevented from accessing his electorate office or other resources like remuneration and entitlements.

- 1.19 According to media reports of 22 March 2022, Mr Ward is charged with:

- three counts of assault with acts of indecency;
- one count each of common assault and sexual intercourse without consent.²⁵

Mr Ward is entitled to the presumption of innocence.

- 1.20 The Legislative Assembly proceedings relevant to the suspension were as follows:

- On 23 March 2022, the Acting Premier, the Hon Paul Toole MP, gave notice of a motion to suspend the Member for Kiama and tabled legal advice that the Government obtained from the NSW Crown Solicitor’s Office concerning the suspension.²⁶
- On 24 March 2022, the Acting Premier moved the suspension, that this House:
 1. Suspends the Member for Kiama from the service of the House until the verdict of the jury has been returned on the five criminal charges laid against him on 22 March 2022, or until it is further ordered.
 2. Acknowledges the need to ensure the alleged victims in this matter have their day in court, and therefore cannot debate the alleged

²⁴ *Harnett v Crick* [1908] AC 470, 476; also referred to by Professor Twomey during her briefing on 27 April 2022.

²⁵ Rose, T. and McGowan, M. ‘NSW Premier wants MP Gareth Ward out of parliament after sexual abuse charges laid’, 22 March 2022, *The Guardian* website: <https://www.theguardian.com/australia-news/2022/mar/22/nsw-mp-gareth-ward-charged-over-historical-sexual-abuse-allegations> viewed 26 April 2022.

²⁶ *Legislative Assembly Debates*, 23 March 2022, p34, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

misconduct of the Member for Kiama contained within the said charges.

3. Notes that it does not have the power to withhold a Member's remuneration.

4. Notes that the Government has sought advice on options to effect the withholding of a suspended Member's remuneration, and all other entitlements.

Debate ensued and the motion was agreed to on the voices. The debate was limited, relating to the actions of the Government in bringing the motion and the tabled advice from the NSW Crown Solicitor's Office. It did not cover the specific allegations against the Member for Kiama.²⁷

1.21 On 31 March 2022, the Leader of the House, the Hon Alister Henskens SC MP, moved a further motion that following on from points (3) and (4) of its resolution of 24 March 2022 regarding the suspension of a Member, the House provide the Standing Committee on Parliamentary Privilege and Ethics with the following terms of reference:

1. That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on:
 - a. the options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House, and
 - b. any other related matter.
2. That the Standing Committee on Parliamentary Privilege and Ethics report by 12 May 2022.
3. That a message be sent to the Legislative Council informing them of the referral.

There was no debate, and the motion was agreed to on the voices.²⁸

1.22 The Committee accepted the referral on 7 April 2022.

1.23 On 10 May 2022, the Committee obtained a one-week extension to the reporting date when the Leader of the House moved another motion, that the resolution of the House of 31 March 2022 regarding the referral of an inquiry to the Standing Committee on Parliamentary Privilege and Ethics

²⁷ *Legislative Assembly Debates*, 24 March 2022, pp38-40, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

²⁸ *Legislative Assembly Debates*, 31 March 2022, p46, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022.

be amended by omitting the words 'That the Standing Committee on Parliamentary Privilege and Ethics report by 12 May 2022' and inserting instead 'That the Standing Committee on Parliamentary Privilege and Ethics report by 19 May 2022'. The motion was agreed to on the voices.²⁹

Previous proposals to withhold remuneration and entitlements

- 1.24 It is worth noting that the question of whether to withhold entitlements from suspended Members has been considered by the Assembly previously. On 22 August 1991 for example, the House debated and passed a motion providing for the forfeiture of part of a suspended Member's salary; and during Question Time on 25 May 1995, Premier Carr announced a similar measure, though this time it was to be by way of legislation.³⁰
- 1.25 The focus of both of these proposals seems to have been to strengthen the hand of the House when dealing with Members' disorderly conduct within the Chamber. In the event, neither the resolution, nor the legislative proposal, were proceeded with.

Comparative jurisdictions

Cases in Australia and New Zealand where a sitting Member has been charged with a serious criminal offence

- 1.26 Information on similar cases received by Clerk of the Legislative Assembly from the Clerks within Australia and New Zealand, confirms that none of these jurisdictions have a Standing Order equivalent to the NSW Legislative Assembly's Standing Order 255 that would provide for the suspension of a Member charged with a serious criminal offence.
- 1.27 It also appeared that there were no cases in Australia or New Zealand where a sitting Member has been suspended in such circumstances. In all cases of a sitting Member being charged with a criminal offence in Australia and New Zealand, it appears that the Member has remained a Member while their matter is being dealt with.
- 1.28 It is relevant to note that other jurisdictions which operate under different constitutional and legislative regimes do not necessarily have the same constraints as those placed on the NSW Parliament by the wording of section 15 of the *Constitution Act 1902* (NSW). NSW also has not enacted legislation to codify parliamentary privilege. Consequently, direct comparisons between jurisdictions are not always possible. In jurisdictions where the suspension of a Member under the Standing Orders is dealt

²⁹ *Legislative Assembly Debates*, 10 May 2022, pp3-4, NSW Parliament website: [HANSARD-1323879322-124391.pdf](#) viewed 16 May 2022.

³⁰ See *Legislative Assembly Debates*, 22 August 1991, pp452-466, NSW Parliament website: [HANSARD-290296563-12701.pdf](#); and *Legislative Assembly Debates*, 25 May 1995, pp 261-265, NSW Parliament website: [HANSARD-1323879322-62264.pdf](#), viewed 17 May 2022.

with as a matter of disorder, the consequences of suspension may vary but do not appear to involve any withholding of, or reduction in, salaries and allowances. For example, in the Australian House of Representatives, a Member suspended from the service of the House is excluded from the Chamber and galleries, the Federation Chamber, and cannot submit petitions, notices of motions or matters of public importance. However, they may still take part in committee proceedings during the period of suspension, and there is no impact on the payment of salaries and allowances.³¹ With regard to the consequences of a suspension and the imposition of penalties, there are, in particular, examples of jurisdictions where penalties form part of the schemes for the regulation of members' entitlements and allowances, code of conduct breaches and also dealing with contempt.³²

The United Kingdom

1.29 Another jurisdiction of relevance in this context is the United Kingdom, where the *Parliamentary Standards Act 2009* provides that Members of the House of Commons are to receive a salary paid by the Independent Parliamentary Standards Authority (IPSA).³³ However, the duty to pay a Member's salary is subject to the disciplinary powers of the House and the statute expressly allows for the Standing Order under which the salary of a Member may be withheld for the duration of their suspension.³⁴ It is important to note the different constitutional context in the United Kingdom and that under the *Recall of MPs Act 2015*, a recall petition process is available where a Member is suspended from the service of the House for at least ten sitting days (or for a period of at least 14 days), following on from a report from the Committee on Standards.³⁵

³¹ See editor, Elder, D.R. *House of Representatives Practice*, seventh edition, Commonwealth of Australia, 2018, pp539-40 and 658.

³² For example, see sections 7B-7D, *Parliamentary Salaries, Allowances and Superannuation Act 1968* (Victoria) – provisions triggered by a motion in the House naming the Member for non-compliance with the Code of Conduct; Queensland's Standing Order 277 – Punishment of a person adjudged guilty of contempt; and section 14, *Members of Parliament (Remuneration and Services) Act 2013* (New Zealand).

³³ Section 4(1)(2).

³⁴ See section 4.(7) *Parliamentary Standards Act 2009* and Standing Order 45A.

³⁵ *Erskine May Online*, 'Procedure in the House in non-ICGS standards cases', Part 1, Chapter 5, paragraph 5.26 at [Procedure in the House in non-ICGS standards cases - Erskine May - UK Parliament](#) viewed 17 May 2022.

Chapter Two – Imposing additional measures on a Member suspended under Standing Order 255

Question #1: Does the Legislative Assembly possess the power to take any further action against a Member facing criminal prosecution (but not convicted), other than to suspend the Member from the proceedings of the Legislative Assembly and access to the parliamentary precincts?

- 2.1 Legal advice available to the Committee indicates that the Legislative Assembly could not, either in the exercise of its inherent power or by adopting a new Standing Order, remove entitlements enjoyed by Members under statute without enacting new legislation.³⁶

Question #2: If such further action were being contemplated, what legislation or other action (if any), including amendments to the Constitution Act and Standing Orders, would be required?

- 2.2 Legal advice available to the Committee suggests that, subject to relevant constitutional limitations, it would be open to the Parliament to pass legislation to provide that a Member is not entitled to receive certain entitlements, or is prevented from engaging in certain parliamentary activities, in the event that they are suspended. For instance, amendments could be made to the *Parliamentary Remuneration Act 1989*, the *Members of Parliament Staff Act 2013* or the *Constitution Act 1902*.
- 2.3 Such a legislative proposal could raise a 'manner and form' issue as it could be held to relate to the 'constitution' i.e. 'the composition' of the NSW Parliament. It is the position under the Constitution Act that (as a law respecting the constitution of the New South Wales Parliament), any such proposed legislation which applied to only Members of the Legislative Assembly may need to be approved at a referendum. This requirement for a referendum would not apply if the proposed legislation applied equally to Members of both Houses.
- 2.4 Any such proposed legislation would be vulnerable to challenge on the basis that it violates an implied constitutional limitation arising from the

³⁶ Remuneration and allowances payable to Members of the NSW Parliament, including the provision of an electorate office, are governed by the *Parliamentary Remuneration Act 1989* and the determinations of the Parliamentary Remuneration Tribunal for additional entitlements in any form. The *Members of Parliament Staff Act 2013* provides for Members (on behalf of the State) to employ staff to assist them with the exercise of their functions as a Member of Parliament.

principle of representative government, derived from the Commonwealth Constitution.

- 2.5 A law which provides for the indefinite incapacitation of a Member may be more likely to infringe this constitutional limitation than a law which provides for the actual expulsion of a Member. This is because the expulsion of a Member creates a vacancy and a by-election, whereas a situation resulting in a Member being deprived of the resources to perform the duties of a Member, results in the voters in the relevant electorate being effectively disenfranchised and denied effective representation.
- 2.6 A law that provides for a Member of the Legislative Assembly to be disabled from performing their duties raises the prospect of a 'ghost Member', who is not for a sustained period of time able to represent their electorate. Accordingly, it is arguable that such a law is inconsistent with the system of representative government that, according to case law, the Commonwealth Constitution assumes to exist in the States.

Question #3: Whether if the Parliament were to legislate to remove any of a Member's entitlements that would be a valid exercise of power and, if it were, whether such legislation could be seen to be punitive?

- 2.7 Legal advice available to the Committee suggests that the terms of the 'trigger' in any new legislation to suspend entitlements may be relevant to any constitutional challenge to that legislation.
- 2.8 Other advice also has suggested that legislation to confer a punitive power on a House of Parliament may provoke a constitutional challenge that could expand the Kable line of cases, which hold that the 'institutional integrity' of State courts cannot be impaired by State legislatures.
- 2.9 The Crown Solicitor's advice, as tabled³⁷ states that if the trigger were the 'unworthy conduct' or similar of a Member, there is a possibility of prejudice to any criminal proceedings which were on foot (and the consequent risk of a stay of those proceedings being ordered by the court). There is also a risk that the Member may argue that the court should decline to exercise jurisdiction as the House has assumed exclusive jurisdiction over the matter.

³⁷ Memorandum of Legal Advice – Expulsion of a Member of the Legislative Assembly charged with a criminal offence, dated 23 March 2022, Tabled papers database, NSW Parliament website: [Tabled Papers and Reports \(nsw.gov.au\)](#) viewed 16 May 2022.

Question #4: Could Standing Orders provide authority for withholding a Member's salary and other entitlements?

2.10 Under section 15 of the *Constitution Act 1902*, the Standing Orders adopted by each House of the NSW Parliament must be for the purpose of regulating 'the orderly conduct of such Council and Assembly respectively'. There is doubt whether 'orderly conduct' would include the taking of punitive measures against a Member. Professor Twomey has noted that because the power to make Standing Orders is a limited one, and the Houses can only make them to regulate their 'orderly conduct', it is unclear whether the statutory power would allow the Houses to make Standing Orders that included punitive measures:

... the power to make Standing Orders in s15 of the Constitution Act is confined to those concerning 'orderly conduct' and there is doubt as to whether that would stretch to include punitive measures. In *Egan v Willis*, Gleeson CJ considered that the Legislative Council Standing Order that picked up and applied UK Standing Orders where a matter is not otherwise covered, could not pick up the punitive powers of the House of Commons.³⁸

2.11 Although the Privy Council in *Harnett v Crick* accepted the validity of Standing Order 255, the legal advice available to the Committee suggests that if the meaning of 'orderly conduct' were to arise in legal proceedings again, it is likely that a court would be less deferential to the House in the application of the Standing Order.

2.12 Legal advice notes that the decision of the Privy Council overturned a decision of the majority of the NSW Supreme Court, which had determined that the Standing Order was invalid. The overturned decision stated that, 'the fact that a criminal charge is pending against a Member of the Legislature in no way affects the course of business of the Chamber, is not in itself an obstruction to such business, and in no way affects or has any relation to the orderly conduct of the House'.³⁹

2.13 Hence, there is significant doubt over whether Standing Order 255, or any new Standing Order, could be utilised as the basis for implementing further measures of a punitive nature.

Consequences of a suspension under the Standing Orders

2.14 In the NSW Legislative Assembly under Standing Order 253, a Member who is suspended from the service of the House shall be excluded from the Parliamentary precincts until the expiration of the suspension period including all intervening non-sitting days and cannot take part in any proceedings of the House or its committees. This Standing Order has not been interpreted to limit a suspended Member's access to their electorate

³⁸ Written briefing provided to the Committee by Professor Anne Twomey, 27 April 2022, pp1-2.

³⁹ *Crick v Harnett* (1907) 7 SR NSW 126 at 135.

office and resources, including their staff. Nor has it been interpreted to limit a suspended Member engaging in parliamentary activities other than debates that a Member would ordinarily engage in by reason of being a Member, e.g. to advocate for their constituents in various forums. Also, the Standing Order has not been interpreted to mean that a Member is restricted from lodging questions on notice or petitions.

- 2.15 In the absence of any specific references in the Standing Orders – or the suspension resolution for the Member for Kiama – that specifies otherwise, the view has been taken that there is nothing to stop the Member engaging in activities that do not occur during or as part of debate or proceedings in the House or its Committees. This interpretation is in keeping with the emphasis in earlier versions of the Assembly's Standing Orders on exclusion from the parliamentary precincts and the Chamber. It has not been the practice of the Legislative Assembly to prevent suspended Members from engaging in other parliamentary activities that occur outside of the House or its committees.
- 2.16 A recent procedural change that incorporates lodged written statements into the Hansard record of proceedings has raised a further matter of interpretation. In addition to making Community Recognition Statements (CRSs) in the House, there is now the capacity under Standing Order 108A to lodge three written CRSs per day, which are published in the Hansard under the authority of the Standing Order. While these written CRSs are not actually given in the House they are an authorised publication, and are printed and form part of the official record of the Assembly's proceedings. Consequently, the situation with regard to written CRSs is unclear and open to interpretation. There does not appear to have been any consideration of the question as to whether written CRSs would be considered to be a 'proceeding' for the purpose of Standing Order 255 or 253. Standing Order 108A also provides that, where a statement doesn't conform with the practice of the House, the Speaker can authorise the amendment of any CRS or direct it not be included in the Hansard.
- 2.17 Legal advice indicates that there does not appear to be a sound basis to argue that the submission of written questions or the lodgement of petitions by a suspended Member would be disruptive to the orderly conduct of House business. This would apply particularly where a Member was already prevented from attending the parliamentary precincts and participating in parliamentary debates in the House and proceedings in committees. It would also be doubtful that a court would find that preventing a Member from being able to remotely submit such items, could be categorised as protecting the Assembly from a 'threat' to the dignity of the House 'essential' to its functions.
- 2.18 The Committee notes that all of these procedures involve the performance of a Member's duty as an elected representative to advocate for the

interests of their local community, represent their constituents and seek to hold the Government to account for decisions affecting their local communities and constituents.

- 2.19 Based on the independent legal advice obtained, the Committee is firmly of the view that a Member suspended from the service of the House should continue to have the opportunity to engage in representative activities, which do not encompass direct participation in debates and proceedings in the House and committees. Where applicable, such activity would need to be conducted according to the relevant Standing Orders. It is open to the Committee to take a case by case approach to advising the House on such matters, as they might arise.
- 2.20 Technological improvements and reforms to modernise the House's procedures and business systems, including the capacity for virtual proceedings also may warrant ongoing monitoring and review of the operation of the Standing Orders. Although the mode of operation for the proceedings is not the determinative factor in relation to the activities a suspended Member should be able to engage in, it does raise practical issues and may lead to confusion in relation to the consequences of a suspension under Standing Order 253. The Committee considers this is a matter that the House may wish to delegate to the Standing Orders and Procedure Committee as a regular part of its remit.

Chapter Three – Potential issues around further penalising a suspended Member

- 3.1 The powers of the House of the NSW Parliament are either derived from inherent right, or from statute. Inherent rights are those which are necessary in order for a House to perform its constitutional functions. A power to punish, such as the power to withhold entitlements, would require an express statutory grant.
- 3.2 In the absence of an express grant, the Houses of the NSW Parliament possess only such powers as are protective and self-defensive, not punitive, in nature. The unanimous judgment in *Taylor v Barton [1884] 6 NSWLR 1*, held that the inherent powers of the NSW Parliament are those that are protective and self-defensive in nature. This position was confirmed by the Privy Council on appeal 'For these purposes, protective and self-defensive powers only, and not punitive, are necessary'.⁴⁰

Possible issues with legislating to provide for punitive powers

- 3.3 The interpretation and application of statutory and other law, is fundamental to the constitutional role of the courts. In the exercise of that role, legislating to withhold entitlements has potential to raise issues about the respective roles and powers of the Parliament and the courts.
- 3.4 Such legislation might disturb the essential comity which should exist between the Parliamentary and Judicial branches of government. For example, difficulties might arise at a practical level if the Judicial branch felt that a punitive action taken by the House had the potential to influence a matter that was awaiting adjudication by a court.
- 3.5 In such circumstances, there could also be potential for difficulties at a higher constitutional level, because the Legislative branch of Government had passed a law that gave it a punitive power (to withhold entitlements): whereas under the separation of powers doctrine, it is the Judicial branch of government, which should exercise the power to make final determinations as to punishment.
- 3.6 There could be further difficulties if litigation arose on such matters, should the House consider that it was the courts that were doing the encroaching into its affairs. Some fundamental parliamentary concepts are involved in these tensions.

⁴⁰ For more on the relevant cases see: Griffith, G. 'Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW' *NSW Parliamentary Library Research Service, Background Paper No 1/2004*, NSW Parliament website: [Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW](#) viewed 17 May 2022.

- 3.7 The House regards its internal proceedings to be under its exclusive control, pursuant to a parliamentary principle known as 'exclusive cognisance', which essentially provides it with immunity from any outside interference. Freedom from outside interference, along with freedom of speech, are both important immunities from aspects of the general law that enable the House to carry out its constitutional functions effectively.⁴¹ These and certain other powers, rights and immunities, are collectively known as 'Parliamentary Privilege'.
- 3.8 However, there is still arguably a role for the courts to play. At common law, it is for the courts to judge the existence of a privilege, while it is for a House to judge the "occasion and manner of the exercise" of an "undoubted privilege." (*R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162).
- 3.9 Suspension of a Member for the remainder of the sitting day, for disorderly conduct in the proceedings of the House, would constitute as the protective exercise of an 'undoubted privilege'.
- 3.10 So ordinarily, parliamentary proceedings to 'simply suspend' a Member (that is without withholding their entitlements) should be protected absolutely by parliamentary privilege, providing the suspension related to disorderly conduct relevant to parliamentary proceedings and not to conduct outside the House.
- 3.11 However, action to provide for punitive measures would be more than 'simply suspending' a Member, because the withholding of entitlements requires legislation and the exercise of that power under any such legislation would be reviewable by the courts. Review of a decision to withhold entitlements might be regarded as an encroachment on the House's constitutional integrity and status. (There have already been instances in NSW, where the courts have given a narrow construction on significant questions of parliamentary privilege.⁴²)
- 3.12 It is difficult to say whether the risks of the courts reading down specific parliamentary immunities, or the powers of Parliament more generally, might ever come to be realised. Nonetheless any attempt by a court to review what was said and done during the course of parliamentary

⁴¹ Article 9 of the English [Bill of Rights 1688](#) affirms the right to freedom speech in Parliament and is the basis of the power of the Assembly to regulate its own proceedings, as well as to control the publication of its debates and proceedings. Article 9 forms part of the law of NSW given effect by s. 6 of the [Imperial Acts Application Act 1969](#) which declares, among other things, the Bill of Rights 1689, so far as it was in force in England on 25 July 1828, to have been in force in NSW on that day.

⁴² See *R v Murphy* (1986) 5 NSWLR 18 where Hunt J held that the only protection given by Article 9 is to prevent court or similar proceedings having legal consequences against a Member of Parliament (or a witness before a parliamentary committee) where those legal consequences have the effect of preventing that Member (or committee witness) from exercising their freedom of speech in Parliament (or before a committee), or of punishing them for having done so. From Griffith, G. 'Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW' *NSW Parliamentary Library Research Service, Background Paper No 1/2004*.

proceedings could pose a challenge to the freedom from interference and the freedom of speech which the concept of Parliamentary Privilege was established to prevent.

Constitutional challenges

- 3.13 As the NSW Parliament has plenary law making powers, legislating to empower the House to withhold entitlements from a Member, is within its legislative competence. However, as Professor Twomey noted in her discussions with the Committee, legislating to obtain a punitive power could give rise to a constitutional challenge based on the 'Kable doctrine', where the courts determined that the effect of the Australian Constitution is to prevent state parliaments from passing legislation that adversely affects the integrity of state courts.⁴³ This might lead to an argument being raised that a legislative body is assuming judicial powers where punishment should rightly be the exclusive domain of the courts.
- 3.14 Furthermore, if any such legislation were seen to be directed against a particular person or class of people (either explicitly or by necessary effect) that punishes them without affording them a trial at which to contest the charge, then there would be a stronger argument that the Kable doctrine was being breached or contravened.⁴⁴
- 3.15 Other constitutional issues which might be relevant concern the implied freedom of political communication and discussion, and the implied principle of representative government, both derived from the Commonwealth Constitution, which could be contravened by State legislation that purported to prevent or impede a Member of Parliament from being able to undertake the ordinary activities of an elected member.
- 3.16 It could also be argued that the implied freedom of political communication limits state legislative power to enact provisions to withhold such an entitlement as the communications allowance on the grounds that such legislation prevented (or burdened) a Member of Parliament from being able to communicate with their constituents in relation to policies or political matters.
- 3.17 Problematic issues would also arise if any legislation that sought to exercise punitive powers against a Member were to be used in a way that might be seen to be partisan, politically motivated or unjust. Such a perception could more readily arise where the punitive action was to be taken where there had been no formal findings of guilt or misconduct,

⁴³ *Kable v Director of Public Prosecutions for NSW* (unreported, High Court of Australia, 12 September 1996). For more on the implications of this case, see: Griffith, G. 'The Kable Case: Implications for New South Wales' *NSW Parliamentary Library Research Service, Briefing Paper No 27/96*, NSW Parliament website: [The Kable Case: Implications for New South Wales \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/parliamentary-library/research-service/briefing-papers/27-96-the-kable-case) viewed 17 May 2022.

⁴⁴ Such legislation could be seen to be a "bill of attainder" or perhaps a "bill of pains and penalties".

such as by a commission of inquiry or a court of law, and the grounds for alleging misconduct were contested.

- 3.18 Other unintended consequences might be that arguments could be raised about the position of Members who are not suspended but due to other circumstances are unable to fulfil the full functions of a sitting Member. For example, this would include Members absent on parental or sick leave.

Chapter Four – Findings and recommendations

- 4.1 In summary, the Committee has determined that it would not be appropriate to enact legislation which purported to withhold or reduce the remuneration or entitlements of a Member in the event that the Member is suspended.
- 4.2 The Committee considers that the current framework is sufficient to protect the dignity and effective functioning of the House and that the Standing Orders, as currently in force, provide for the House to deal with conduct that has the potential to disrupt or impede the orderly business of the House.
- 4.3 Independent legal advice and expert opinion obtained by the Committee has indicated that legislating to provide for punitive powers would present significant constitutional issues and have the potential for challenge in the courts. There are also issues that the Committee considers to be important about the need for a Member who is suspended to be able to continue to represent their constituents, who should not be penalised for the alleged actions of a Member.
- 4.4 The Committee accordingly makes the following findings and recommendations arising from its consideration of the issue:

Finding 1 – Remuneration and entitlements

The Committee finds any additional measures that would involve withholding of remuneration and other entitlements of a Member suspended from the service of the House would require new legislation to be enacted.

Recommendation 1

Given the constitutional limitations, the Committee recommends against the enactment of legislation to withhold the statutory remuneration or entitlements, or access to the employment of staff, from a Member suspended from the service of the House.

Finding 2 – Parliamentary activities

The Committee finds that any proposal to further restrict a Member's participation in parliamentary activities, would require legislation. Absent legislation, the House may only take protective or defensive action reasonably necessary for the proper exercise of its functions, or via a Standing Order regulating the 'orderly conduct' of the Legislative Assembly under section 15(1)(a) of the *Constitution Act 1902*. It is doubtful that orderly conduct can form the basis of measures that are essentially punitive in nature. Hence, any Standing Order which provides for punitive action may be vulnerable to legal challenge as beyond power.

Recommendation 2

As a result of the constitutional requirements, the Committee recommends that a Member suspended from the service of the House should be able to continue to represent their electorate through the remaining mechanisms available to them as a Member of the Legislative Assembly which do not involve their actual participation in debates or proceedings in the House or Committees. Such mechanisms would include being able to access their electorate office resources and staff, make representations for constituents, and engage in parliamentary activities such as the lodging of questions on notice and petitions.

Finding 3

The Committee finds that in relation to the consequences of a suspension, there is a lack of clarity around the meaning of the term ‘any proceedings of the House or its Committees’ in Standing Order 253. (As noted, in Recommendation 2, it is the view of the Committee that the reference to proceedings in this context should not be construed so narrowly as to eliminate all parliamentary activities that a Member of the House may engage in as an elected representative).

Recommendation 3

As a consequence of Finding 3, the Committee recommends that the House consider delegating to the Standing Orders and Procedure Committee the ongoing role of reviewing the adoption of new procedures, including in response to technological developments, which may have implications for the operation of Standing Order 253.

Appendix One – The July 1906 suspension of the Member for Blayney

While the Committee is not inquiring into the suspension resolution passed by the House on 24 March 2022, it forms the over-arching context for considering the question of whether additional measures should be taken. Consequently, the Committee considered it important to provide some insights into the competing arguments considered by the Legislative Assembly on the only other occasion the House suspended a Member awaiting trial.

The 1906 debates on the suspension of William Patrick Crick provide insights into the competing arguments for and against the House using its powers to suspend a member in such circumstances, and the extent of judicial review on that occasion. An appreciation of the particular circumstances surrounding this precedent, the relevant case law and more recent commentary on these judgments is important in understanding the position the Committee has formed on the question of additional measures following a suspension.

Suspension:

The only other instance of the NSW Legislative Assembly suspending a sitting Member charged with a serious criminal offence (besides the March 2022 suspension of the Member for Kiama) occurred in July 1906, pursuant to the newly introduced Standing Order 393A. The Member in question was William Patrick "Paddy" Crick, the Member for Blayney.

In 1905, a Royal Commission had been established 'to inquire into allegations of impropriety regarding certain transactions concerning Crown Lands'.⁴⁵ The Commissioner made adverse findings against Mr Crick, namely that in his capacity as Minister for Lands, he had received bribes from applicants for lands, and as a result he was charged with conspiracy.⁴⁶

On 11 July 1906, Sir Joseph Carruthers, Premier and Colonial Treasurer, moved a motion in the following terms that the House take cognisance of the Commissioner's report:

That this House do now proceed to consider so much of the report of the Royal Commission on the Administration of the Lands Department as contains findings of misconduct against William Patrick Crick, Esquire, now sitting as

⁴⁵ Clune, D, and Griffith, G, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, Sydney, Federation Press, 2005, p162.

⁴⁶ *Legislative Assembly Debates*, 11 July 1906, pp427-432, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1> viewed 26 April 2022; and Clune D, and Griffith, G, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, p162.

*member of the Legislative Assembly for the electoral district of Blayney, and that certain portions of the said report be read by the Clerk.*⁴⁷

The motion was agreed to on the voices and the relevant excerpts read onto the record by the Clerk. However, the Speaker ruled that the House could not discuss the Commissioner's report, nor take action regarding the findings within it of misconduct against Mr Crick, while related matters were before the criminal courts:

*... the usage of the Imperial Parliament and of our own Parliament has been not to discuss such cases whilst charges on the same ground are pending in the courts below. I must be guided by that, and I now rule that it is not in order to discuss the Lands Commission report, or take action on it, so far as relates to the hon. member for Blayney and others, while the hon. member and others are defending themselves in the criminal court on charges founded on that report.*⁴⁸

Mr James McGowen, Member for Redfern summed up the situation the House found itself in thus:

*... the report of this commission strikes a blow at the purity of Parliament, and Parliament finds itself in the position of being fettered in dealing with the scandal put upon its name.*⁴⁹

Directly after the Speaker's ruling, Mr Crick asked for the concurrence of the House to move a motion that he be granted leave for the balance of the parliamentary session:

*As far as I am concerned, I am quite satisfied that the position I have taken up is the right one; but judging from remarks which fell from some hon. members, it seems that they feel I might be here as a fighting individual while this case is proceeding and before its determination. To relieve hon. members on that score, I beg, with concurrence, to move that I be granted leave of absence for the balance of the session.*⁵⁰

However, no such concurrence was granted.

On 19 July 1906, the Premier moved that the House agree to and adopt a new Standing Order for the suspension of a Member against whom a criminal trial is pending in the terms of Standing Order 393A (discussed earlier in the report); and that the House authorise the Speaker to present such Standing Order to His Excellency the Governor for approval.⁵¹

⁴⁷ *Legislative Assembly Debates*, 11 July 1906, p427.

⁴⁸ *Legislative Assembly Debates*, 11 July 1906, p458.

⁴⁹ *Legislative Assembly Debates*, 11 July 1906, p457.

⁵⁰ *Legislative Assembly Debates*, 11 July 1906, p458.

⁵¹ *Legislative Assembly Debates*, 19 July 1906, p571, NSW Parliament website:
<https://www.parliament.nsw.gov.au/la/papers/pages/house->

The Premier explained the rationale for the Standing Order, stating that if the House could not investigate a charge of misconduct against a Member on the grounds that it may prejudice a Member in related, pending criminal proceedings, then Parliament itself should not be prejudiced either:

... if any one attempted on a motion for the suspension of an hon. member under the new standing order to discuss the merits of a charge before the courts, Mr Speaker would rule as he did the other night, and would be upheld in his ruling. It will have to be on other grounds that a man will be suspended, and the bald ground which is asked for in this standing order is this: That if Parliament is to have its mouth closed, and is to have its investigation suspended, Parliament shall be put in the position that it shall not be prejudiced while it admits the member whose misconduct is the subject of criminal investigation, as well as parliamentary investigation, shall not be prejudiced too.⁵²

In so stating, the Premier also emphasised that the Standing Order '...is to protect the House, and it is the only means we have to protect it, while criminal proceedings are pending against a Member'.⁵³

In a similar vein, Sir Charles Wade, Attorney General, stated that the standing order could only operate under certain conditions, including that a matter concerning the alleged misconduct of the Member must have been initiated in the House:

... there must be a combination of three circumstances; first of all, there must be a charge pending in the criminal court. In the next place that charge must be in respect of an indictable offence, because the standing order says that there shall be a suspension of action until the jury returned their verdict...thirdly the existence side by side with those facts of a charge against the member based upon those facts inside the walls of this House. It is under those conditions only that the standing order can begin to operate.⁵⁴

The Attorney General further remarked:

... if Mr. Speaker under those circumstances decides that as the matter is sub judice in the criminal courts it cannot be discussed in the House on the part of members as against the defaulting member, then the House can determine in their own interests and the interests of good order, dignity and propriety,

[papers.aspx?tab=Browse&browseHouse=LA&type=Hansard&filterHouse=LA&paperType=Hansard&s=1](#) viewed 26 April 2022.

⁵² *Legislative Assembly Debates*, 19 July 1906, p572.

⁵³ *Legislative Assembly Debates*, 19 July 1906, p577.

⁵⁴ *Legislative Assembly Debates*, 19 July 1906, p592.

*without passing judgment to suspend action, to suspend judgment, not for all time, not for an indefinite period, but until the jury have given their verdict.*⁵⁵

However, some Members raised concerns with the proposed Standing Order. For example, the Hon. William Wood, the Member for Bega, raised concerns about its effect on the rights of accused persons, and that the Standing Order was punitive. On the first point, Mr Wood stated:

*... somebody, after controverting [the Speaker's ruling that the discussion of matters that are before the criminal courts is sub judice]...will bring under the notice of the House that a member has been arrested or has been indicted on a charge, and the House will not be able to go into the merits of that charge. The standing order lays down that, on the mere fact of his being an accused person, the House will be justified in taking action...It has never been regarded as necessary or desirable that an accused person against whom there is only an alleged charge, against whom there are no proofs of any kind, should be dealt with by this House in any way.*⁵⁶

On the second point, that the Standing Order was punitive, the following exchange is notable:

Mr Wood: *... I am very doubtful that it can be construed into anything other than of a punitive character...It is very difficult for an hon. member to assume that the mere fact that a person has had information laid against him, and been arrested, constitutes an act which renders it necessary for the House to protect itself against the hon. member in the absence of any proof...*

Mr Ashton: *What is to be the proof?*

Mr Kelly: *When he is convicted of course!*⁵⁷

Comment was also made that the proposed Standing Order would disenfranchise the affected Member's constituency. For example, the Hon. John Perry, Member for the Richmond stated:

*... we can hardly justify ourselves in not only punishing a member but also punishing his constituents, because under the rule you will be punishing him by not allowing him to attend the sittings of the House, though the remuneration would still be going on. You would not only punish the member, but you would also punish his constituents by disenfranchising them for a considerable time.*⁵⁸

Notwithstanding the arguments, the question as to whether the proposed Standing Order should be adopted was put, and agreed to on the voices.⁵⁹ Approximately 90

⁵⁵ *Legislative Assembly Debates*, 19 July 1906, p592.

⁵⁶ *Legislative Assembly Debates*, 19 July 1906, p583.

⁵⁷ *Legislative Assembly Debates*, 19 July 1906, p586.

⁵⁸ *Legislative Assembly Debates*, 19 July 1906, p580. See also the comments of the Hon. William Wood at p588.

⁵⁹ *Legislative Assembly Debates*, 19 July 1906, p593.

minutes later⁶⁰ the Speaker announced that the 'standing order adopted by the House this day had been presented to the Governor and...his Excellency had been pleased to approve of the same'.⁶¹

The Premier then immediately put the Standing Order to use, moving a motion for the suspension of Mr Crick:

*That the Hon. Member for Blayney – Mr Crick – be suspended from the service of the House until the verdict of the jury has been returned in the criminal trial now pending.*⁶²

Debate on the motion was adjourned to resume the next Tuesday, 24 July, and take precedence of all other business.⁶³

On 24 July 1906, debate resumed on the suspension motion and in speaking against it Mr Crick again noted that he had wanted to proceed by seeking a leave of absence from the House:

*This standing order, of course, is now being applied to me. Of its ulterior consequences, I cannot much complain, because hon. members heard me get up and move that I be granted leave of absence for the balance of the session.*⁶⁴

As with the debate on the motion to adopt Standing Order 393A, the debate on the suspension motion covered whether suspension under the Standing Order was punitive, the rights of accused persons, and the possible effect on the Member's constituents; as well as the subject of indefinite suspensions.⁶⁵

For example, the Hon. John Fegan, Member for Wickham raised concerns that because of the Speaker's ruling on 11 July, the House could not fully debate why they were suspending the Member for Blayney and also expressed disquiet about the punitive effect on the Member, the effect on his constituency, and the fact that it was unclear how long the suspension would operate for:

... to my mind, it is a question of suspending a member, and, according to your ruling, sir, we do not know what for...if this motion be carried it will, without there being a fair opportunity for defence, deprive one hon. gentleman of the right to vote here and represent his constituents.

⁶⁰ See *Legislative Assembly Debates*, 19 July 1906, pp593 and 603 which indicate that the House resolved to adopt the Standing Order at approximately 8:30pm, whilst the Premier moved the suspension motion the same night at approximately 9:58pm.

⁶¹ *Legislative Assembly Debates*, 19 July 1906, p603.

⁶² *Legislative Assembly Debates*, 19 July 1906, p603.

⁶³ *Legislative Assembly Debates*, 19 July 1906, p604.

⁶⁴ *Legislative Assembly Debates*, 24 July 1906, p616, NSW Parliament website: [HANSARD-290296563-3092 \(4\).pdf](#) viewed 26 April 2022.

⁶⁵ See *Legislative Assembly Debates*, 24 July 1906, pp615-652.

... May I point out that we are asked to take an extreme step here, that of suspending the hon. member for Blayney for an indefinite period. As the hon. member pointed out, it was nearly four years before the Mercadool case was completed. What is to hinder Blayney under this resolution from being unrepresented for four years?

... If it were not for this commission there would be no evidence against anybody in connection with the land scandals. Why are we called upon to suspend the hon. member for Blayney?⁶⁶

On the converse, Mr John Cohen, Member for Petersham argued that the Standing Order was not punitive because it only allowed a Member to be suspended from the service of the House:

All that this resolution says, and all that the standing order said, was that an hon. member who is accused of a crime may be suspended from the service of the House. He is not suspended from his privileges as a Member of Parliament. His pass is not taken away, and I doubt whether you can take away his salary. He is suspended from the service of the House, but that is not a punitive sentence...It is done to protect the honor and dignity of this House.⁶⁷

Mr Cohen also indicated that while the Standing Order would disenfranchise constituents to some extent, this would be within limits:

It would disenfranchise them so far as the member's vote in this House is concerned, but it would not prevent the member from otherwise attending to the wants of his constituents...Another argument used was that suspension under this resolution may operate for four or five years. No resolution we may pass in this Parliament can have any effect upon the next Parliament. The next Parliament would have to take action.⁶⁸

Following debate, the question on the suspension motion was put and passed on division, with 43 ayes and 10 noes. The Speaker directed Mr Crick to withdraw from the Chamber, however, he refused to go voluntarily, and upon being directed to do so by the Speaker, the Searjeant-at-Arms removed Mr Crick.⁶⁹

Disorderly conduct in the Chamber:

Prior to this suspension, Mr Crick had a significant history of disrupting proceedings in the House. According to HV Evatt:

During his long parliamentary career, Crick was very prominent in disgraceful scenes inside the Chamber, and in fisticuffs within the precincts of the House. He

⁶⁶ *Legislative Assembly Debates*, 24 July 1906, pp638-639.

⁶⁷ *Legislative Assembly Debates*, 24 July 1906, p641.

⁶⁸ *Legislative Assembly Debates*, 24 July 1906, p641.

⁶⁹ *Legislative Assembly Debates*, 24 July 1906, p652.

The Chief Justice noted that the Constitution allows for the disqualification of Members where they are convicted of certain crimes 'but the Act is silent as to what course is to be pursued while the charge against him is pending and during which time he is presumed to be innocent'. The Chief Justice held that to suspend a Member on the basis of charges brought against the Member was to ignore the presumption of innocence and the rights of the Member's constituents and 'practically disenfranchise them'.⁷⁴

However, this judgment was overturned on appeal by the Privy Council. The Privy Council stated while 'No one probably would contend that the orderly conduct of the Assembly would be disturbed...by the mere fact that a criminal charge is pending against a Member of the House' in this case there appeared to be 'special circumstances'.⁷⁵ The Privy Council further stated:

*Two things seem to be clear: (1) that the House itself is the sole judge whether an "occasion" has arisen for the preparation and adoption of a Standing Order regulating the orderly conduct of the Assembly, and (2) that no court of law can question the validity of a Standing Order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all the circumstance, it is apparent that it does not relate to the orderly conduct of the Assembly.*⁷⁶

The Privy Council noted the charges against Mr Crick related to bribery and corruption and that 'No graver charge can be made against a public man in his public capacity'. It further stated that after the Speaker's ruling that the House could not deal with matters surrounding the findings of the Royal Commission against Mr Crick, while related charges were pending 'The accused insists on appearing in the House and taking part in proceedings of the Assembly'.⁷⁷ This continued attendance was a crucial point for the Privy Council and it commented:

*It may have been a deliberate insult and challenge to the whole House...If the House itself has taken the less favourable view of the Plaintiff's attitude, and has judged that the occasion justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was so wrong in its judgment.*⁷⁸

The Privy Council also stated that the suspension was not one for an indefinite period and that it would last 'only until a verdict be given in the criminal case or the House determines sooner to remove the suspension'.⁷⁹

⁷⁴ *Crick v Harnett* (1907) 7 SR (NSW) 126 at 135-136.

⁷⁵ *Harnett v Crick* (1908) p4, Casemine website:
<https://www.casemine.com/judgement/uk/5b4dc2442c94e07cccd23652> viewed 29 April 2022.

⁷⁶ *Harnett v Crick* (1908) p5.

⁷⁷ *Harnett v Crick* (1908) p5.

⁷⁸ *Harnett v Crick* (1908) p6.

⁷⁹ *Harnett v Crick* (1908) p6.

Committee Comment:

It appears that the type of offences that Mr Crick was charged with were significant for the Privy Council in reaching its decision, being offences that relate to honesty and probity in public office, which could thereby be said to affect the conduct of the House.

As the Privy Council also found that Mr Crick's continued attendance in the context of those alleged offences could be seen to be a deliberate challenge and insult to the House, there could also be said to be a situation that was bearing on its dignity. In this regard, Professor Twomey noted in discussions with the Committee that: 'The Court treated the suspension in that case as being one of self-defence of the House, and therefore it would have actually fallen within the inherent power [to suspend]...not just the standing order...because it was falling within the self-defence category...'.⁸⁰

The Committee also observes, that Mr Crick's history of disruptive conduct in the House may have informed the Privy Council's judgment.

Another matter of note is that the Privy Council decision may also suggest that Mr Crick's behaviour following the suspension was relevant to him deliberately defying the House, and therefore to the validity of the suspension. It is unclear. In any case, it is difficult to see how Mr Crick could be defying a suspension unless it was validly passed in the first place.⁸¹ The Privy Council's judgment states towards the beginning, when the facts of the case are being re-counted:

*Notwithstanding this [suspension] Resolution [Mr Crick]...persisted in attending the House and claimed to take part in its proceedings. The Speaker called upon him to withdraw. He refused to comply with the Speaker's order. And then by the Speaker's direction, the [Serjeant-at-Arms] removed him from the House.*⁸²

Hansard transcripts show that following the Speaker's ruling on 11 July 1906, Mr Crick attended the House and took part in proceedings on 17 and 18 July, and of course on 24 July when the suspension motion was debated (though as noted above, he had indicated on 11 July a desire to be granted a leave of absence for the remainder of the parliamentary session).⁸³

However, following the suspension, there is no record of Mr Crick continuing to attend the House – only refusing to leave on 24 July after the House had resolved to suspend him, upon which the Speaker ordered that he be forcibly removed. From the date of

⁸⁰ Verbal briefing provided to the Committee by Professor Anne Twomey, 27 April 2022, *Transcript*, p2.

⁸¹ This difficulty was noted by Professor Anne Twomey in the verbal briefing provided to the Committee, 27 April 2022, *Transcript*, p2.

⁸² *Harnett v Crick* (1908) p2.

⁸³ See *Legislative Assembly Debates*, 17 and 18 July 1906, NSW Parliament website: [Hansard & House Papers by Date \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/hansard) viewed 17 May 2022.

that removal until 6 December 1906, when Mr Crick resigned as a Member, there is no record of him attending proceedings.⁸⁴

It may be that the Privy Council, in including the above information in its judgment, was not suggesting that the behaviour after the suspension was relevant to its validity and it may simply be that the words ‘persisted in attending the House’ referred to Mr Crick’s refusal to leave the House immediately after he was suspended – not that he continued to attend thereafter.

Another important matter of note in the Crick case was that there was an adverse Royal Commission finding against Mr Crick, which had been put before the House for consideration and debate (‘a matter initiated in the House’), and which could not be dealt with because of the Speaker’s ruling concerning criminal proceedings pending. This was the context in which Standing Order 393A was adopted and first used.

⁸⁴ See *Legislative Assembly Debates*, 24 July 1906 to 6 December 1906, p4512, when Mr Crick resigned as a Member of Parliament, NSW Parliament website: [Hansard & House Papers by Date \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/hansard/hansard-by-date) viewed 17 May 2022.

Appendix Two – Terms of reference

EXTRACT FROM VOTES AND PROCEEDINGS OF THE NEW SOUTH WALES LEGISLATIVE ASSEMBLY No. 131, Thursday 24 March 2022

17 SUSPENSION OF A MEMBER

Mr Paul Toole moved, pursuant to notice, That this House:

- (1) Suspends the Member for Kiama from the service of the House until the verdict of the jury has been returned on the five criminal charges laid against him on 22 March 2022 or until it is further ordered.
- (2) Acknowledges the need to ensure the alleged victims in this matter have their day in court, and therefore cannot debate the alleged misconduct of the Member for Kiama contained within the said charges.
- (3) Notes that it does not have the power to withhold a Member's remuneration.
- (4) Notes that the Government has sought advice on options to effect the withholding of a suspended Member's remuneration, and all other entitlements.

Debate ensued.

Question put and passed.

EXTRACT FROM VOTES AND PROCEEDINGS OF THE NEW SOUTH WALES LEGISLATIVE ASSEMBLY

No. 134, Thursday 31 March 2022

18 STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

Mr Alister Henskens further moved, That following on from points (3) and (4) of its resolution of 24 March 2022 regarding the suspension of a member, this House provide the Standing Committee on Parliamentary Privilege and Ethics with the following terms of reference:

- (1) That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on:
 - (a) the options available to the House regarding the withholding of remuneration and other entitlements of a member suspended from the service of the House, and
 - (b) any other related matter.
- (2) That the Standing Committee on Parliamentary Privilege and Ethics report by 12 May 2022.

(3) That a message be sent to the Legislative Council informing them of the referral.

Question put and passed.

EXTRACT FROM VOTES AND PROCEEDINGS OF THE NEW SOUTH WALES LEGISLATIVE ASSEMBLY

No. 135, Tuesday 10 May 2022

5. STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

Mr Alister Henskens moved, That the resolution of the House of 31 March 2022 regarding the referral of an inquiry to the Standing Committee on Parliamentary Privilege and Ethics be amended by omitting the words 'That the Standing Committee on Parliamentary Privilege and Ethics report by 12 May 2022' and inserting instead 'That the Standing Committee on Parliamentary Privilege and Ethics report by 19 May 2022'.

Debate ensued.

Question put and passed.

Appendix Three – Conduct of inquiry

Terms of Reference

On 31 March 2022, the Legislative Assembly referred to the Committee an inquiry into options for action against a suspended Member. On 7 April 2022, the Committee accepted the referral. The full terms of reference can be found at Appendix Two.

Briefing

On 27 April 2022, the Committee conducted a briefing with Professor Anne Twomey AO to discuss issues of relevance to the inquiry.

Conference with Senior Counsel

On 3 May 2022, the Committee attended a conference with Mr Stephen Free SC, Mr Jackson Wherrett, Reader, Eleven Wentworth Chambers, and Mr Mark Smyth, Partner, Herbert Smith Freehills concerning legal advice sought by the Committee for the inquiry. The resulting memorandum of advice is dated 11 May 2022.

Advice from comparable jurisdictions

Advice was also provided by the Clerks in each Australian State and Territory and by the Clerks of the Parliament of Australia and the New Zealand Parliament, in response to a request from the Clerk of the NSW Legislative Assembly. This advice concerned relevant cases in those jurisdictions, and comparable procedures.

Appendix Four – Extracts from minutes

MINUTES OF MEETING No. 27

Thursday 31 March 2022, 1:30pm

Room 1136, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Kevin Conolly MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Clerk-Assistant, House and Procedure

1. Apologies:

The Hon. Wendy Tuckerman MP

Ms Melanie Gibbons MP

2. ***

3. Suspension of a Member – possible referral to the Committee

The Committee noted the terms of the suspension of the Member for Kiama on 24 March 2022 and the likely referral to the Committee by the House (expected after Question Time this day), of possible options for further action against a suspended member.

Discussion ensued on approaches for the conduct of such a referral.

Resolved on the motion of Mr Hoenig, seconded by Mr Crouch:

- a) That, in the event the referral is received, the Committee would need to obtain expert advice on complex legal and constitutional matters and the Clerk should consult with Committee Members on possible lines of questioning for consideration.
- b) That Professor Anne Twomey be invited to meet with the Committee to discuss relevant issues.

The Committee further resolved that on receiving the referral from the House:

- the Clerk is to proceed to arrange for Senior Counsel to be briefed, in order to provide advice to the Committee on questions concerning the potential further action arising from a Member's suspension, constitutional implications, the powers of the House in these circumstances, and the extent to which such action requires legislation; and

- the Clerk is to update the Committee on progress in making such arrangements.

4. Next meeting

Committee Secretariat to circulate a meeting date for Members' consideration.

Meeting adjourned at 2.00pm.

MINUTES OF MEETING No. 28

Thursday 7 April 2022, 2:30pm

Webex and Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Alex Greenwich MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 2:29pm.

1. Apologies:

Ms Melanie Gibbons MP

2. Committee Membership

The Committee noted that on 31 March 2022, the House resolved that:

1. The Standing Committee on Parliamentary Privilege and Ethics have a membership of five Members.
2. Alexander Hart Greenwich be appointed to serve on the Committee.
3. Wendy Margaret Tuckerman and Kevin Francis Conolly be discharged from the Committee.

(Votes and Proceedings, 31 March 2022, entry no.18).

3. ***

4. ***

5. Inquiry referral: Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House

The Committee noted that on 24 March 2022, the House resolved:

That this House:

- (1) Suspends the Member for Kiama from the service of the House until the verdict of the jury has been returned on the five criminal charges laid against him on 22 March 2022 or until it is further ordered.
- (2) Acknowledges the need to ensure the alleged victims in this matter have their day in court, and therefore cannot debate the alleged misconduct of the Member for Kiama contained within the said charges.
- (3) Notes that it does not have the power to withhold a Member's remuneration.
- (4) Notes that the Government has sought advice on options to effect the withholding of a suspended Member's remuneration, and all other entitlements.

Referral:

Further, on 31 March 2022, the House resolved:

That following on from points (3) and (4) of its resolution of 24 March 2022 regarding the suspension of a member, this House provide the Standing Committee on Parliamentary Privilege and Ethics with the following terms of reference:

- (1) That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on:
 - (a) the options available to the House regarding the withholding of remuneration and other entitlements of a member suspended from the service of the House, and
 - (b) any other related matter.
- (2) That the Standing Committee on Parliamentary Privilege and Ethics report by 12 May 2022.
- (3) That a message be sent to the Legislative Council informing them of the referral.

The Committee also noted an indicative timeline for the inquiry that was circulated in the meeting papers, which would vary according to the availability of key individuals contributing to the inquiry.

Given the Crown Solicitor has declined to provide services, the Clerk is to make alternative arrangements for Senior Counsel to be briefed by a private solicitor for the purpose of providing advice in relation to the matters referred, which include potential further action arising from a Member's suspension and the extent to which such action requires legislation.

Discussion ensued.

Resolved, on the motion of Mr Greenwich, seconded by Mr Crouch:

1. That the Committee accept the referral by the House of an inquiry into options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House;
2. That the Committee conduct an initial meeting with Professor Anne Twomey for a briefing on the matters referred, with a view to:
 - a. obtaining a formal submission from Professor Twomey after the discussions (a working transcript of the meeting if desired); and
 - b. resolving any further individuals to hear from.
3. The Clerk is to make alternative arrangements for Senior Counsel to be briefed and provide advice in relation to the matters referred, which include potential further action arising from Mr Ward's suspension and the extent to which such action requires legislation.

The Committee agreed on the Clerk circulating potential questions in the coming days via email, to obtain consensus among Committee Members on the matters for advice. This would facilitate discussions with the solicitor, with a view to informing the instructions to be drafted for Senior Counsel.

The Committee further noted that the Clerk will provide briefing material to the Committee including comparative information about relevant cases in other jurisdictions.

6. ***

7. ***

8. Next meeting

Further, the Committee agreed that the Committee Secretariat is to circulate a date for the next meeting of the Committee for Members' consideration.

Meeting adjourned at 3.39pm.

MINUTES OF MEETING No. 29

Wednesday 27 April 2022, 9:30am

Webex and Macquarie Room, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 9:49am.

1. Confirmation of minutes

Resolved, on the motion of Mr Hoenig, seconded by Mr Greenwich:

- That the draft minutes of meeting no. 27 on 31 March 2022 be confirmed.
- That the draft minutes of meeting no. 28 on 7 April 2022 be confirmed.

2. ***

3. Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House

3.1 Update from the Clerk regarding engaging Counsel

The Clerk updated the Committee on progress regarding engaging Counsel to advise on matters of relevance to the inquiry.

3.2 Briefings/submissions regarding matters of relevance to the inquiry

The Committee noted a briefing note circulated with the meeting papers containing information about cases from other jurisdictions that are of relevance to the inquiry; and that the briefing note showed that in other Australian jurisdictions and in New Zealand, where a sitting Member has been charged with an offence and is awaiting trial, no action (regarding suspension, expulsion, remuneration etc) has ever been taken against the Member by the House.

The Chair also noted that the Committee may wish to consider whether there are any other stakeholders it would like to invite to make a written submission to the inquiry.

Discussion ensued.

The matter of the Member for Kiama being invited to be heard by the Committee was raised, to be considered further if necessary.

3.3 Meeting with Professor Anne Twomey

The Chair noted that arrangements had been made for the Committee to meet with Professor Anne Twomey regarding issues of relevance to the inquiry.

The Chair further noted that it was proposed the proceedings be recorded by Hansard for the purpose of creating a transcript for the Clerks to use as an internal working document; and that Professor Twomey had been notified of this, and had raised no concerns.

Resolved, on the motion of Mr Crouch, seconded by Mr Greenwich:

- That Professor Anne Twomey be authorised to attend the meeting to discuss issues of relevance to the inquiry;
- That the proceedings be recorded by Hansard for the purposes of creating a transcript for the Clerks to use as an internal working document.

Ms Gibbons noted for the record, in the context of the inquiry, that she has been a personal friend of the Member for Kiama for many years.

The remaining Committee Members (the Chair, Mr Crouch, Mr Greenwich and Mr Hoenig) also noted that they have known the Member for Kiama for a number of years.

Professor Twomey was admitted at 10:04am.

Professor Twomey made opening remarks and furnished a document containing a summary of matters relevant to the inquiry.

Discussion ensued.

Professor Twomey withdrew at 11:01am.

The Committee deliberated further on matters of relevance to the inquiry.

4. ***

5. Next meeting

Committee secretariat to circulate a meeting date for Members' consideration.

Meeting adjourned at 11:20am.

MINUTES OF MEETING No. 30

Tuesday 3 May 2022, 3:30pm

Microsoft TEAMS and Herbert Smith Freehills, 161 Castlereagh Street, Sydney

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement
Ms Elspeth Dyer, Manager, House and Procedure

The Chair opened the meeting at 3:30pm.

1. Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House

The Committee attended a conference with Mr Stephen Free SC; Mr Jackson Wherrett, Reader, Eleven Wentworth; and Mr Mark Smyth, Partner, Herbert Smith Freehills concerning legal advice sought by the Committee for the inquiry.

2. Next meeting

Committee secretariat to circulate a meeting date for Members' consideration.

Meeting adjourned at 4:40pm.

MINUTES OF MEETING No. 31

Tuesday 10 May 2022, 1:15pm

Webex and Room 814/815, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Ms Melanie Gibbons MP
Mr Alex Greenwich MP
Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 1:17pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Mr Hoenig, seconded by Mr Greenwich:

- That the draft minutes of meeting no. 29 on 27 April 2022 be confirmed.
- That the draft minutes of meeting no. 30 on 3 May be confirmed.

3. ***

4. ***

5. ***

6. Options available to the House regarding the withholding of remuneration and other entitlements of a member suspended from the service of the House

The Clerk updated the Committee on progress with regard to obtaining legal advice for the inquiry, and on matters of relevance to the report for the inquiry.

Discussion ensued.

7. ***

8. Next meeting

Wednesday 18 May 2022 at 1:15pm.

Meeting adjourned at 1:52pm.

UNCONFIRMED MINUTE EXTRACTS OF MEETING No. 32

Wednesday 18 May 2022, 1:15pm

Room 1043, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 1:18pm.

1. Apologies

Mr Adam Crouch (Deputy Chair)

2. Confirmation of minutes

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:

That the draft minutes of meeting no. 31 on 10 May 2022 be confirmed.

3. Options available to the House regarding the withholding of remuneration and other entitlements of a member suspended from the service of the House

The Chair referred to the Chair's draft report, Options available to the House regarding the withholding of remuneration and other entitlements of a Member suspended from the service of the House, circulated to Committee Members by e-mail on Monday 16 May 2022.

The Committee agreed to consider the report *in globo*.

Chair's draft report proposed.

Discussion ensued.

Upon which, Mr Greenwich moved, seconded by Mr Hoenig: That the words "Given the constitutional limitations" be added to the beginning of recommendation 1.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Hoenig moved, seconded by Mr Greenwich: That the words "As a result of constitutional requirements" be added to the beginning of recommendation 2.

Discussion ensued.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Greenwich moved, seconded by Ms Gibbons: That the words "Mr Ward is entitled to the presumption of innocence" be added to the end of paragraph 1.19.

Discussion ensued.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

The Committee proceeded to consider amendments circulated by the Chair at the meeting.

The Clerk spoke to the amendments.

Discussion ensued.

Upon which, Mr Greenwich moved, seconded by Ms Gibbons: That the following words be inserted before the last sentence in paragraph 1.28: "In jurisdictions where the suspension of a Member under the Standing Orders is dealt with as a matter of disorder, the consequences of suspension may vary but do not appear to involve any withholding of, or reduction in, salaries and allowances. For example, in the Australian House of Representatives, a Member

suspended from the service of the House is excluded from the Chamber and galleries, the Federation Chamber, and cannot submit petitions, notices of motions, or matters of public importance. However, they may still take part in committee proceedings during the period of suspension, and there is no impact on the payment of salary and allowances" and a new footnote: "See editor, Elder, D.R. *House of Representatives Practice*, seventh edition, Commonwealth of Australia, 2018, pp539-40 and 658".

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Greenwich moved, seconded by Ms Gibbons: That the following words be inserted at the end of paragraph 1.28: "code of conduct breaches and also dealing with contempt" and a new footnote: "For example, see sections 7B-7D, *Parliamentary Salaries, Allowances and Superannuation Act 1968* (Victoria) – provisions triggered by a motion in the House naming the Member for non-compliance with the Code of Conduct; Queensland's Standing Order 277 – Punishment of a person adjudged guilty of contempt; and section 14, *Members of Parliament (Remuneration and Services) Act 2013* (New Zealand)".

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Greenwich moved, seconded by Ms Gibbons: That the word "also" be inserted before the words "may warrant" on the third line of paragraph 2.20.

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Upon which, Mr Greenwich moved, seconded by Ms Gibbons: That the following words be inserted before the last sentence of paragraph 2.20: "Although the mode of operation for the proceedings is not the determinative factor in relation to the activities a suspended Member should be able to engage in, it does raise practical issues and may lead to confusion in relation to the consequences of a suspension under Standing Order 253".

Question put: that the amendment be agreed to.

Question resolved in the affirmative.

Due to amendments to paragraph 1.28, Mr Greenwich moved, seconded by Ms Gibbons: That Appendix 2 "Cases in other State and Territory jurisdictions, the Australian Parliament and the New Zealand Parliament" be removed from the report; and that Appendix 3 "Other jurisdictions – consequences of a suspension" be removed from the report.

Question put: that the amendments be agreed to.

Question resolved in the affirmative.

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig that:

- i. the Committee adopt the Chair's draft report as amended;
- ii. the report be signed by the Chair and tabled in the House;
- iii. the Committee secretariat be permitted to make appropriate final editing and stylistic changes as required; and
- iv. once tabled, the report be published on the Committee's webpage.

The Committee discussed issues surrounding non-publication of the legal advice provided to the Committee for the purposes of its inquiry and directed the Clerk not to make the legal advice public.

Discussion ensued.

The Committee agreed that a draft statement would be prepared for the Chair and circulated to the Committee in the event that a public statement is called for in relation to the non-publication of legal advice.

4. ***

5. Next meeting

Committee secretariat to circulate a date for Members' consideration.

Meeting adjourned at 1:54pm