

## How far can they go: committee powers outside of inquiries\*

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Committees are established to undertake inquiries. To perform this role, they are delegated powers to send for and examine persons, papers, records and things; make visits of inspection; and publish documents. Yet to what extent can committees exercise these powers outside of inquiries?

The NSW Legislative Council has, in practice, taken a cautious approach to the exercise of committee powers outside of inquiries. In general, its committees do not consider or publish unsolicited material received outside of inquiries, nor do they conduct site visits without a reference.

A survey of 11 parliaments<sup>1</sup> conducted for the purposes of this article found that the exercise of powers by reference committees (as opposed to legislative committees) outside of inquiries varies considerably between different jurisdictions, and in some instances even between different houses within the same jurisdiction. Some take a more liberal approach, while others – like the Legislative Council – take a more restricted approach.

This article compares the practice of the NSW Legislative Council to other houses in examining the extent to which reference committees exercise delegated powers outside of inquiries; the extent to which they *should* exercise these powers outside of inquiries; and whether unsolicited materials sent to committees outside of inquiries attract parliamentary privilege.

### NSW Legislative Council committees

As at 2012, the Legislative Council has ten standing committees. Three of these – the Law and Justice, State Development and Social Issues Committees – are policy-oriented and receive references from the house or a minister. There are five General Purpose Standing Committees which oversee specific government portfolios and receive references from the house, a minister or through their self-referral power; and a Privileges Committee and Procedure Committee, which consider matters referred by the house or President (the latter can also consider amendments to standing orders on its own initiative).

Committees are established to conduct inquiries on behalf of the house, and are delegated inquiry powers to fulfil this duty. The parliamentary powers of inquiry are extensive and derive from the notion of the House of Commons as the ‘Grand Inquest of the Nation’.

Almost all parliaments in Australia have received or adopted the powers, privileges and immunities of the House of Commons by constitution or statute, the exception being NSW (and to a limited extent, Tasmania) which relies on the doctrine of ‘reasonable necessity’ – that is, it has ‘the powers, rights and privileges necessary for the discharge of its functions.’<sup>2</sup> Lovelock & Evans assert that these include the inquiry power, which is ‘a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government.’<sup>3</sup>

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\* This paper was prepared for the 2010 Parliamentary Law, Procedure and Practice course. The practice of the NSW Legislative Council has since changed as a direct result of its recommendations.

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The powers delegated to committees include calling for and examining witnesses and documents, publishing materials and making visits of inspection. For example, Legislative Council standing order 208 provides:

A committee has power:

- (a) to adjourn from time to time,
- (b) to adjourn from place to place,
- (c) to send for and examine persons, papers, records and things,
- (d) to make visits of inspection within NSW and, if authorised by the House, with the approval of the President, elsewhere in Australia and outside Australia, and
- (e) to request the attendance of and examine members of the House.

Standing order 223(1) authorises committees to publish submissions received and evidence taken before presentation to the house.

Other sources of Legislative Council committee powers include relevant statutes, resolutions, practice and precedents. For example, s 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* (NSW) authorises a committee to publish ‘documents received’ or ‘evidence given’ before it.

### **To what extent do committees exercise their delegated powers outside of inquiries?**

NSW Legislative Council committees exercise delegated powers outside of inquiries very little, if at all. For example, most Council committees generally do not accept (or even consider) correspondence unrelated to an inquiry. Such material is usually received by the committee secretariat, which may reply to the author to advise that the committee does not have an inquiry into the subject matter, with a referral to other authorities where appropriate. If deemed important the material may be forwarded to the committee chair for information; however it is rarely circulated to the rest of the committee, and rarely added to a committee agenda.

In contrast, a survey of various parliaments conducted for the purposes of this article found that committees in most of the surveyed jurisdictions may accept unsolicited correspondence, so long as it is relevant to the committee’s remit.

It is also rare for Legislative Council committees to accept material relating to inquiries after the final report has been tabled. As with correspondence, if the secretariat receives material relating to a completed inquiry, a staff member would normally reply to the author advising that the committee is no longer inquiring into the matter, with a referral to other bodies where appropriate. Again, such material is generally not circulated to the committee, although it may be forwarded to the chair for information.

Given that Council committees are unlikely to accept material outside of inquiries, they are even less likely to act upon such material, such as by pursuing the issues raised or publishing the document.

An example of this arose from a 2006 Budget Estimates inquiry. During a hearing before General Purpose Standing Committee No. 2, the Director General of the Department of Community Services, Dr Neil Shepherd, was questioned about a District Court case, which he

stated had led to an amendment of the *Children and Young Persons (Care and Protection) Act 1998*. The Committee requested a copy of the court judgement and transcript, which Dr Shepherd agreed to provide on notice.

The Committee did not however receive a copy of the judgement until the evening of 22 November (the day before the report was due for tabling), and the Department had requested that it remain confidential as it related to closed court proceedings. Given the role the case had purportedly played in changing the legislation, the Committee felt there was sufficient public interest to warrant its partial publication. Out of respect to the court the Committee wrote to the judge requesting that the judgement be partially published with identifying information suppressed.

The Chief Judge replied on 28 November, declining the Committee's request and contending that the judgement did not in fact contain the view which Dr Shepherd claimed it did. The Committee sought clarification and still desired partial publication, however as it had finished the inquiry and tabled its report the then Clerk of the Parliaments advised that it could not take any further action unless it established a new inquiry to do so.

The Committee therefore self-referred a new inquiry into *Evidence given during Budget Estimates on 7 and 13 November 2006*. The two week inquiry involved the Committee partially publishing the court's judgement and holding a two hour hearing to question Dr Shepherd further.

Survey results revealed that Joint Investigatory Committees in Victoria and committees in the Scottish Parliament and Canadian Senate are similarly unlikely to pursue issues raised in material that has been submitted after an inquiry report has been tabled. The Canadian Senate stated:

Once a final report has been tabled on a study [i.e. inquiry], the committee no longer has the authority to conduct work on the study. If the committee wanted to do further work, it would have to seek the authorization of the Senate for a new order of reference.<sup>4</sup>

In contrast, the Senate, Queensland Parliament and WA Legislative Council advised that their reference committees would likely accept and publish new material relating to a completed inquiry. Going even further, the WA Legislative Assembly advised that if one of its standing committees received new material after an inquiry had been completed, the committee would be free to pursue the material to the extent it considered necessary. Another approach, practised by UK Select Investigative Committees, is to publish the new material with a Special Report. The same houses advised that their committees may publish unsolicited correspondence unrelated to inquiries, whereas the House of Representatives, Victorian Joint Investigatory Committees, NT Legislative Assembly and Scottish Parliament stated that their committees would be highly unlikely to do so.

Another committee power is the power to make visits of inspection. Nearly all survey respondents advised that their committees conduct visits outside of inquiries. Only NSW Legislative Council and Canadian Senate committees generally do not do so. The most common reasons cited for conducting such visits were to educate members and/or keep them abreast of issues within their committee's remit, or to consider an issue before deciding whether to hold an inquiry into it.

In summary, there is no common convention regarding the use of committee powers outside of inquiries. It is clear however that the Legislative Council takes a more reserved approach

compared to other houses, with Council committees rarely exercising any of their powers outside of inquiries.

### **To what extent should committees exercise their powers outside of inquiries?**

The powers considered in this article involve considering correspondence, conducting site visits and publishing materials. In the NSW Legislative Council, these are specifically the powers to:

- examine papers and records (SO 208(c)),
- make visits of inspection (SO 208(d)),
- publish submissions received and evidence taken (SO 223(1)), and
- publish documents received (s 4(2) *Parliamentary Papers (Supplementary Provisions) Act*).

None of the above provisions refer to inquiries. In other words, there is no express or implied restriction in the standing orders or statute requiring committees to only exercise their powers during inquiries, nor are there restrictions in the equivalent standing orders or statutes of the other houses surveyed.

However, as outlined earlier, the Department of the Legislative Council has generally been reluctant to allow its committees to exercise these powers outside of inquiries. One reason for this is because reference committees are established by the house to conduct inquiries. The house delegates those powers necessary to fulfil this role. On this basis there is an argument that committees should only exercise those powers during inquiries.

Another reason is accountability. Committees are a creature of the house. They are ‘an extension of the House, operate under the authority of the House and share the privileges of the House.’<sup>55</sup> As such, they should be fully accountable to the house.

Legislative Council committees report all of their activities to the house, which is always aware when one of its committees is conducting an inquiry. Even when self-referred, committees must report the terms of reference to the house, which has the power to reject or restrict any reference. This further demonstrates that committees are wholly answerable to the house. Committees are also restricted by their terms of reference, unable to inquire into matters beyond those approved terms.

Upon completing an inquiry all materials, such as transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence, are tabled in the house, ensuring accountability. On the other hand, unsolicited materials received by committees outside of inquiries are *not* reported. This is due to practicality – it would be onerous and unnecessary for committees to report every piece of unsolicited correspondence to the house.

The mere acceptance of unsolicited correspondence by a committee however is unlikely to equate to an exercise of the power to examine papers and records. It would be an undesirable outcome if accepting unsolicited correspondence for information only, without inquiring into the matter or using it as evidence, was interpreted as the formal exercise of a committee’s power. Individual members routinely accept unsolicited correspondence, why should a committee not be permitted to do the same? Given this, and given that the majority of committees in other parliaments surveyed may accept unsolicited correspondence outside of inquiries, the Legislative

Council should change its practice to allow committees to accept unsolicited material outside of inquiries, so long as the material is relevant to the committee's remit.

On the other hand, conducting site visits outside of inquiries *does* appear to be a formal exercise of a committee power, particularly as such visits are funded by the parliament (unlike visits conducted by individual members). Although there is an argument that committees should only exercise their delegated powers during inquiries, one should also consider why committees use these powers in the first place. As stated earlier, the most common reasons cited for conducting site visits outside of inquiries were to educate members or assist them to decide whether to conduct an inquiry. These are valid, practical reasons that must surely outweigh any argument for restricting delegated powers. Therefore the Council should consider changing its practice to allow its committees to conduct visits outside of inquiries (even on a case-by-case basis), so long as the visit is relevant to the committee's responsibilities. Such visits should however be reported to the house to ensure accountability, particularly given that all visits conducted *during* inquiries are reported through inquiry reports. While some survey respondents advised that their committees did so, many others stated that their committees were under no obligation to.

The final power to be considered is the power to publish documents. It seems unlikely that unsolicited correspondence unrelated to inquiries would be considered a 'submission received' or 'evidence taken' under standing order 223(1), however whether new material relating to completed inquiries falls within that scope is arguable. It is more likely that such material falls within the scope of 'documents received' under s 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act*. Given that individual members do not have the power to publish documents, it would appear that publishing documents outside of inquiries does amount to an exercise of formal powers. Presumably the reason why committees might exercise this power outside of inquiries would be to enter the information into the public domain, and possibly to generate discussion on the matter. Nevertheless committees should exercise caution in doing so, as it may grant absolute privilege to material that the house has not authorised the committee to examine (qualified privilege may nonetheless apply under the *Defamation Act 2005*). A preferable approach may be for the chair to table the material in the house on behalf of the committee, making it a decision of the house and thus ensuring accountability.

### **Does unsolicited material sent to committees outside of inquiries attract parliamentary privilege?**

The answers to this survey question produced a variety of responses. The WA and Queensland Parliaments stated that such material would be privileged if accepted by a committee; the Senate, ACT Legislative Assembly and UK Select Investigative Committees said it would depend on the circumstances; the House of Representatives, Victorian Parliament and NT Legislative Assembly replied that it would be unlikely; while the New Zealand and Canadian Parliaments and NSW Legislative Assembly expressed the view that privilege would not apply as the material would not be accepted by the committee or form part of its proceedings.

Like the Senate, ACT and UK, the NSW Legislative Council's position is that it would depend on the circumstances. Article 9 of the *Bill of Rights 1689*, which applies in NSW under the *Imperial Acts Application Act 1969*, states that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' Article 9 grants an absolute legal immunity of freedom of speech not only to members, but also to witnesses and other participants involved in parliamentary proceedings.

The *Bill of Rights* however does not define ‘proceedings in parliament’, nor is there any statutory definition provided in other NSW legislation. It is therefore open to the courts to determine its meaning. Guidance is available from s 16(2) of the *Parliamentary Privileges Act 1987* (Cth), which states that ‘proceedings in parliament’ means ‘all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee’, which includes (but is not limited to):

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.<sup>6</sup>

It is generally accepted that proceedings in parliament include the formal transaction of business in a house or its committees, such as debates, questions and answers, the giving of evidence by witnesses and tabling documents. The term has also been used in a wider sense to include matters connected with, or ancillary to, the formal transaction of such business, where sufficient proximity to the formal transaction of parliamentary business can be established.

Little consideration has been given to the question of whether unsolicited material sent to committees outside of inquiries constitutes a proceeding in parliament. However much consideration has been given to whether unsolicited information provided to individual members falls within this scope. It is therefore logical to begin by examining the latter.

### ***Unsolicited correspondence sent to individual members***

Carney states that it is generally accepted that communications between members and constituents do not by themselves enjoy Article 9 immunity, given the wide ranging circumstances under which such communications occur. He observes that this becomes less clear where a constituent communicates information to a member in the hope that the member will raise the matter in parliament. Where the matter is raised, the earlier communication is protected. Where it is not, the existence of any immunity is uncertain.<sup>7</sup> Carney notes that the closer the communication can be connected to a proceeding in parliament, the easier it is to argue that it should be protected.<sup>8</sup>

McGee agrees that sending unsolicited information to a member does not in itself amount to engaging in a parliamentary proceeding. While the communication may attract qualified privilege or public interest immunity, according to McGee it will only attract absolute privilege if it becomes ‘directly connected with some specific business to be transacted in the House, such as the delivery of a petition to the member for presentation to the House’.<sup>9</sup> Therefore there must be some action by the member for the communication to become a ‘proceeding in parliament’:

If the member takes some action in respect of it for the purpose of transacting parliamentary business, it may, at that point, become part of a proceeding ... But, even so, that will not have any retrospective effect so as to afford protection in respect of the original communication to the member.<sup>10</sup>

This principle was espoused in *O'Chee v Rowley*, which considered whether s 16 of the *Parliamentary Privileges Act 1987* (Cth) would apply to documents in the possession of Senator O'Chee, including communications from constituents and letters exchanged between the Senator and another member. The QLD Court of Appeal held that a member must first act on a communication, with a view to raising it in the house before the s 16 immunity can apply. McPherson JA stated:

It is not, I think, possible for an outsider to manufacture parliamentary privilege for a document by the artifice of planting the document upon a parliamentarian ... The privilege is not attracted to a document by s 16(2) until at earliest the parliamentary member or his agent does some acting with respect to it for the purposes of transacting business in the House. Junk mail does not, merely by its being delivered, attract privilege.<sup>11</sup>

Campbell & Groves point out that under this test, it is not the intention of the person who sends the correspondence that determines whether a document is a proceeding in parliament, but whether the member uses or intends to use the correspondence for parliamentary business.<sup>12</sup>

The Senate Committee of Privileges has adopted a wider view than that of the court in *O'Chee v Rowley*. In its 72<sup>nd</sup> report the Committee expressed the view that unsolicited material sent to a member should *initially* attract immunity *until* a member decides what action (if any) to take.<sup>13</sup> If the member does not act with a view to raising the matter in parliamentary proceedings, the immunity ceases to exist. The Committee's rationale was that individual citizens should be protected in their approaches to members of parliament.

Carney argues that the Privileges Committee's approach is preferable to the approach espoused in *O'Chee v Rowley*, as it better facilitates the flow of information to members of parliament, which he asserts is 'essential to the functioning of parliament in a democracy'.<sup>14</sup>

A different approach was adopted by the NSW Legislative Council's Privileges Committee in 2004, which created a three step test to determine whether a document falls within 'proceedings in parliament'. The test, developed during an inquiry into the seizure of documents from a member's parliamentary office by the Independent Commission Against Corruption, is as follows:

(1) Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?

YES → falls within 'proceedings in Parliament'.

NO → move to question 2.

(2) Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or a committee?

YES → falls within 'proceedings in Parliament'.

NO → move to question 3.

(3) Have the documents been retained for the purposes of or incidental to the transacting of business in a House or a committee?

YES → falls within 'proceedings in Parliament'.

□ NO → does not fall within ‘proceedings in Parliament.’<sup>15</sup>

The Council’s test encompasses documents that have been *retained* for the purposes of or incidental to the transacting of business in a house or a committee, rather than just documents that have been *used* for parliamentary business. The Committee expressed the view that the documents in question, while not brought into existence or used for the purposes of or incidental to the transaction of parliamentary business, constituted a proceeding in parliament as they were retained by the member for the purpose of informing himself in anticipation of debate in the house on the subject. This is consistent with the view in *O’Chee v Rowley*, which held that a member’s intent to use material for parliamentary business was sufficient for it to fall within the scope of ‘proceedings in parliament’. McPherson JA said:

[If documents] came into the possession of Senator O’Chee and he retained them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining possession of them were ‘acts done ... for purposes of or incidental to the transacting of business’ of that House.<sup>16</sup>

Having considered approaches for determining whether unsolicited correspondence sent to individual members constitutes a proceeding in parliament, the same approaches can now be used to determine whether unsolicited correspondence sent to committees outside of inquiries falls within the same scope.

### ***Unsolicited correspondence sent outside of inquiries***

As noted previously, NSW Legislative Council committees generally do not accept unsolicited correspondence outside of inquiries. Such correspondence would therefore not attract privilege under the approaches adopted in *O’Chee v Rowley* or by the Senate and NSW Legislative Council Privileges Committees, which all require that the material be accepted by the committee.

It is arguable that this should change. Council committees should be able to exercise discretion to accept such correspondence, so long as the information is relevant to the committee’s responsibilities.

If this were to occur, the material would most likely attract privilege under the third category of the NSW Privileges Committee’s test – i.e. documents ‘retained for the purposes of or incidental to the transacting of business in a House or a committee’. However, under the current wording of the test, it could be argued that such material also falls within the first category i.e.:

- (1) Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?

While this clearly encompasses documents such as submissions, hearing transcripts, tabled documents, questions and answers, debates and speeches, it could arguably also include documents created by citizens wishing to have their matter raised by a committee, even if that material is not subsequently raised or retained with a view to being raised. This was clearly not the intention of the Committee, which supported the view in *O’Chee v Rowley* that documents must be connected with, or incidental to, business transacted in the house for privilege to apply. If this test is to be applied again in the future, it may be worth considering rewording question (1) to make it clear that it is not the intent of the author which determines whether a document constitutes a proceeding in parliament.

Question (1) is also unclear as to when such documents attract Article 9 immunity. Although the Legislative Council Privileges Committee's test is the most recent, it did not explicitly address the earlier view of the Senate Privileges Committee that documents sent to members would initially attract privilege until such time as the member acted on that document. Given that the NSW Committee relied on the court's approach in *O'Chee v Rowley* in developing its test, it can be assumed that immunity only applies when the committee acts or intends to act on the document. This is preferable to the approach adopted by the Senate Committee. Unsolicited material should not attract immunity before a committee makes a decision about to it, otherwise all material – no matter how defamatory – would be protected by parliamentary privilege merely by sending it to a committee (such material may however be protected by qualified privilege). Lake states:

As with all privileges of the Parliament, the House must guard itself against the unnecessary and irresponsible extension of absolute privilege to documents it has neither authored nor requested.<sup>17</sup>

A final factor to contemplate is whether consideration of unsolicited material at a properly constituted committee meeting is sufficient in itself to connect the material to a proceeding in parliament, even if the material were ultimately rejected by the committee. Applying the above view that documents should only become a proceeding in parliament when a member or committee has made a decision about it, the answer would be no. Privilege should be determined by the committee's intent, not by the action or intent of a private citizen.

## **Conclusion**

There is no express or implied restriction in standing orders or statute, nor is there a common convention, requiring committees to exercise their powers only during inquiries. Nonetheless the NSW Legislative Council has taken a cautious approach to the exercise of powers by their committees outside of inquiries.

One reason for this caution is that committees are established by the house to conduct inquiries, and the powers delegated to it are those necessary to fulfil that role. It can therefore be argued that committees should only exercise those powers during inquiries. Another reason is accountability. Committees are a creature of the house and operate under its authority, and therefore should be fully accountable to the house.

However, practical reasons should also be taken into account when considering whether committees should be permitted to exercise their powers outside of inquiries, such as the benefit of conducting site visits to inform members about issues and assist them to decide whether to conduct a particular inquiry. These surely outweigh the argument regarding the restriction of committee powers. The Legislative Council should therefore consider changing its practice to allow its committees to conduct site visits outside of inquiries, so long as the visits are relevant to the committee's remit and are reported to the house to ensure accountability.

In regard to unsolicited correspondence, individual members accept such correspondence on a regular basis. It therefore seems unlikely that the mere acceptance of such correspondence by a committee would be a formal exercise of delegated powers. As such, Legislative Council committees should be permitted to accept unsolicited material received outside of inquiries, if the material is relevant to the committee's responsibilities. Once retained by the committee, such material would be protected by parliamentary privilege.

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- <sup>1</sup> Australia, New Zealand, UK, Scotland, Canada, NSW, Queensland, Victoria (responses provided in relation to Joint Investigatory Committees), WA, ACT and NT. For a copy of survey results, please contact the NSW Legislative Council committee secretariat on 9230 3311.
- <sup>2</sup> Lovelock L & Evans H, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, 2008, p 488.
- <sup>3</sup> *ibid.*, p 490.
- <sup>4</sup> Survey answer to question (2).
- <sup>5</sup> Lovelock & Evans, *op. cit.*, p 527.
- <sup>6</sup> *Parliamentary Privileges Act 1987*, s 16(2).
- <sup>7</sup> Carney G, 'Lifting the veil of mystery: freedom of speech under parliamentary privilege', Jones J & McMillan J (eds), *Public law intersections: papers presented at the Public Law Weekend - 2000 & 2001*, 145 at 148.
- <sup>8</sup> Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, pp 210-211.
- <sup>9</sup> McGee D, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> ed, Dunmore Publishing, Wellington, 2005, p 622.
- <sup>10</sup> *ibid.*
- <sup>11</sup> (1997) 150 ALR 199 at 209.
- <sup>12</sup> Campbell E & Groves M, 'Correspondence with Members of Parliament', *Media and Arts Law Review* (2006) 11, 227 at 227.
- <sup>13</sup> Senate Standing Committee of Privileges, Parliament of Australia, *Possible Improper Action Against a Person (Dr William De Maria)*, 72<sup>nd</sup> Report, June 1998, 2.12.
- <sup>14</sup> Carney, *op. cit.*, 'Lifting the veil of mystery: freedom of speech under parliamentary privilege', p 150.
- <sup>15</sup> NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004, p 8.
- <sup>16</sup> (1997) 150 ALR 199.
- <sup>17</sup> Lake N, 'Parliamentary Papers and Parliamentary Privilege: A case for continued vigilance', *Australasian Parliamentary Review*, Spring 2007, Vol. 22(2), 107 at 116.