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**Expulsion of Members of the
NSW Parliament**

by

Gareth Griffith

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EXECUTIVE SUMMARY

The purpose of this Briefing Paper is to set out the law relating to the expulsion of Members of Parliament, primarily in NSW but also with reference to other selected jurisdictions.

The expulsion of a Member is an example of the power of a House of Parliament to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of Parliament. It is an ultimate sanction that is rarely used.

According to the 22nd edition of *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, published in 1997:

The expulsion by the House of Commons of one of its Members may be regarded as an example of the House's power to regulate its own constitution, though it is treated here as one of the methods of punishment at the disposal of the House. Members have been expelled for a wide variety of causes (at 141).

The leading case is *Armstrong v Budd* (1969) 71 SR (NSW) 386. In that case the NSW Court of Appeal held:

- That in addition to the powers specifically conferred by the *Constitution Act 1902*, the common law confers on each of the Houses of Parliament such powers as are necessary to the existence of the particular House and to the proper exercise of the functions it is intended to execute.
- That in a proper case a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and its exercise is not a cloak for punishment of the offender.

The grounds for expulsion suggested by the Solicitor General and accepted by the NSW Court of Appeal were as follows:

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 the good faith of its deliberations.
- (4) As would tend to bring the Council into disrepute and would lower its authority and dignity unless it was so preserved and maintained (at 396).

As to the scope of the expulsion power, Herron CJ referred to cases concerning disorderly conduct, on one side, and those dealing with conduct outside the Chamber involving 'want of honesty and probity', on the other:

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 arise also from misconduct outside the House provided 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 (at 397).

Sugerman JA observed:

That the proper discharge of the legislative function by the Council demands an orderly conduct of its business is undoubted. That it demands honesty and probity of its members should be equally undoubted. Indeed, the need for removal and replacement of a dishonest member may be more imperative as a matter of self-preservation than that of an unruly member (at 408).

Wallace P summarised the Court's opinion of the expulsion power in the following terms:

the Legislative Council has an implied power to expel a member if it adjudges him to be guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive – a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council (at 403).

Concerning the potential for abuse of the expulsion power, in *Armstrong* the response by Herron CJ was twofold. First, he assumed that the House would not exercise the power 'irresponsibly or capriciously'. Secondly, he noted that an expulsion could always be appealed to the Supreme Court which has the power 'to declare a resolution for expulsion null and void' (at 397-8).

In *Armstrong*, the Court had received in evidence the Hansard report of the debate on the expulsion resolution. Wallace P used this to satisfy himself that the grounds stated in the resolution were not only grounds upon which the House was entitled to expel, but that the resolution was based on 'substantial material' and was therefore not a 'sham' designed to gain some political or other advantage (at 403).

Four Members have been expelled from the NSW Parliament, three from the Legislative Assembly (in 1881, 1890 and 1917) and one from the Legislative Council (in 1969). Of the other Australian States, only the Victorian Parliament has used its power of expulsion. The last occasion was in 1901. At the Commonwealth level, the expulsion power has been abolished (*Parliamentary Privileges Act, 1987* (Cth), section 8).

Although expulsion vacates the seat of a Member, it does not create a disability to serve again in the House, if re-elected.

1. INTRODUCTION

In July 2003 the ICAC released a report titled, *Report on an investigation into the conduct of the Hon. Malcolm Jones MLC*. Mr Jones has been a member of the Legislative Council since March 1999, where he is the sole representative of the Outdoor Recreation Party. The ICAC report dealt with the use made by Mr Jones of certain additional entitlements provided under the *Parliamentary Remuneration Act 1989*. As explained in the Executive Summary to the report:

The investigation focussed on allegations that Mr Jones had used certain of these entitlements for purposes not connected with his parliamentary duties, in particular for membership drives for eleven 'micro' political parties unconnected with the Outdoor Recreation Party. A further allegation concerned Mr Jones's ineligibility to claim the Sydney Allowance.

As to the outcomes of the investigation, the ICAC reported:

This investigation found evidence that Mr Jones had knowingly misused additional entitlements provided under Part 3 of the *Parliamentary Remuneration Act*.

Findings are made in this report that Mr Jones engaged in conduct that was corrupt within the meaning of the ICAC Act in relation to his use of the entitlements described above.

In Chapter Four of this report a recommendation is made that the Director of Public Prosecutions consider the prosecution of Mr Jones for breaches of sections 178BA of the *Crimes Act 1900* (obtaining money by deception or false/misleading statements), the common law offence of breaching public trust, and a breach of section 87 of the ICAC Act (giving false evidence before the Commission).

In addition, I state my opinion that consideration be given to the expulsion of Mr Jones from the Upper House.

It is this last recommendation, in respect to the possible expulsion of a member of the NSW Parliament, that is the focus of this paper. On this matter, the ICAC Commissioner later explained:

Mr Jones is a serving Member of Parliament and it is clear that the Legislative Council has the constitutional power to expel a Member or, in other words, to end the term of office of the public official (*Greiner v ICAC* [1992] 28 NSWLR 125 per Maloney JA at 170). This power is conferred by the common law and is in addition to the powers specifically conferred by the *Constitution Act 1902*.

There is a precedent. In 1969 the Legislative Council expelled a Member, the Hon Alexander Ewan Armstrong (as he then was), in the exercise of its inherent powers on the ground of 'conduct unworthy of a Member of the Legislative Council'. The validity of the expulsion was upheld by the Supreme Court in proceedings brought by the Member challenging the validity of the House's actions: *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241. In particular, Sugerman JA (as he then was) made clear that the proper discharge of the legislative function 'demands honesty and probity of its Members. Indeed,

the need for removal and replacement of a dishonest Member may be more imperative as a matter of self preservation, than that of an unruly Member' (at page 261).

I have found that the conduct of Mr Jones involved both dishonesty and untruthfulness. Mr Jones's lack of credibility and lack of candour on oath, when combined with the foregoing matters, is conduct which, in my opinion, is redolent of the conduct which led to the 1969 expulsion.

For the above reasons, I state the opinion that consideration should be given to the expulsion of Mr Jones from the House.

This statement was made further to section 74A(2) of the ICAC Act 1988 which requires the Commission to state in its report to the Parliament whether, in its opinion, consideration should be given to prosecuting or otherwise taking action against the 'affected person' (in this case Mr Jones). Further to section 74A(2)(c) this would include 'taking action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official'.

This Briefing Paper looks first at the relationship between the ICAC Act and the power of expulsion. It then sets out key points and issues in respect to the expulsion power in a broader legal, conceptual and historical context. Expulsion cases in NSW are discussed, and the paper ends with a review of the expulsion power in other selected jurisdictions.

2. THE ICAC ACT 1988, FINDINGS OF CORRUPT CONDUCT AND THE POWER OF EXPULSION

2.1 The ICAC and Parliament

The point has been made that the ICAC has a 'special relationship with the Parliament'. It is said that

the Parliament created the ICAC to protect the public interest, prevent breaches of public trust and guide the conduct of public officials. The legislation gives the ICAC significant powers and discretion to expose corruption through investigations, to prevent corruption by giving advice and developing resistance to corrupt practices in public sector organisations, and to educate the public sector and the community about corruption and the role of the Commission.¹

In respect to the Parliament the ICAC plays a number of distinct roles. On one side, the ICAC reports to Parliament and there is oversight of its work by a parliamentary committee. On the other, under section 3 of the ICAC Act the Commission has jurisdiction over all Members of Parliament, their staffs and the staff of Parliament generally. The ICAC also has an active role in educating Members of Parliament about their rights and obligations.

¹ R Grove, 'Officers of Parliament and how their work impacts on the House', 33^d *Conference of Presiding Officers and Clerks*, Brisbane, July 2002, p 4.

2.2 The ICAC Act and Members of Parliament

The ICAC Act applies to ‘public officials’, a term that is defined to include Members of the NSW Parliament. ‘Corrupt conduct’ is defined under Part 3 of the Act, notably under sections 8 and 9. The full text of these provisions is set out at Appendix A. Section 8 of the Act defines ‘corrupt conduct’ in general and more specific terms. The specific definition under section 8(2) includes reference to fraud, bribery, blackmail and theft. The more general definition in section 8(1) reads:

- (1) Corrupt conduct is:
- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

This is then qualified by section 9 which is headed ‘Limitation on nature of corrupt conduct’. After amendment in 1994, the provision reads:

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section:

applicable code of conduct means, in relation to:

- (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct could also constitute a breach of a law (apart from this Act) and the Commission identifies that law in the report.

Sections 9(1)(d), the reference to ‘applicable code of conduct’ in section 9(3), and sections 9(4) and 9(5) were inserted in 1994. This followed the decision of the NSW Court of Appeal in *Greiner v ICAC* which revealed gaps in the ICAC’s jurisdiction over Members of Parliament. These were identified in the context of what is known as the ‘Metherell Affair’. In 1992 Dr Terry Metherell resigned from the Legislative Assembly to take up a senior public service position. The appointment had been arranged by the then Premier Nick Greiner and the Minister for the Environment, Tim Moore. On referral of the matter to the ICAC from the Parliament, the ICAC found that both the Premier and Minister had engaged in ‘corrupt conduct’ within the meaning of sections 8 and 9 of the ICAC Act. Prior to amendment in 1994, section 9 provided that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve: (a) a criminal offence; (b) a disciplinary offence; or (c) reasonable grounds for the dismissal of a public official, or the termination of their services. In the case of Greiner and Moore, the ICAC did not consider that the relevant conduct could involve a criminal offence and found that, when dealing with a Minister or a Member of Parliament, the concept of a disciplinary offence is irrelevant. It was therefore on the basis of section 9(1)(c) – that the conduct could involve reasonable grounds for dismissal – that the ICAC’s adverse findings were founded.

On appeal to the NSW Court of Appeal these findings were overturned.² This was on the ground that, until codes of practice for Ministers were in place, no objective test existed for determining if there were ‘reasonable grounds’ for recommending their dismissal as Ministers by the Governor for the purposes of section 9 of the Act. In effect, the Court of Appeal decision showed that section 9 (1)(b) and (c) - that the conduct constituted a disciplinary offence or reasonable grounds for dismissal – could have little practical operation in relation to Ministers and Members of Parliament.³ The only relevance of

² *Greiner v ICAC* (1992) 28 NSWLR 125.

³ NSWPD, 22 September 1994, p 3627.

section 9 in these circumstances was where the conduct could constitute a criminal offence.

To plug this gap and to place Ministers and Members on effectively the same footing as other public service employees the ICAC Act was amended in 1994. Inserted into section 9 for this purpose was an objective test for determining corrupt conduct in the case of Ministers and Members of Parliament, in the form of a reference to conduct constituting ‘a substantial breach of an applicable code of conduct’. An applicable code for Members is defined in terms of one adopted by resolution of the relevant House.⁴ Professor Carney states:

Since each House adopted the same code of conduct in 1998, ICAC is now able to make a finding of corrupt conduct against a member but only in respect of a substantial breach of the code. Such a finding is reported to the member’s House which decides what disciplinary action it should take.⁵

2.3 Sections 9(4) and (5) of the ICAC Act and Members of Parliament

Note that another limb was added to the definition of ‘corrupt conduct’ in 1994. Under section 9(4) of the Act, the ICAC is not precluded from finding that, in relation to Ministers and Members, the conduct in question would be such as to ‘cause a reasonable person to believe that it would bring the integrity of the office concerned or Parliament into serious disrepute’.⁶ However, for such conduct to amount to ‘corrupt conduct’, under section 9(5) the ICAC must be satisfied that it would also constitute an identifiable breach of a law.⁷ What seems to be contemplated under sections 9(4)-(5) is a situation where the conduct of a Member does not amount to a ‘substantial breach’ of the relevant code of conduct, yet a finding of ‘corrupt conduct’ can be made nonetheless where the ICAC is satisfied that the Member has broken the law in such a way as to bring the integrity of the office or Parliament into ‘serious disrepute’. However, as the then ICAC Commissioner, Hon Barry O’Keefe, told the Legislative Council Standing Committee Parliamentary Privilege and Ethics in 1996, the application of these subsections is far from clear. Mr O’Keefe called subsection (5) a ‘qualification on a qualification’, and an unnecessary one at that:

If it constituted a breach of the law, you did not ever need this amendment because already you fell within section 9(1)(a) because presumably the law is a criminal law. So I have great difficulty with subsection (5)....⁸

⁴ Another feature of these amendment was that Part 7A was inserted into the ICAC Act to provide for the formation of an Ethics Committee for each House with a function to prepare draft codes for their respective Houses.

⁵ G Carney, *Members of Parliament: Law and Ethics*, Prospect, 2000, p 257. A finding of criminal conduct by a member would be referred by the ICAC to the DPP for prosecution.

⁶ *ICAC Act 1988*, section 9 (4). In other words, where section 9(4) applies, section 9 does not operate to exclude a finding of corrupt conduct under section 8.

⁷ *ICAC Act 1988*, section 9 (5). The reference is to a breach of a law other than the ICAC Act itself.

⁸ Parliament of NSW, Legislative Council Standing Committee on Parliamentary Privilege and

2.4 Section 9(1)(c) of the ICAC Act and Members of Parliament

As noted, in its July 2003 *Report on an investigation into the conduct of the Hon. Malcolm Jones MLC*, the ICAC stated:

Mr Jones is a serving Member of Parliament and it is clear that the Legislative Council has the constitutional power to expel a Member or, in other words, to end the term of office of the public official (*Greiner v ICAC* [1992] 28 NSWLR 125 per Maloney JA at 170).

In making this statement the ICAC was confirming both the relevance of section 9(1)(c) to Members of Parliament, along with the further relevance of the power of expulsion in giving effect to that section. Section 9(1)(c) provides that, despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official...

The difficulties involved in applying this provision to Members of Parliament have been discussed on a number of occasions. By definition, Members are ‘public officials’ under the ICAC Act. Is it therefore meaningful to refer to ‘terminating the services’ of Members of Parliament (in their capacity as ‘public officials’)? If so, in a formal sense the services of a Member could only be terminated in one of two ways:⁹ by disqualification under the provisions of the *Constitution Act 1902*; or by the exercise by the relevant House of its discretionary power of expulsion.

However, the primary question as to whether a Member’s services can be terminated, as contemplated by section 9(1)(c), remains to be answered. The ICAC itself appears to have held different views on this matter over the years. In its 1992 report on the ‘Metherell affair’ it commented:

Neither Parliamentarians or Ministers render ‘services’. That word is appropriate to describe work done in employment, under what is sometimes called a master and servant contract. Both members and Ministers hold office, they are accountable to the public generally, but have no master in the strict legal sense.

Accordingly the question is whether in all the circumstances any conduct of a Minister ‘could constitute or involve...reasonable grounds for dismissing...a public official’, namely Greiner as Premier and Moore as Minister for the Environment.¹⁰

Ethics, *Proceedings of the Public Hearing on the Inquiry into the Establishment of a Draft Code of Conduct for Members*, October 1996, pp 133-4. For further comment on section 9(5) see – The ICAC, *Report on Investigation into Circumstances Surrounding the Payment of Parliamentary Pension to Mr PM Smiles*, February 1995, p 19.

⁹ A Member’s services could be terminated by informal means, for example if they were persuaded to resign from Parliament.

¹⁰ The ICAC, *Report on Investigation into the Metherell Resignation and Appointment*, June 1992, p 60.

The conclusion at that stage appeared to be that, under section 9(1)(c), the issue of the ‘dismissal’ of a Premier or Minister is relevant, but not the question of the termination of their services as parliamentarians.

The matter was revisited in April 1998 in the context of the ICAC’s investigation into parliamentary and electorate travel, where consideration was given to the views expressed by the NSW Court of Appeal in *Greiner v ICAC*. In the April 1998 report the ICAC Commissioner noted that ‘The difficulty in applying s. 9(1)(c) to Ministers, and by parity of reasoning to Members, is highlighted by the judgments in *Greiner*’. However, the Commissioner went on to say:

Since two of the members of the court [Gleeson CJ and Mahoney JA] were clearly of the opinion that s. 9(1)(c) applied to all public officials and since that term is defined in s. 3 to include, expressly, a Member of the Legislative Council and of the Legislative Assembly, I am of the opinion that s. 9(1)(c) does apply to Members.¹¹

There followed a lengthy discussion of the power of a House to expel a Member and the authorities relevant to this, the implication being that, in an appropriate case, the power can be exercised on an objective basis, according to standards established and recognised by law. In this way, the statutory requirement in section 9(1)(c) relating to ‘reasonable grounds for...terminating the services of a public official’ could be applied, by reason of the power of expulsion, to Members of Parliament. Furthermore, it also meant that a statement could be made in the Commissioner’s report to Parliament under section 74A(2) that consideration should be given to the taking of action with a view to ‘terminating the services of the public official’. In the April 1998 report, the ICAC Commissioner concluded:

In light of these authorities, I am of the opinion that s. 9(1)(c) of the Act can have application to a Member, at least if the nature of the conduct established in respect of the Member is dishonest and serious, that is of ‘sufficient gravity’.¹²

In essence, it is this view of the application of section 9(1)(c) to Members of Parliament that is restated in the July 2003 *Report on an investigation into the conduct of the Hon. Malcolm Jones MLC*.

Whether the question of the application of section 9(1)(c) to Members will be challenged in some future case remains to be seen. A point to bear in mind is that the section is framed in a way that suggests it applies, in the words of Gleeson CJ, ‘primarily to the case of an official who is liable to be dismissed for cause, and concerning whom there could arise a triable question as to whether the dismissal was on reasonable grounds’.¹³ *Armstrong v Budd* is authority for the proposition

¹¹ The ICAC, *Investigation into Parliamentary and Electorate Travel: First Report*, April 1998, p 10.

¹² The ICAC, n 11, p 11.

¹³ [1992] 28 NSWLR 125 at 142.

That in a proper case a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and its exercise is not a cloak for punishment of the offender.¹⁴

That said, it is arguable that the principle of the non-interference of the courts in the business of Parliament would preclude meaningful inquiry into the grounds for expulsion. To a unique degree Parliament exercises and enforces its discretionary privileges without reference to the courts. Broadly, it is for the courts to rule on their existence, but not on the occasion or manner of their exercise, this being a matter for the relevant House to determine.¹⁵ The issue goes to the heart of the question of judicial review and the right of a House to judge the lawfulness of its internal proceedings. One technical basis for judicial intervention was referred to in *R v Richards; Ex parte Fitzpatrick and Browne* where Dixon CJ went on to say:

If the warrant specifies the ground of the commitment the Court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.¹⁶

From this it would seem that the court can at least examine the resolution of the House by which the House exercises the asserted privilege to determine if it is consistent with that privilege. Professor Enid Campbell has suggested that the *Armstrong* case may also be authority for the proposition that, in the context of the NSW Parliament, the scope of judicial review would extend to a court deciding whether an administrative power had been exercised for a proper purpose.¹⁷

2.5 Section 9(1)(a) and (b) of the ICAC Act and Members of Parliament

For completeness, note can be made about the application and non-application respectively of sections 9(1)(a) and (b) to Members of Parliament. As the ICAC said in its April 1998 report:

The application of s. 9(1)(a) to parliamentarians is straightforward enough. The criminal law applies to parliamentarians as well as to all others in the community. There is no

¹⁴ (1969) 71 SR (NSW) 386.

¹⁵ *Egan v Willis* (1998) 195 CLR 424 at 446; *R v Richards; Ex parte Fitzpatrick and Browne* (1995) 92 CLR 157 at 162.

¹⁶ (1955) 92 CLR 157 at 162.

¹⁷ E Campbell, 'Expulsion of Members of Parliament' (1971) 21 *University of Toronto Law Journal* 15 at 37. Prior to the *Armstrong* case, Campbell had commented, 'Whether the courts would sit in judgment on the House's findings as to fitness is debatable' – E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 104. What is clear is that the ICAC Act cannot operate so as to abrogate parliamentary privilege. This is because, by the operation of section 122 of the ICAC Act, nothing in it can be taken 'to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament'.

concept of parliamentary privilege, which extends to exempting Members from the criminal law, as it does in some other countries outside the common law system.

The concept of a disciplinary offence has no application to Members. They may be subject to discipline, in a broad sense, by the House to which they belong. However, it would be inappropriate to describe conduct which merits such action as constituting an offence, let alone a disciplinary offence.¹⁸

2.6 The ICAC Act and the power of expulsion

It is clear that at certain points the ICAC Act is likely to interact with the parliamentary power of expulsion. A finding that a Member has breached a code of conduct and/or that the criminal law has been broken may lead the Commissioner to report, under section 74A(2), that action should be taken against the relevant Member, to remove them from public office.

The issue of expulsion may of course be raised in other ways, without reference to the ICAC. For example, expulsion may be contemplated in circumstances where a Member is persistently disruptive in the Chamber, or where the parliamentary privilege of free speech is grossly abused. The ICAC is therefore only one avenue through which the expulsion matter may be raised. That said, it is a fact that the ICAC is an avenue of particular significance. Its findings have all the authority that attends an independent commission of inquiry, established specifically to investigate allegations of corruption in public life. Further, its findings are placed in the public domain, subject to the glare of media interest.

However, while the ICAC's finding may be persuasive, it is not a determinative finding of guilt. In *Greiner v ICAC*, Priestley JA discussed a possible scenario where the ICAC had reported to Parliament that a public official had engaged in corrupt conduct, and where the official was subsequently acquitted of the offence charged. Priestley JA commented:

The example is not an improbable one; in my opinion some such case is bound to happen if the Act continues in its present form. The example demonstrates that in one very real sense 'findings' by the Commission of corrupt conduct should be regarded as conditional or provisional only. Yet it seems inevitable that such findings may gain general currency as final.¹⁹

That the ICAC's findings are 'conditional or provisional' in nature is one consideration. Another is that, unlike the legislative regime in place for the disqualification of Members, the expulsion power is discretionary in nature. Under section 13A(1)(e) of the *Constitution Act 1902* a Member's seat is to be declared vacant if, for example, they are 'convicted of an infamous crime', but only where any appeal process has run its course. This could be one outcome of an ICAC finding of criminality, subject to confirmation of that finding by the courts. In these circumstances section 13A would operate inflexibly and by its own force to vacate a Member's seat. On the other hand, any action taken (or not taken) by the relevant

¹⁸ The ICAC, n 11, p 8.

¹⁹ [1992] 28 NSWLR 125 at 181.

House further to a report of the ICAC, either to discipline or expel the Member concerned, will be a matter for the House alone to decide. In essence, irrespective of any pending or ongoing court proceedings, it will be for the House to determine whether the provisional findings of the ICAC offer sufficient grounds to warrant the removal of the Member for ‘conduct unworthy’ of the House.

3. THE POWER OF EXPULSION – KEY POINTS AND ISSUES

In its July 2003 *Report on an investigation into the conduct of the Hon. Malcolm Jones MLC*, the ICAC stated:

Mr Jones is a serving Member of Parliament and it is clear that the Legislative Council has the constitutional power to expel a Member or, in other words, to end the term of office of the public official... This power is conferred by the common law and is in addition to the powers specifically conferred by the *Constitution Act 1902*.

This statement can be placed in the context of a broader discussion about the expulsion power.

3.1 Nature and purpose – a collective power to enable the effective functioning of Parliament

- Expulsion belongs to that branch of the law concerned with the powers and privileges of Parliament.
- These powers and privileges are of two kinds: individual rights and immunities and collective rights and powers. Individual rights and immunities are enjoyed by Members and officers of Parliament individually (but not for their personal benefit) and include immunity from liability for anything said in the course of parliamentary proceedings (free speech in Parliament). On the other hand, collective rights and powers are enjoyed by the Houses of Parliament on a corporate or aggregate basis.
- Expulsion is a collective power and is one aspect of the broader power of the Houses of Parliament to regulate their internal affairs, procedures, proceedings and constitution.²⁰
- From this broad collective power there flows the right to discipline Members where a breach of privilege or contempt has occurred. Relevant sanctions include suspension, censure or expulsion.
- Expulsion is an ultimate sanction that is rarely used.
- Although it can be viewed as a disciplinary sanction, the true purpose of the expulsion power is not so much disciplinary as remedial, no so much to punish Members as to rid the relevant House of persons who are unfit for membership.
- The expulsion of ‘unworthy’ members is said to be an example of the House’s power to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of Parliament.

²⁰ Sir D Limon and WR McKay eds, *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, Butterworths, 1997, p 141.

- In *Armstrong v Budd* Wallace P found that the power of expulsion is a ‘power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties’.²¹
- Ultimately, the collective rights and powers of a legislative body are founded on the same general grounds as are the rights and immunities enjoyed by individual Members, namely, to enable the legislative body to perform freely and efficiently its constitutional functions of scrutiny, representation, deliberation and legislative enactment and review.

3.2 Source – at common law the expulsion power is reasonably necessary

- The traditional view is that the power of expulsion is inherent in all legislative assemblies.
- While the expulsion power is ‘inherent’ in any legislative body, its source varies as between one Parliament and another.
- In the case of the British House of Commons, its source is the peculiar law of Parliament – the *lex et consuetudo parliamenti* - founded on precedent and immemorial usage and by which the Parliament is constituted as a High Court with judicial powers.²²
- In other cases, in respect to those Parliaments that define their powers and privileges by reference to the British House of Commons, the expulsion power has a statutory foundation. These include the Canadian House of Commons and the Houses of all the Australian State Parliaments, other than NSW.
- In NSW a third source applies, namely the common law.
- In the case of the Legislative Assembly (but not the Legislative Council) this common law doctrine is supplemented by the House’s Standing Orders. Legislative Assembly Standing Order 294 reads: ‘A member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant’.
- At common law the inherent power of expulsion is implied by reasonable necessity.
- In more detail, at common law a formerly subordinate legislature such as the NSW Parliament – originally a ‘colonial’ legislature deriving its authority from Imperial statute – and each House in a bicameral legislature, has only such powers, privileges and immunities as are reasonably ‘necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute’.²³
- As Sugerman JA observed in *Armstrong v Budd*:

²¹ (1969) 71 SR (NSW) 386 at 403.

²² *Kielley v Carson* (1842) 4 Moo PC 63 at 89; 13 ER 225 at 235.

²³ *Kielly v Carson* (1842) 4 Moo PC 63 at 88; 13 ER 225 at 234; *Barton v Taylor* (1886) 11 App Cas 197; *Willis v Perry* (1912) 13 CLR 592; *Egan v Willis* (1998) 195 CLR 424 at 447.

In these circumstances the source if any particular power, privilege or immunity claimed to be possessed by a House of the NSW legislature or its members has to be found, if at all, in the application of the principle of implied grant as a matter of necessity.²⁴

- In *Kielley v Carson*,²⁵ an 1842 case concerning the powers of the Newfoundland House of Assembly, it was held that a Colonial House of Parliament ‘has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the Common Law’.
- The relevant common law principle is ‘that things necessary pass as incident’ – “*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*” (when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist).
- The test is described as one of ‘reasonable necessity’.
- That the power of expulsion is available at common law was recognised in the 19th century case law.
- The focus of that case law was on conduct inside the Chamber. In *Doyle v Falconer* it was said that a member found guilty of disorderly conduct in the House whilst it is sitting may be ‘removed, or excluded for a time, or even expelled’.²⁶ The matter was also canvassed in *Barton v Taylor* where, in *obiter*, the power to expel a Member for habitually obstructive or disorderly conduct was confirmed.²⁷
- *Armstrong v Budd* confirmed that, in a proper case, expulsion could apply to conduct outside the House and where the misconduct in question was not in the course of the Member’s performance of their parliamentary duties and functions.

3.3 Source - what is reasonably necessary changes over time

- Later case law has determined that what is “reasonably necessary” is not fixed, but changes over time. This means that, because a power was held to be reasonably necessary in the past, there is no guarantee that a court will arrive at the same conclusion in the changed circumstances of today.
- According to Wallace P in *Armstrong v Budd*, the word ‘reasonable’ must be given an ambulatory meaning ‘to enable it to have sense and sensibility when applied’ to contemporary conditions: ‘the critical question is to decide what is “reasonable” under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists’.²⁸

²⁴ (1969) 71 SR (NSW) 386 at 404.

²⁵ (1842) 4 Moo PC 63 at 88.

²⁶ (1866) LR 1 PC 328 at 340.

²⁷ (1886) 11 AC 197 at 205.

²⁸ (1969) 71 SR (NSW) 386 at 402. His views have since been approved by the NSW Supreme Court – *Egan v Willis and Cahill* [1996] 40 NSWLR 650 at 664 (Gleeson CJ) and

- The common law test is therefore whether any particular power or privilege is reasonably necessary today, in its present form, for the effective functioning of the House.
- In the case of the NSW Parliament, where the power of expulsion rests on a common law foundation, the courts may establish new limits on the form of that power. The High Court could even decide, in an appropriate case, that the power is no longer reasonably necessary in any form.
- As to the uncertain and historically relative nature of the powers of the NSW Parliament, Kirby J commented in *Egan v Willis*:

Where, as in the case of the Houses of the New South Wales Parliament, no external reference point has been provided to identify and define the limits of the applicable privileges, the inquiry is even more at large than otherwise it would be. It involves identifying the functions of the House in question and then specifying, by reference to the [Commonwealth] Constitution, statute law and the common of Parliaments, those powers essential to the existence of the House as a chamber of Parliament, or at least reasonably necessary to the performance by that House of its functions as such. The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or elsewhere.²⁹

- For those Parliaments where the expulsion power rests on a statutory basis, express legislative enactment is required for its abrogation or abolition.
- The expulsion power has been abolished by legislation in some Australian jurisdictions, namely, the Commonwealth,³⁰ the ACT and the Northern Territory.³¹

3.4 Source and scope – at common law the expulsion power is solely defensive

- Just as the source of the expulsion power varies as between one Parliament and another, so too does its scope. The latter is a consequence of the former.
- As noted, the British House of Commons is vested with judicial power, notably to punish for contempts.
- This judicial power to punish is also vested in those Parliaments that comprehensively define their powers and privileges by statutory reference to the powers and privileges of the British House of Commons.
- At present, the Houses of the Queensland, Victorian, South Australian and Western Australian Parliaments possess the same power of expulsion as the British House of Commons. The powers of the Tasmanian Parliament are only partially defined by statute.
- At common law, the judicial power to punish for contempts is not vested in the

at 691 (Priestley JA).

²⁹ *Egan v Willis* (1998) 195 CLR 424 at 495-6 (Kirby J).

³⁰ *Parliamentary Privileges Act 1987* (Cth), section 8. The provision applies to the Legislative Assembly of the ACT.

³¹ *Legislative Assembly (Powers and Privileges) Act 1992* (NT).

NSW Parliament. Under the common law, its power of expulsion can only be used for self protective and self-defensive purposes only. The power is not punitive in nature.

- The distinction between punitive and non-punitive powers is a difficult one.
- The basis for it was set out in 1866 in *Doyle v Falconer* where Sir James Colville, on behalf of the Privy Council, observed:

It is necessary to distinguish between a power to punish for contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.³²

- It was decided in *Egan v Willis* that, at least in the case of the power to suspend a member, this protective or self-defensive power may extend to the House taking action to ‘coerce or induce compliance with its wish’.³³
- Note that, although expulsion vacates the seat of a Member, it does not create any disability to serve again in the House, if re-elected. For example, in 1890 W.P. Crick was expelled from the Legislative Assembly and re-elected within the month.

3.5 Objective tests and principles – ‘unworthy conduct’ and the erosion of public confidence in the Parliament as reasonable grounds for expulsion

- If a House of the NSW Parliament has the power to expel a Member either for conduct inside the Chamber or, in a proper case, for misconduct unconnected with parliamentary duties, it begs the question as to when the House would be justified in taking such action and on what grounds?
- That the action must be self-defensive in nature and purpose is agreed.
- Expulsion resolutions refer to conduct that is ‘unworthy of a Member’. As noted, Legislative Assembly Standing Order 294 reads: ‘A member adjudged by the House guilty of *conduct unworthy of a Member of Parliament* may be expelled by vote of the House, and the seat declared vacant’.
- The expulsion power operates in addition to the disqualification regime, as set out in the NSW *Constitution Act 1902* (sections 13, 13A and 13B). Inserted in 2000 was section 13A(3) which provides, ‘Nothing in this section affects any power that a House has to expel a Member of the House’.
- The implication is that actual convictions for criminality will result in disqualification, whereas expulsion is a power to be used in other, less defined circumstances, as a power of last resort.
- The expulsion power is obviously discretionary, but is it therefore entirely at large?

³² (1866) LR 1 PC 328 at 340.

³³ *Egan v Willis* (1998) 195 CLR 424 at 455 (Gaudron, Gummow and Hayne JJ).

- The question is whether these ‘other’ circumstances can be established with the aid of precedent and principle?
- In *Armstrong* the grounds suggested by the Solicitor General and accepted by the Court were as follows:

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 the good faith of its deliberations.
 - (4) As would tend to bring the Council into disrepute and would lower its authority and dignity unless it was so preserved and maintained.³⁴
- Sugerma JA’s argument was that, while he agreed with the third and fourth ‘public respect’ criteria, in his view the ‘cardinal principle’ was derived from the first and second criteria, that is, the necessity of preserving the ‘integrity’ of those who participate in parliamentary proceedings ‘which is essential to mutual trust and confidence amongst the members’. To this end he defined, by analogy with the courts, the proper relationship between Members of Parliament as one of ‘mutual trust and respect’.³⁵
 - However, the analogy made by Sugerma JA, between Parliament and the courts, is dubious at best. It can be argued that the High Court is unlikely to uphold this ‘mutual trust’ rationale for the expulsion power. As Justice Callinan observed in *Egan v Willis*, ‘Legislative Councillors hold office by popular franchise governed by legislation which is the product of both Houses of Parliament’.³⁶ The question of trust between them is basically irrelevant.
 - A better basis for the power is to be found in the third and fourth criteria, where the trust between Parliament as an institution and the electorate is at issue.
 - Herron CJ observed in this regard:

The requirements of necessity must be measured by the need to protect the high standing of Parliament and to ensure that it may discharge, with the confidence of the community and the members in each other, the great responsibilities which it bears.³⁷

- It can be argued further that it is this ‘public confidence’ rationale for the expulsion power that is more likely to find favour with the High Court.
- The emphasis in the third and fourth criteria on the need to protect the honour and

³⁴ (1969) 71 SR (NSW) 386 at 396.

³⁵ (1969) 71 SR (NSW) 386 at 408-9.

³⁶ (1998) 195 CLR 424 at 511 (fn 430) (Callinan J).

³⁷ (1969) 71 SR (NSW) 386 at 397.

dignity of the House, thereby preserving public confidence in the institution of Parliament, bears some comparison with the High Court's reasoning in *Kable v Director of Public Prosecutions (NSW)*³⁸ where the notion of 'public confidence' in the judiciary was used to support the doctrine of the separation of powers. The application of this 'public confidence' criterion to the Parliament need not rely on a direct analogy between Parliament and the courts. It is enough to say that the integrity of both institutions is what is at issue.

- Whether the 'public confidence' argument applies in the same way to all kinds of expulsions is hard to say. Expulsion for disciplinary reasons, to prevent disruptive conduct, is certainly concerned with the public integrity of Parliament as an institution, as it is with the efficiency by which the institution performs its constitutional functions.
- For Sugerman JA they were two sides of the same coin. As quoted with approval in the ICAC report of July 2003, Sugerman JA observed:

That the proper discharge of the legislative function by the Council demands an orderly conduct of its business is undoubted. That it demands honesty and probity of its members should be equally undoubted. Indeed, the need for removal and replacement of a dishonest member may be more imperative as a matter of self-preservation than that of an unruly member.³⁹

- Likewise, Herron CJ referred in similar terms to cases concerning disorderly conduct, on one side, and those dealing with conduct outside the Chamber involving 'want of honesty and probity', on the other. Herron CJ commented:

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 arise also from misconduct outside the House provided 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.⁴⁰

- In *Greiner v ICAC*, Gleeson CJ commented that standards that govern the grounds for the dismissal of a Premier or a Minister are 'vague and uncertain', but that in such circumstances 'precedent is an important guide'. While the analogy with the expulsion power is not exact, a similarly broad reliance on precedent can be expected to apply in determining cases of 'want of honesty and probity' by Members.⁴¹
- Of course, the question of the appropriate occasion for the use of the expulsion

³⁸ (1997) 189 CLR 51.

³⁹ (1969) 71 SR (NSW) 386 at 408.

⁴⁰ (1969) 71 SR (NSW) 386 at 397.

⁴¹ [1992] 28 NSWLR 125 at 146.

power remains for the House to decide. Professor Campbell commented in this respect: ‘Corruption revealed by parliamentary or other official inquiry would probably be regarded as cause for expulsion even though criminal guilt had not been established’.⁴²

3.6 Source and judicial review –to what extent does the NSW Supreme Court exercise a supervisory jurisdiction over the NSW Parliament?

- Again, the source of power may have other implications, notably concerning any role the courts may have in reviewing a decision to expel a Member.
- In the context of the UK Parliament a decision to expel a Member has never been referred to the courts. The traditional view is that the power of expulsion is unlimited, but only in the sense that any decision is not subject to judicial review.
- What this means is that the courts may determine the existence and scope of a power of privilege, but that the occasion and manner of its exercise is a matter for the relevant House to determine. This confirms the point that the privileges of Parliament are part of the general law, on one side, while on the other satisfying the principle of the non-intervention of the courts in the internal business of a House.
- It seems that, in the case of the British House of Commons, if a court were satisfied that the grounds for expulsion were permissible grounds, the correctness of the House’s decision would not be questioned.⁴³
- *Armstrong v Budd* was the first case where a Member of a Westminster style Parliament challenged his expulsion in the courts.
- It suggested a broader role for judicial review, one that arises from the common law basis of the power. Professor Campbell has said that the court’s role would not be limited to determining whether the grounds stated in the expulsion resolution were grounds on which the House was entitled to expel. According to Campbell, ‘The court would need to be satisfied that there was evidence of such grounds, and that the House had decided on those grounds...’.⁴⁴
- Professor’s Campbell’s view of the *Armstrong case* was that ‘In determining whether the parliamentary power to expel members had been exercised for an improper purpose, The NSW Supreme Court exercised supervisory jurisdiction akin to that it would exercise in relation to the exercise of discretionary powers vested in administrative authorities’.⁴⁵
- In other words, *Armstrong* may be authority for the proposition that, in the context of the NSW Parliament, the scope of judicial review would extend to a court deciding whether an administrative power had been exercised for a proper purpose.

⁴² E Campbell, ‘Expulsion of Members of Parliament’ (1971) 21 *University of Toronto Law Journal* 15 at 20-1.

⁴³ E Campbell, ‘Expulsion of Members of Parliament’ (1971) 21 *University of Toronto Law Journal* 15 at 35.

⁴⁴ E Campbell, n 43, p 36.

⁴⁵ E Campbell, n 43, p 37.

- This interpretation was based largely on the decision of Wallace P in *Armstrong v Budd*. That decision is an example of where a court was prepared to review the factual grounds for the expulsion of a member of the NSW Legislative Council, for the purpose of ensuring that it was not a “sham” designed to gain some political or other advantage.⁴⁶ In *Armstrong*, the Court had received in evidence the Hansard report of the debate and Wallace P used this to satisfy himself that the grounds stated in the resolution were not only grounds upon which the House was entitled to expel, but that they were also factually well-founded. Reliance by the House on the evidence presented before Justice Street was noted, on the basis of which Wallace P concluded that the resolution was based on ‘substantial material’ and was therefore not a ‘sham’ designed to gain some political or other advantage.⁴⁷ He also inquired into the ‘motive’ behind the introduction of the expulsion motion, at least to the extent of confirming that it was formulated in terms consistent with the self-protective principle of reasonable necessity.
- But note that the precise nature and extent of the Supreme Court’s supervisory jurisdiction over the NSW Parliament remains to be decided. The dissenting opinion of McHugh J in *Egan v Willis* suggests that different views may still be held at the highest judicial levels.
- In *Armstrong* Wallace P concluded on a conventional note, commenting that ‘The manner and the occasion of the exercise of the [expulsion] power are for the decision of the Council’.⁴⁸

3.7 Summary of the Court’s findings in *Armstrong v Budd*

- *Armstrong* is authority for the proposition that a House of Parliament possessing only those powers and privileges reasonably necessary for its self-protection and defence may expel one of its Members for something said or done outside the House – for ‘conduct involving want of probity and honesty’⁴⁹ - provided the circumstances are special and the expulsion is not a cloak for punishment of the offender.
- The three judgments varied as to the precise grounds upon which that power might be exercised – to maintain ‘mutual trust’ between Members, as emphasised by Sugeran JA, or more for reasons of ‘public confidence’ in the ‘dignity and honour’ of the Parliament.
- As to this ‘public confidence’ basis for the power, both Herron CJ and Wallace P quoted with approval what the Leader of the Government in the Council, JB Fuller, had said during the course of the parliamentary debate on the expulsion resolution. According to Fuller:

⁴⁶ (1969) 71 SR (NSW) 386 at 403.

⁴⁷ (1969) 71 SR (NSW) 386 at 403.

⁴⁸ (1969) 71 SR (NSW) 386 at 403.

⁴⁹ (1969) 71 SR (NSW) 386 at 397 (Herron CJ).

In our democracy, in the parliamentary institutions of the free world, it is essential that the standing of members of Parliament in the eyes of the community should be maintained at a high level. It is necessary to maintain certain standards for the very preservation of the institution of Parliament itself and in particular for the preservation of the Legislative Council of New South Wales in this case.⁵⁰

- These grounds for the expulsion power may be disputed in any future case. The most cogent argument for the expulsion power to emerge from *Armstrong v Budd* was summarised by Wallace P in the following terms:

the Legislative Council has an implied power to expel a member if it adjudges him to be guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive – a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council.⁵¹

3.8 Issues and arguments – the danger of abuse by partisan politics, leave it to the electors and other matters

- The High Court may decide that the expulsion power is not reasonably necessary under modern conditions of representative democracy. In doing so, it may point to the fact that the Commonwealth Parliament has expressly abolished the power.
- Federally, in 1984 the Joint Select Committee on Parliamentary Privilege recommended the abolition of the power of expulsion. That recommendation was informed by the ‘Mahon precedent’ from 1920, the only instance of expulsion federally, and based on three considerations: first, ‘the general and worrying potential for abuse’ by a partisan vote; secondly, the specific constitutional provisions in Australia which amount to ‘something approaching a statutory code of disqualification’; and, thirdly, ‘on the basic consideration that it is for the electors, not Members, to decide on the composition of Parliament’.⁵² The Joint Committee argued that ‘the Houses still retain the wide powers to discipline Members. Members guilty of a breach of privilege or other contempt may be committed, or fined...These sanctions seem drastic enough. They may also be suspended or censured by their House’.⁵³
- The concern that the expulsion power is open to abuse by the forces of partisan politics is longstanding. As long ago 1866, in the 2nd edition of his *Elements of the Law and Practice of the Legislative Assemblies in the USA*, LS Cushing commented

⁵⁰ NSWPD, 25 February 1969, p 3871.

⁵¹ (1969) 71 SR (NSW) 386 at 403.

⁵² The Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, PP No 219/1984, p 126.

⁵³ The Parliament of the Commonwealth of Australia, *Final Report of the Joint Select Committee on Parliamentary Privilege*, October 1984, Recommendation 25, p 8.

that the expulsion power:

is in its very nature discretionary, that is, it is impossible to specify beforehand all the causes for which a member ought to be expelled; and, therefore, in the exercise of this power, in each particular case, a legislative body should be governed by the strictest justice; for if the violence of party should be let loose upon an obnoxious member, and a representative of the people discharged of the trust conferred upon him by his constituents, without good cause, a power of control would thus be assumed by the representative body over the constituent, wholly inconsistent with the freedom of election.

- The danger of abuse was raised following the decision in the *Armstrong* case. A comment in *The Australian Law Journal* from June 1969 was concerned about the width of the power, saying it would be ‘unrealistic to expect that the courts will always be able to check’ its political abuse and adding, ‘It would be equally unrealistic to pretend that there is no danger of abuse’. The comment ended on this cautionary note:

There is a very heavy responsibility on the Speaker and members, backed by whatever weight public opinion and the press may have, to ensure that such powers as the *Armstrong* case endorsed are exercised only where the individual’s conduct clearly and seriously threatens the very functioning of the institution itself.⁵⁴

- In *Egan v Willis* Justice Callinan appeared to question the very power endorsed in the *Armstrong* case, stating that the Court

in *Armstrong v Budd* ...regarded *Harnett v Crick* [1908] AC 470 (a suspension case only) as supporting a right of expulsion. Legislative Councillors can hardly be regarded as holding office, like members of a club at the pleasure, or the displeasure of other members. They hold office by popular franchise governed by legislation which is the product of both Houses of Parliament.⁵⁵

- Although an expelled Member can be re-elected to the House, in the case of the Legislative Council this is technically difficult. The system operates well enough for the Legislative Assembly, or indeed for any House elected on a constituency basis where vacancies are refilled by the holding of a by-election. That would not apply in the case of the Legislative Council where a vacancy arising from expulsion would be filled according to the provisions of the *Constitution Act 1902*, which, it is said, ‘effectively disbar the expelled Member from contesting their own vacancy’.⁵⁶ In any case, casual vacancies for the Upper House are filled, not by the electors, but by a joint sitting of both Houses.⁵⁷ In this latter context it could not be argued that the

⁵⁴ ‘Parliamentary self-protection’ (1969) 43 (6) *The Australian Law Journal* 213-4.

⁵⁵ (1998) 195 CLR 424 at 511 (fn 430) (Callinan J).

⁵⁶ Parliament of NSW, Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, June 1998, p 57.

⁵⁷ *Constitution Act 1902* (NSW), section 22D (1).

electors would have an opportunity to participate in the expulsion process, albeit belatedly, by their decision to re-elect or reject an expelled Member at a by-election.⁵⁸

- The argument that the expulsion power is reasonably necessary in cases where a Member has been adjudged guilty of unworthy conduct outside the House is complicated by the fact that the actual use of the power will depend on the political circumstances. This is a different point to the issue of abuse by the forces of partisan politics. The suggestion is that the major parties are likely in many cases to fend off calls for expulsion, using their numbers to defeat an expulsion resolution, thereby minimizing the political damage and embarrassment involved to the party. At the same time a behind the scenes solution to the political problem will be found. The Member may be persuaded to resign, or they may lose party endorsement immediately or at the next election. Either way, the dignity of Parliament will be upheld by means other than the expulsion power. The point to make is that, in similar situations, the expulsion power may or may not be used, depending on the prevailing forces of political circumstance. It may be that expulsion power is only reasonably necessary where a Member cannot be persuaded or pushed to ‘go quietly’, immediately or in the near future. Whether a court would have regard to such considerations of political contingency in deciding on the underlying question of reasonable necessity is another matter.
- An additional factor in the contemporary debate is the implied constitutional freedom of political communication.⁵⁹ A relevant question is whether that implied freedom would ‘trump’ the power of a House of a State Parliament to expel a Member in certain circumstances, where, for example, the NSW Legislative Council sought to expel a member for gross abuse of parliamentary freedom of speech?
- An underlying issue is the extent to which the procedures adopted by the House must conform to the rules of natural justice or procedural fairness – the hearing rule, the bias rule and the no-evidence rule. The question is whether, or to what extent, the relevant parliamentary proceedings are to be reviewed by the courts for this purpose? Conversely, would the courts be excluded by parliamentary privilege from inquiring into proceedings that resulted in a decision to expel a Member? Again, these matters revolve around the legitimate scope of judicial review in this area. The general point to make is that, while the expulsion power is discretionary in nature, it is not to say that it can be exercised without regard to the rules of procedural fairness.⁶⁰

⁵⁸ On the other hand, an expelled member would be eligible to contest the next periodic Council election as an independent.

⁵⁹ *Lange v ABC* (1997) 189 CLR 520.

⁶⁰ *E Campbell*, n 17, at 39.

3.9 Two responses

One response to the argument that the Commonwealth Parliament does not find it necessary to possess a power of expulsion is the suggestion that this state of affairs is unsatisfactory. Take for example the comments on this issue in the 10th edition of *Odgers' Australian Senate Practice*. Whilst noting that the Senate had denied itself the 'protection of expulsion', comment is made on hypothetical situations where expulsion might apply to a member who embarks 'upon highly disruptive behaviour in the House'.⁶¹ The suggestion is that, in the uncertain world of politics, expulsion may still be necessary in some circumstances, as a power of last resort. Note, too, that the powers of the NSW Parliament to discipline Members are not as wide as those of the Commonwealth Parliament. For example, a House of the NSW Parliament cannot fine a Member, or exercise any other form of penal power against one of its Members.

As to the question of the potential for abuse of the expulsion power, in *Armstrong* the Court's response, as formulated by Herron CJ, was twofold. First, it was assumed that the House would not exercise the power 'irresponsibly or capriciously'. Secondly, it was noted that an expulsion could always be appealed to the Supreme Court which has the power 'to declare a resolution for expulsion null and void'.⁶² The power may be discretionary, therefore, but it is not beyond the supervisory jurisdiction of the courts. Another aspect to this is the fact that the use of the expulsion power is sure to be judged in the court of public opinion.

4. EXPULSION IN NSW

Expulsion is a power of last resort. No wonder then that it has only been used in NSW on a handful of occasions, three times in the Legislative Assembly and once in the Legislative Council. To this list might be added the disqualification of TC Trautwein from the Council in 1940. Expulsion resolutions have been moved on other occasions, but they have failed for one reason or another.

4.1 Expulsion in the Legislative Assembly

As noted, Legislative Assembly Standing Order 294 provides for the expulsion of Member as follows:⁶³

A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant.

The provision dates from 1894 when it was inserted into the Legislative Assembly Standing

⁶¹ H Evans (ed), *Odgers' Australian Senate Practice*, 10th edition, Department of the Senate 2001, p 55.

⁶² (1969) 71 SR (NSW) 386 at 397-8.

⁶³ Originally Standing Order 391.

Orders. Both Houses substantially reviewed and amended their Standing Orders at this time, although only the Assembly deemed it necessary to include express reference to expulsion. That inclusion followed two expulsions from the Legislative Assembly, in 1881 and 1890.

4.1.1. *Expulsion of EA Baker:* In 1881 EA Baker was expelled from the Assembly for ‘conduct unworthy of a Member and seriously reflecting upon the honour and dignity of Parliament’.⁶⁴ The conduct in question referred to the misappropriation of funds. Having been granted a mineral lease near Cowra on land which had already been sold by the Crown, Baker was found by a Royal Commission to have received money in compensation ‘under circumstances of concealment and false statement, evidencing a consciousness on [his] part, that such appropriation was unauthorised and unjustifiable’.⁶⁵ Baker was later brought to court but the case was dropped. Following this, the resolution expelling him, which had passed by 71 votes to 2, was rescinded⁶⁶ on the ground that Baker was ‘entitled to the money he had received’.⁶⁷ He was re-elected in 1884 but retired from public life three years later.

In support of the original resolution to expel Baker, Sir Henry Parkes said:

I maintain that the power to expel a member guilty of improper conduct – say of infamous conduct – must be inherent in every Legislature. I then say the way to obtain the power, if any doubt be felt as to the right to it, is to exercise it, and let the Supreme Court be appealed to by the aggrieved parties, and I have no doubt that the highest court in the colony will sustain our action in expelling a member who has been guilty of disgraceful conduct.⁶⁸

4.1.2 *Expulsion and suspension of WP Crick:* On 12 November 1890 WP Crick was found ‘guilty of a contempt of this House’ and expelled. The resolution was moved by Sir Henry Parkes who said that Crick had defied the ruling of the Chair in Committee of the Whole

and afterwards having violently resisted the Serjeant-at-Arms when that officer was directed to remove him, and continued such resistance until other officers rendered assistance, causing a great disorder and scandal.⁶⁹

Although Crick forwarded his resignation to the Speaker while debate on the motion for his expulsion was still in progress, the motion was nonetheless proceeded with and carried by

⁶⁴ NSWPD, 8 November 1881, p 1861.

⁶⁵ B Nairn and G Serle eds, *Australian Dictionary of Biography, 1851-1890 (A-C)*, Melbourne University Press 1969, p 75.

⁶⁶ NSWPD, 1 May 1883, p 1924.

⁶⁷ B Nairn and G Serle eds, n 65, p 75.

⁶⁸ NSWPD, 8 November 1881, p 1853.

⁶⁹ NSWPD, 12 November 1890, p 5188.

63 votes to 10. Of this notorious Member, one of the 'wild men of Sydney', Evatt wrote: 'During his long parliamentary career, Crick was very prominent in disgraceful scenes inside the Chamber, and in fisticuffs within the precincts of the House'.⁷⁰ Indicative of Crick's behaviour was that, when he was called by the Speaker to explain his actions, he entered the Chamber the worse for drink and had to be removed forcibly by the Serjeant-at-Arms, at which time he shouted insults at the Speaker saying he and the Chairman of Committees were 'both a pair of thieves and robbers of the country'. For good measure, Crick added 'There, now, put that in your pipe'.⁷¹

Crick was re-elected in December 1890 and rose to serve as Minister for Lands from 1901 to 1904. In that position he was again embroiled in controversy. Evidence before a Royal Commission set up in 1905 led to him being charged a year later with unlawfully receiving money from various transactions involving Crown lands. Acquitted of that charge, in its subsequent interim report the Royal Commission found Crick had accepted bribes and he was charged with conspiracy. The Speaker ruled that Parliament could not deal with Crick's misconduct while it was before the courts and, further to this, on 19 July 1906 the Assembly approved Standing Order 295, headed 'Crime trial pending'.⁷² Its effect was to allow the House to suspend the Member until the end of the criminal trial. Standing Order 295 provides:

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.

Crick was duly suspended, and the validity of Standing Order 295 was later upheld on appeal by the Privy Council. In his second trial, the jury was unable to agree on a verdict. However, Crick resigned his seat in December 1906 and so could not be expelled. Instead, the Assembly passed a resolution on 11 December that in view of the Royal Commission's findings Crick was 'adjudged guilty of conduct which should render him ineligible to sit as a member of this Assembly'. According to Rydon, Spann and Nelson:

There was much criticism of the Government and Parliament for their failure to deal more severely with Crick. Public meeting protested at the degradation of Parliament and urged an immediate dissolution, and the *Worker* criticized labor members who voted for the suspension of Crick which they considered a Government attempt to save face. The *Sydney Morning Herald* constantly attacked Carruthers for his handling of the scandals and argued that Parliament, as a Superior Court, had a right to deal with its members when they disgraced it. It considered that Parliament had in no way vindicated its honour by the 'harmless' resolution finally passed against Crick....⁷³

⁷⁰ HE Evatt, *Australian Labour Leader: The Story of WA Holman and the Labour Movement*, Angus and Robertson 1940, p 109.

⁷¹ *NSWPD*, 12 November 1890, p 5188.

⁷² Originally Standing Order 394.

⁷³ J Rydon, RN Spann and H Nelson, *NSW Politics, 1901-1917: An electoral and political*

4.1.3 Expulsion of RA Price: The most recent case of expulsion in the Assembly involved a gross abuse of parliamentary freedom of speech. This arose from allegations made in the Assembly by Price on 13 December 1916 and 5 September 1917 against the Minister for Lands and Forests, WG Ashford. A Royal Commission was appointed to investigate the allegations. It concluded that they had been made ‘wantonly and recklessly and without any foundation whatsoever’. It was on this basis that the expulsion resolution was moved and Price was expelled on 17 October 1917 for conduct unworthy of a Member of Parliament and seriously reflecting on the dignity of the House. At the subsequent by-election, less than month later, Price was re-elected to the Assembly.

4.1.4. An unsuccessful expulsion motion – the case of Roger Degen: An example of an unsuccessful expulsion motion is the Opposition’s motion to expel Roger Degen from the Legislative Assembly in 1980, following adverse comments made about the Member in the Woodward Royal Commission into Drug Trafficking. Moving the motion, the Leader of the Opposition, J.M. Mason, said that Justice Woodward had declared Degen to be

a liar, that he lied to high ranking persons about covert adventures, is a consort of criminals, has been used by master criminals whose pernicious trade is drugs, has associations with illegal casinos, participated in covert adventures and deliberately lied and prevaricated to the Royal Commission, and admits to excessive drunkenness.⁷⁴

The motion was defeated along party lines, 58 votes to 30. The one Independent Member of the House, John Hatton, believing Degen should be censured but not expelled, voted against the motion.⁷⁵ Degen was re-elected in 1981 and remained a Member of the Assembly till his retirement in 1984.

4.1.5. An unsuccessful expulsion motion – the case of Brian Langton: A second example is the Opposition motion to expel Brian Langton from the Legislative Assembly in 1998. It followed an ICAC report of the same year into the abuse of MP’s travel entitlements which found that Langton had, while a Shadow Minister, improperly used air travel warrants obtained from six Labor Party colleagues. The report found that there was ‘corrupt conduct’ on Langton’s part and recommended that consideration be given to prosecuting him and expelling him from Parliament.⁷⁶ The expulsion motion was defeated along party lines, 49 votes to 40, with Langton challenging the legality of the ICAC’s findings and warning of instituting proceedings in the Supreme Court.⁷⁷ In the event, Langton resigned as Minister of Fair Trading and Emergency Services and later retired from Parliament at the General

chronicle, NSW Parliamentary Library/Department of Government, University of Sydney, 1996, p 36.

⁷⁴ *NSWPD*, 14 August 1980, p 193.

⁷⁵ *NSWPD*, 14 August 1980, p 242 and p 246.

⁷⁶ ICAC, *Investigation into Parliamentary and Electorate Travel: First Report*, April 1998.

⁷⁷ *NSWPD*, 5 May 1998, p 4379.

Election of March 1999.⁷⁸

4.2 Expulsion in the Legislative Council

4.2.1. *Expulsion of AE Armstrong*: The only expulsion from the Council is of AE Armstrong in 1969. The findings of the Supreme Court in that case have been discussed. By resolution of the House Armstrong was adjudged guilty of ‘conduct unworthy’ of a Member of the Council. This followed ‘judicial strictures’ by Justice Street who had conducted a trial of a matter involving Armstrong and his business associate, Alexander Barton. The strictures were directed at the fact that Armstrong:

- Was a party to an arrangement which he believed to be one to procure false evidence for a court;
- Entertained as a real possibility the bribery of a Supreme Court judge;
- Demonstrated by his documents his views on bribery in general; and
- Would not hesitate if he thought it necessary for his own protection or advantage so to do, to give false evidence.

Armstrong’s career in public life was summed up in the short obituary that appeared in the *Sydney Morning Herald* on 1 May 1985. It started with the statement that one of the State’s ‘most colourful characters’ had died ‘after a lifetime filled with scandal, gossip and intrigue’. Describing Armstrong as a ‘wealthy grazier and company director’, it continued:

In 1952 he was elected as a Liberal member to the NSW Legislative Council. In 1958 he quietly resigned from the Liberal Party and joined the Country Party. He later denied that he had paid a \$30,000 bribe to secure his seat in the Upper House. If he had, it would have been wasted money because in 1969 the Legislative Council made the unprecedented move of expelling Mr Armstrong from the House. The expulsion came after allegations that Mr Armstrong had forced a company director to buy shares held by the MLC. The director, Mr Alexander Barton, claimed he bought the shares because he feared for his life.⁷⁹

The extraordinary circumstances surrounding the Armstrong case, including the involvement of another MLC, SLM Eskill, were set out in 1970 by the President of the Legislative Council, as follows:

The member, Mr Armstrong, was very active in business affairs in the city. He had been a director of a company and a member of a board, and had associated with a gentleman named Mr Barton as a co-director. In the course of their dealings Mr Barton had entered into a contract to do certain things involving the payment to Mr Armstrong of substantial sums of money. Some time before he had done what he had contracted to do, Mr Barton apparently changed his mind and brought an Equity Court action to obtain relief from the

⁷⁸ D. Clune, ‘Political Chronicles – NSW, January to June 1998’ (1998) 44 *Australian Journal of Politics and History* 576 at 577-78.

⁷⁹ ‘Controversial former MP dies’, *The Sydney Morning Herald*, 1 May 1985.

necessity of carrying out the contract into which he had entered. He claimed that he had only signed the contract under duress.

This had nothing to do with Parliament or with Mr Armstrong's position as a member of Parliament. It was during the course of the evidence that things came out which involved Mr Armstrong and threw a smear over his character and status. It was alleged that the man who was the complainant in this action, Mr Barton, through his access to offices which were occupied by directors of the company, including Mr Armstrong, on some occasion when Mr Armstrong was not present, went through Mr Armstrong's papers and extracted information on slips of paper in Mr Armstrong's writing. This information was used by Barton's counsel during the hearing and the main objective of the cross-examination of Mr Armstrong was to discredit him and to influence the court to grant Barton the relief he sought.

Amongst the things found were some ruminations of Mr Armstrong – apparently he had put these down on paper – including whether he ought to bribe a Judge of the Supreme Court. It appeared from what was written on the paper that Mr Armstrong had been entertaining, as a serious possibility, the thought that he should try to bribe a Supreme Court Judge....

The other thing that emerged from the examination of Mr Armstrong's papers was that he had endeavoured or had agreed to co-operate in obtaining false evidence to put before a court which was hearing a divorce case. Strangely, this divorce action concerned one of his parliamentary colleagues, Mr Eskell, MLC, who at the time of the Equity Court proceedings was Leader of the Liberal Party in the Legislative Council and Chairman of Committees. This had nothing to do with Parliament except that it indicated that Mr Armstrong was willing, as the court said, to engage in a course of procuring false evidence to be used in the divorce court. It was just a curious coincidence that the false evidence concerned Mr Eskell's associations with a woman [Mrs Cleary] was to be named as the co-respondent in his divorce case.⁸⁰

On 25 February 1969 the expulsion resolution was moved as a matter of privilege by the Leader of the Government in the Council, JBM Fuller. Mr Armstrong was present in the House and immediately took a point of order that the matter was sub judice, the judgment of Justice Street then being subject to appeal. Following discussion, the President disallowed the point of order and declared the motion in order. The case against Armstrong was then put by Fuller. Armstrong spoke next in his own defence, noting that he had declined an invitation to resign. He was followed by the Leader of the Opposition, RR Downing, who moved an amendment that the matter be referred to a Select Committee. He argued that the Government had moved the motion to save it the embarrassment of any inquiry into the conduct of Eskell. Downing maintained that, like Eskell, Armstrong had committed no offence for which he could be charged and that the Justice Street was at least as derogatory of Eskell's conduct as of Armstrong's.

Responding to Downing, Fuller laid on the Table advice from the Crown Solicitor. The

⁸⁰ Sir H Budd, 'Power of Parliament to expel a member', *3^d Conference of Presiding Officers and Clerks*, Melbourne 1970, p 61. These comments were made in the proceedings following the formal speech.

opinion stated that the evidentiary matter in the brief for opinion did not disclose evidence of conspiracy to abuse or pervert the due course of justice on the part of Armstrong, Eskell or Mrs Cleary (co-respondent in the Eskell divorce case). Fuller said that his charge was not that Armstrong was engaged in a conspiracy to procure false evidence. Rather, it was that he participated in what he believed to be an arrangement to procure false evidence. There may not have been such an arrangement, but he thought there was. That, it seems, was the basis of the Government's different treatment of Armstrong and Eskell.

The House divided and Downing's amendment was lost on division, 29 votes to 28, Armstrong voting with the Opposition. The original motion was then agreed to on the voices.⁸¹

There is no doubt that the expulsion of a Member is an inescapably political process. Armstrong saw his own expulsion in that light, comparing the harsh treatment meted out to him, with the more lenient treatment of the Liberal Party 'insider', Eskell. The Government had administered two kinds of justice, he said: 'One kind was for favourites who preserve the Government's voting strength... The other was for "expendables" like myself, who can be crucified when it suits the Liberal-Country Party Government'.⁸²

4.2.2. An unsuccessful expulsion motion – the case of Franca Arena: On 11 November 1997 the then Attorney General, Hon Jeff Shaw, moved a motion that Hon Franca Arena be expelled on the ground that she had been 'guilty of conduct unworthy of a Member of the Legislative Council'. This expulsion motion arose from a speech given by Mrs Arena in the Legislative Council on 17 September 1997 during debate on the Final Report of the Royal Commission into the NSW Police Service. The speech suggested that certain prominent persons, including the Premier of NSW and the Royal Commissioner, had been involved in meetings or agreements concerning an alleged "cover-up" of names of high-profile paedophiles. On 25 September 1997 the Legislative Council resolved to authorise the Governor to establish a Special Commission of Inquiry to investigate Mrs Arena's claims and the basis on which she had made them. The Special Commission, which reported on 7 November 1997, concluded that Mrs Arena had no evidence to support those claims.

It was following the release of that report that the motion to expel Mrs Arena was moved. In the event, on 12 November 1997, an amendment to that motion resolved that the Legislative Council Standing Committee on Parliamentary Privilege and Ethics investigate and report on what sanctions should be enforced in relation to Mrs Arena's conduct in this matter.

In what amounted to a finding of abuse of privilege, Mrs Arena's conduct was found by the Privileges Committee to have fallen 'below the standards which the House is entitled to expect from its Members' and that it brought 'the House into disrepute'. The

⁸¹ NSWPD, 25 February 1969, p 3858-90.

⁸² 'Eskell: it has all been said', *The Sydney Morning Herald*, 7 March 1969, p 1. Eskell, who was Chairman of Committees of the Whole House, was removed from office, but no further action was taken against him.

recommendation was that the House pass a resolution to this effect and further calling on Mrs Arena to make a written apology to named persons, plus a withdrawal of the allegations made against them, within 5 sitting days after the passing of the proposed Resolution. The apology was to be read by Mrs Arena in the House and published in the Minutes of Proceedings. It was to be in the following terms:

I hereby withdraw the allegations made in my speech to the House on 17 Sept 1997, which involved imputations against Mr Carr, Mr Collins, Mr Justice Wood, Mr Della Bosca and Mr Sheahan, of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

I hereby apologise to the House and to those people for making those imputations.

Furthermore, failure to submit an apology and withdrawal by the time required would, under the resolution proposed by the Committee, result in the suspension of Mrs Arena from the services of the House until such formal apology and withdrawal was made.

A resolution to this effect was subsequently passed by the Legislative Council on 1 July 1998. That same day the expulsion motion was withdrawn. On 16 September 1998 Mrs Arena moved an apology in amended terms. She explained she could not apologise in the terms required by the Standing Committee for two reasons:

First, I could not make an apology for imputations of criminal conspiracy because I never made such imputations. Such an apology would require me to mislead the House. Second, because of advice given by my barrister...I believe that there is a real doubt whether the House had the implied power to suspend a member from the service of the House until tendering of an apology in terms specified by the House.⁸³

The House agreed to accept a 'statement of regret' from Mrs Arena in place of the apology.

In the Arena case (as in the Assembly expulsion of RA Price in 1917) the decision of the House to take action against a Member for statements made under parliamentary privilege followed findings by an external inquiry that the Member's statements were unfounded. Whether the exercise of the expulsion power in cases of gross abuse of parliamentary freedom of speech would be subject to the implied freedom of political communication under the Australian Constitution remains to be decided.

4.2.3. Disqualification of TC Trautwein: In 1940 the Legislative Council sought advice from the Court of Disputed Returns as to whether a Member convicted of making false representations orally and in writing to the Tax Commissioner had been convicted of an 'infamous crime'.⁸⁴ That Member was TC Trautwein, elected to the Council in 1933, and

⁸³ NSWPD, 16 September 1998, p 7457.

⁸⁴ The case for sending the matter to the Court of Disputed Returns was made out by Sir Henry Manning. When asked, 'Is there any definition of "infamous crime"', Manning replied: 'No. The question of infamous crime is a matter purely of law. It is not a question of fact, and, therefore, it is not a question which could be dealt with by this House': NSWPD, 23 May 1940, p 8685.

the only Member of the NSW Parliament to be disqualified under what is now section 13A(1)(e) of the *Constitution Act 1902*. That section provides:

If a Member of either House of Parliament:

.....

(e) *is convicted of an infamous crime*, or an offence punishable by imprisonment for life or for a term of 5 years or more, and is the subject of the operation of subsection (2), his seat as a Member of that House shall thereby become vacant.

While this is not an expulsion case, the Court's discussion of the term 'infamous crime' suggests an underlying connection between the expulsion power and for this basis for disqualification. It was explained by Maxwell J that 'infamous crime' was an old common law term that would make a person unable to testify in court. The rationale underlying this exclusion of witnesses was that persons who stood convicted of serious crimes 'could not be trusted to speak the truth'.⁸⁵ Although 'infamous crime' was not defined, it was taken to be a crime reflecting adversely upon a person's moral character and trustworthiness, such as fraud or perjury. This was found to apply to Trautwein, whose offence was found by Maxwell J to be 'analogous to the crime of forgery'. Maxwell J concluded:

The offence proved is properly described in the language of the cases which founded the Common Law doctrine as 'contrary to the faith credit and trust of mankind'. It is for this reason an infamous crime.⁸⁶

This view of 'infamous crime', as a test of moral worthiness, was adopted by the Committee on the ICAC in its 1998 inquiry into section 13A of the *Constitution Act*. Based on the judgment of Maxwell J, the Committee commented that 'The infamy of a crime did not stem from the punishment given but from its reflection on a person's ability to testify'.⁸⁷

As to the connection to be made between the 'infamous crime' ground for disqualification and the expulsion power, the ICAC itself commented in its 1998 investigation into parliamentary and electorate travel:

If the conduct of a Member involves dishonesty 'contrary to the faith credit and trust of mankind', be it in the course of performance of parliamentary functions or otherwise, then there is precedent for a House of Parliament to expel the Member. This is the effect of the decision in *re Trautwein*... and the authorities referred to in it. Furthermore, Members have been expelled from the House of Commons for fraud, breach of trust, perjury and a series of other wrongdoings.

In the case of section 13A the operation of the disqualification regime is automatic, in the

⁸⁵ *In re Reference by the Legislative Council (NSW), In re Trautwein* (1940) 40 SR (NSW) 371 at 375.

⁸⁶ *In re Reference by the Legislative Council (NSW), In re Trautwein* (1940) 40 SR (NSW) 371 at 380.

⁸⁷ Parliament of NSW, Committee on the ICAC, *Inquiry into Section 13A Constitution Act 1902*, 1998, p 20.

sense that a Member found to have committed an ‘infamous crime’ would automatically vacate their seat. In the case of expulsion, on the other hand, any consequences flowing from unworthy conduct, involving dishonesty ‘contrary to the faith credit and trust of mankind’, would be for the House to decide.

4.2.4. Disqualification on the ground of ‘infamous crime’ – an historical note: On a point of legal history, Maxwell J stated that, while the exclusion of witnesses was abolished in England in 1843, the same test was introduced by statute for the disqualification of a juror by *Juries Act*, 33 and 34 Vic, c 77, s 10. From there, he says, the expression ‘infamous crime’ found its way on to the NSW Statute Book in the Constitution Bill of 1855 (sections 5 and 26). His argument was that the NSW Parliament introduced the expression into the statute law of this jurisdiction based on the law of England. In particular, in respect to the question of statutory interpretation, he was of the opinion that

the Legislature must be taken to have used the expression in the sense it bore in the judgments at common law prior to 1843.⁸⁸

In fact the history of the competence of those convicted of criminal offences as witnesses is peculiarly complex in NSW. In the context of the convict colony of pre-1840 it was recognised that the courts had to find legal answers suitable to local peculiarities. The difficulty was that, by this time, all felonies had come to be treated as infamous crimes for the purpose of the exclusion rule and, further to this, lifelong testimonial incompetence applied to all those convicted of such crimes. The difficulty this created for the administration of justice in a penal colony is obvious enough. According to GD Woods:

If the rule against accepting the evidence of the infamous were to have been actually applied in early New South Wales, it would have been practically impossible for the courts to have operated – more than half of the potential witnesses in the colony would have been ruled out of court.⁸⁹

For this reason, in the earliest years of the colony the ‘infamy’ rule was ignored or by-passed, until that is the *NSW Act* of 1823 establishing an independent Supreme Court was passed and Chief Justice Forbes arrived in the colony determined to take a more literal view of rules applying to the competence of witnesses. Against this literal view stood a more flexible interpretation associated with Justice Dowling, to the effect that English law should apply only ‘so far as the same can be applied within the Colony’. Woods comments:

The attempt during the 1820s to apply the strict letter of the attainer-infamy rule in the colonial criminal courts failed. Dowling’s eminently practical approach prevailed. The result was that the infamous could be and were heard as witnesses in NSW, subject to their assessment by the jury in the light of stringent judicial directions, and sometimes after

⁸⁸ *In re Reference by the Legislative Council (NSW), In re Trautwein* (1940) 40 SR (NSW) 371 at 376.

⁸⁹ GD Woods, *A History of Criminal Law in NSW: The Colonial Period 1788-1900*, The Federation Press 2002, p 99.

direct evidence by defence witnesses that they would not believe a particular prosecution witness on his oath.⁹⁰

What is more, it was this pragmatic approach associated with Dowling that was enacted by statute in 1843-44 both in England and NSW. In other words, the abolition of the witness exclusion rule in England in 1843 reflected settled practice in NSW where moral turpitude was rejected as a categorical objection to testimonial competence.

It is doubtful that any of this would disturb the understanding of ‘infamous crime’ arrived at by Maxwell J in *re Trautwein*. Although felonies were treated as infamous crimes for the purpose of the ‘infamy rule’, that is not to say that the categories of ‘felony’ and ‘infamous crime’ were treated as coterminous by the law. That a distinction between the two remained is suggested by the disqualification provision for the first partially elected Australian legislature, the NSW Legislative Council of 1843. That Council was constituted under the Imperial Australian Constitution Act of 1842 which provided for disqualification on several grounds, including that a Member ‘be convicted of Felony or any infamous Crime’ (5 and 6 Vic c 76, s 16). That provision remains a template for the current section 13A of the *Constitution Act 1902*.

As noted in the 1998 Committee on the ICAC report, ‘infamous crime’ has a defined meaning for the purpose of sections 101-4 of the *Crimes Act 1900*, but this is not relevant to its common law meaning as used in section 13A of the *Constitution Act*. Instead, the statutory definition found in section 104 of the *Crimes Act* reflects the definition of abominable crimes (bestiality etc) under the *Larceny Act 1861* (UK).

4.2.5. Disqualification under section 13A: Instances of Members’ seats being vacated by section 13A or its equivalent in earlier forms of the Constitution Act were set out in the 1998 Committee on the ICAC report as follows:⁹¹

Seats Vacated by Operation of section 13A (or predecessors)*

	Legislative Council		Legislative Assembly	
	Incidents	Most recent	Incidents	Most recent
(a) absence	12	1925	3	1925
(b) foreign allegiance	-	-	-	-
(c) bankrupt	1	1932	7	1931
(d) public defaulter	-	-	-	-
(e) conviction	1	1940	-	-
Total	14		10	

* This table does not include Members who resigned in circumstances likely to attract the operation of s 13A, such as Sir Henry Parkes who resigned twice because of insolvency.

⁹⁰ GD Woods, n 89, p 109.

⁹¹ Committee on the ICAC, n 87, p 4.

5. EXPULSION IN OTHER JURISDICTIONS

5.1. Other Australian States

For the Houses of Westminster Parliament the power of expulsion is unrestricted. The same might be said, subject perhaps to the implied constitutional freedom of political communication under the Australian Constitution, of the Houses of the Queensland, South Australian, Victorian and Western Australian Parliaments.⁹² All these define their power and privileges by reference to the House of Commons, although the date of reference varies – as at 1901 for Queensland, 1856 for South Australia, 1855 for Victoria and ‘for the time being’ in the case of Western Australia. On the other hand, the expulsion power is available to the Houses of the Tasmanian Parliament, only for the purpose of self-protection.⁹³

No Members have been expelled from the Queensland, Tasmanian, South Australian or Western Australian Parliaments.

There have been at least 5 expulsions from the Victorian Parliament, all from the Legislative Assembly.⁹⁴ The first occurred in 1861 when Patrick Costello was expelled from the Assembly on grounds of electoral fraud (specifically the misdemeanour of ‘personation’).⁹⁵ Although a jury had found Costello guilty, technically his expulsion occurred before the Supreme Court had delivered its final decision. That was a matter of some concern to several Members who spoke to the resolution. After a lengthy debate, however, the resolution to expel Costello, as ‘unworthy and unfit to continue as a member of this House’, was carried without a division.⁹⁶

Two further expulsions occurred in 1869, those of James Butters MLA and Charles Edwin Jones MLA. According to Professor Campbell:

Receipt or solicitation of money or other reward in consideration for their votes in Parliament is regarded as even more reprehensible conduct on the part of members and conduct meriting not only expulsion but criminal sanctions. In 1869 the Legislative Assembly in Victoria investigated the conduct of a number of members accused of corruption. One member was expelled for accepting bribes, another for offering bribes and

⁹² *Constitution Act 2001* (Qld), section 9; *Constitution Act 1934* (SA), section 38; *Constitution Act 1975* (Vic), section 19; and *Parliamentary Privileges Act 1891* (WA), section 1.

⁹³ *Parliamentary Privilege Act 1858* (Tas), section 12.

⁹⁴ R Wright, *A People's Counsel: A History of the Parliament of Victoria, 1856-1990*, Oxford University Press 1992, p 65. There is some doubt as to whether the 1857 case of William Kaye MLC was one of expulsion or disqualification. While Wright says the former, the Victorian MPs Biographical Database says Kaye was disqualified under the Election Act.

⁹⁵ R Wright, n 94, p 65.

⁹⁶ *VPD*, 1 November 1861, p 254.

other advantages to members for promoting a bill then before Parliament, though in his case the offence was committed before his election.⁹⁷

Influential in the debate concerning the expulsion of EA Baker from the NSW Legislative Assembly in 1881 was the recent exercise by the Victorian Parliament of its expulsion power. The reference was to the expulsion in 1876 of Charles McKean from the Legislative Assembly for a breach of the privileges of the House. According to Sir Henry Parkes, McKean was found to have slandered the Assembly, by claiming among other things that Members came into the House 'staggering drunk'.⁹⁸ McKean's derogatory comments were made outside the House (in the Collingwood Police Court) and reported in the press.⁹⁹ A Select Committee was established to investigate the matter and its report was read to the House. Before being required to withdraw from the Chamber, McKean was given the opportunity to explain his actions and to apologise to the House. The motion to expel him was passed without a division.

Wright also refers to the expulsion in 1901 of Edward Findley from the Victorian Legislative Assembly for seditious libel. Findley had published an article attacking King Edward VII in the Labor newspaper *Tocsin* and was expelled for conduct discreditable to the House. This was despite the fact that he was not the author of the article and disclaimed personal responsibility for its publication. Campbell explains:

The article in question appeared in a newspaper of which Findley was the printer and publisher and reproduced passages from an issue of the *Irish People* which the Chief Secretary of Ireland had ordered to be seized. One of the reasons for reproducing the offending extracts seems to have been to show that the Chief Secretary's action was unnecessary.¹⁰⁰

According to Wright, the author of the article was in fact a Member of the British House of Commons and, although that House had responded by confiscating all extant copies of the offending *Irish People*, it had not expelled the author.¹⁰¹

⁹⁷ E Campbell, n 17, p 21.

⁹⁸ *VPD*, 27 July 1876, p 186; *NSWPD*, 8 November 1881, p 1826.

⁹⁹ The reports in the *Argus* and the *Evening Herald* were read out in the House. It seems McKean was appearing for a client in a case during the course of which the magistrate suggested that the Legislature should change a relevant law. At this McKean said, 'Call such a drunk and immoral lot of individuals legislators? Why, the lowest in Collingwood are not so near so bad as they': *VPD*, 26 July 1976, p 153.

¹⁰⁰ E Campbell, n 17, p 21.

¹⁰¹ R Wright, n 95, pp 144-5. Wright reprints relevant sections from the article which described the King as an 'old and bald-headed roue', and as 'the old and worn out descendant of a race of scoundrels and practical professors of hideous immorality...this unutterably abominable person'.

5.2. Commonwealth of Australia

At the Commonwealth level the expulsion power has been abolished,¹⁰² as it has for the legislatures of the ACT and the Northern Territory. The only instance of its exercise at the Commonwealth level was the 1920 case of Hugh Mahon who was expelled from the House of Representatives. Along similar lines to the Victorian case of Edward Findley, Mahon was charged with having made ‘seditious and disloyal utterances’ which were ‘inconsistent with the oath of allegiance’ he had taken as a Member. Mahon had spoken at a meeting at which motions were passed censuring British actions in Ireland and advocating the establishment of an Australian republic.

This use of the expulsion power was reviewed in the 1984 report of the Joint Select Committee on Parliamentary Privilege. The Committee considered that the disqualification provisions under the Australian Constitution were sufficient, but also recognised the dangers of the abuse of the expulsion power by a partisan vote.

This danger can never be eradicated and the fact that the only case in federal history when the power to expel was exercised is a case when, we think, the power was demonstrably misused is a compelling argument for its abolition. But the argument for abolition of the power to expel does not depend simply on the great potential for abuse and the harm such abuse can occasion. There are other considerations. Firstly, there are the detailed provisions in the Constitution. In short, we already have something approaching a statutory code of disqualification. Secondly, it is the electors in a constituency or in a State who decide on representation. In principle, we think it wrong that the institution to which the person has been elected should be able to reverse the decision of his constituents. If expelled he may stand for re-election but, as we have said, the damage occasioned by his expulsion may render his prospects of re-election negligible. Thirdly, the Houses still retain the wide powers to discipline Members. Members guilty of a breach of privilege or other contempt may be committed, or fined... These sanctions seem drastic enough. They may also be suspended or censured by their House.¹⁰³

5.3. British House of Commons

In the context of the Westminster Parliament, the expulsion power is an incident of the right of the House of Commons to regulate its own affair, arising from the fact that the House is invested with the exclusive power of regulating its own procedure and adjudging matters which arise within its walls. The leading case on the right of the House of Commons to be the sole judge of the lawfulness of its own proceedings is *Bradlaugh v Gosset* which upheld the exclusive jurisdiction of the Commons in matters found to relate to the management of the internal proceedings of the House.¹⁰⁴

¹⁰² *Parliamentary Privileges Act 1987* (Cth), section 8.

¹⁰³ The Parliament of the Commonwealth of Australia, *Final Report of the Joint Select Committee on Parliamentary Privilege*, October 1984, Recommendation 25, p 8.

¹⁰⁴ The case related to the exclusion of Charles Bradlaugh from the House. An atheist, Bradlaugh was not permitted to take the oath as required under the *Parliamentary Oaths Act 1866* on being elected to the House. He was held to have disturbed the proceedings of the House by attempting to administer the oath to himself, for which conduct he was, by

According to the 5th edition of Sir William Anson's classic text on constitutional law,

expulsion is a matter which concerns the House itself and its composition, and amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House of Commons.¹⁰⁵

Similarly, the 2nd edition of the standard work by Griffith and Ryle on parliamentary law and practice comments:

Expulsion is the ultimate sanction against a Member. It is an outstanding demonstration of the House's power to regulate its own proceedings, even its composition. The expulsion of a Member cannot be challenged. It may best be understood as a means available to the House to rid itself of those it finds unfit for membership, rather than as a punishment.¹⁰⁶

This reflects the authoritative statement of the law in the 22nd edition of *Erskine May*, published in 1997:

The expulsion by the House of Commons of one of its Members may be regarded as an example of the House's power to regulate its own constitution, though it is treated here as one of the methods of punishment at the disposal of the House. Members have been expelled for a wide variety of causes.¹⁰⁷

These are defined to include: (a) being guilty of certain criminal offences such as forgery, perjury, fraud or breach of trust, conspiracy to defraud, misappropriation of public money, and corruption either in the administration of justice or in public office; (b) having misconducted themselves in the exercise of their duties as Members of the House; (c) and being guilty of contempts, libels, or other offences against the House.

Erskine May continues:

Members have been expelled who have fled from justice, without any conviction or judgment recorded against them. Where Members have been legally convicted of offences which may incline the House to consider their expulsion, the record of their conviction has been laid

order, excluded from the Commons.

¹⁰⁵ W.A. Anson, *The Law and Custom of the Constitution, Volume 1*, 5th edition, The Clarendon Press 1922, p 188.

¹⁰⁶ R Blackburn and A Kennon, *Griffith and Ryle on Parliament: Functions, Practice and Procedures*, 2nd edition, Sweet and Maxwell, 2003, p 136.

¹⁰⁷ Sir D Limon and WR McKay eds, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, Butterworths, 1997, p 141.

before the House. In other cases the proceedings have been founded upon reports of commissions or committees of the House or other sufficient evidence....

Expulsion, though it vacates the seat of a Member and a new writ is immediately issued, does not create any disability to serve again in the House of Commons, if re-elected.¹⁰⁸

While expulsion continues to be regarded by the House of Commons as a sanction at its disposal, it is rarely used nowadays. In the 20th century only three cases of expulsion were recorded. Horatio Bottomley was expelled in 1922, after being convicted of fraudulent conversion of property and sentenced to 7 years imprisonment. Garry Allighan was expelled in 1947 for lying to a committee and a gross contempt of the House after publication of an article accusing Members of insobriety and of taking fees or bribes for the supply of information. Peter Baker was expelled in 1954 after being sentenced to 7 years imprisonment for forgery.¹⁰⁹ Baker was expelled despite the fact that his sentence disqualified him from continuing to sit. The vote probably had no legal effect.¹¹⁰ Of these three, only in the Allighan case was a Member expelled for an offence against the House.

The misdemeanours for which Members of the House of Commons have been expelled have mainly involved some element of dishonesty, although not necessarily in the performance of public functions or duties. Further to this, Professor Campbell commented, 'Most of these cases would be comprehended by a standing disqualification for conviction of an infamous crime'. This suggests that, historically at least, expulsion has sometimes been used in cases where there ought to be a standing statutory disqualification from being a member.¹¹¹

5.4. United States Congress

Section 5 of Article 1 of the US Constitution provides in part that:

Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two thirds, expel a member.

This power of expulsion is not justiciable in the US.¹¹² *Mason's Manual of Legislative Procedure* writes in this respect, confirming the decision in *French v Senate*, 146 Cal 604 (1905):

¹⁰⁸ Erskine May, n 107, pp 141-2.

¹⁰⁹ Parliament of NSW, Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the Conduct of the Hon Franca Arena*, Report No 6, June 1998, p 55.

¹¹⁰ UK Parliament, Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, Session 1998-99, HL Paper 43-1, HC 214-1, p 74 (Fn 276).

¹¹¹ E Campbell, n 17, p 20.

¹¹² Section 5 of Article 1 also states that 'Each House shall be the judge of the elections, returns and qualifications of its members'.

There is no authority for courts to control, direct, supervise or forbid the exercise by either house of the power to expel a member. These powers are functions of the legislative department, and therefore in the exercise of the power thus committed to it, the house is supreme.¹¹³

Likewise, *Jefferson's Manual and Rules of the House of Representatives of the US Ninety-Sixth Congress* states:

It has been held that the power of the House to expel one of its members is unlimited; a matter purely of discretion to be exercised by a two-thirds vote, from which there is no appeal.¹¹⁴

As early as 1807, John Quincy Adams argued that the Senate's power of expulsion was indeed without limitation:

When a man, whom his fellow-citizens have honored with their confidence, on the pledge of a spotless reputation, has degraded himself by the commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member; which should have no remedy of amputation to apply until the poison has reached the heart.¹¹⁵

Broad as the power of expulsion may be, its exercise is limited. In fact, except for expulsions of southerners loyal to the Confederacy during the Civil War, Congress has rarely used its power to remove a member for misconduct. The power was first used in 1797 when the Senate expelled William Blount of Tennessee for inciting two Indian tribes to attack Spanish Florida and Louisiana. The subsequent history of the expulsion power has been encapsulated as follows:

During the Civil war fourteen senators and three representatives were expelled. On a single day, July 11, 1861, the Senate expelled ten southerners for failure to appear in their seats and for participation in secession from the Union. One of the ten expulsions was rescinded after the expelled member's death.

From the Civil War through 1998, formal expulsion proceedings were instituted eleven times in the Senate and fourteen times in the House. Only once during that time, however, was a member actually expelled. That one member was Rep. Michael J 'Ozzie' Myers, a Democrat from Pennsylvania. The House voted in 1980 to expel Myers after he was

¹¹³ *Mason's Manual of Legislative Procedure*, 1989, p 394. It is also said that, 'A legislative house, in a proceeding to expel a member, has power to adopt any procedure, and to change it at any time without notice. There is no constitutional provision giving persons who have been expelled the right to have a trial and opportunity to be heard in the house'.

¹¹⁴ WH Brown, *Jefferson's Manual and Rules of the House of Representatives of the US Ninety-Sixth Congress*, US Government Printing Office 1979, p 27.

¹¹⁵ Adams quoted in R Luce, *Legislative Assemblies: Their Framework, Make-up, Character, Characteristics, Habits and Manners*, Houghton Mifflin Co 1924, p 285.

caught in the Abscam Scandal, a sting operation conducted by the FBI. Myers, who had accepted money from an FBI agent posing as an Arab sheik, was the first member of Congress ever expelled for corruption...

In most other cases the House shied away from expulsion and instead opted for a lesser form of punishment. Eleven of the House expulsion cases resulted in censure or reprimand. Several members have resigned to avoid expulsion proceedings. Among them was Mario Biaggi, a New York Democrat who was twice convicted on criminal charges that included accepting bribes. Biaggi resigned in 1988 to avoid near certain expulsion from the House.

The Senate Committee on Ethics in 1982 recommended the expulsion of New Jersey Democrat Harrison A Williams Jr., another Abscam target. Senate floor debate had already begun by the time Williams, realizing that a vote to expel him was likely, announced his resignation. In 1995 Republican Senator Bob Peckwood of Oregon resigned after the ethics panel recommended his expulsion on charges of sexual harassment and other misconduct.¹¹⁶

Cases of expulsion in the US Congress are set out at Appendix B. The Senate's record shows that, as at 1995, it had considered expulsion on charges including corruption, disloyalty, or embezzlement. The record also shows that, after investigation, many of these members were cleared. As to the relationship between criminal charges and expulsion, Butler and Wolff comment in respect to the US Senate:

Ten senators have been indicted while in office, but only three were convicted (the conviction of one other was later overturned by the Supreme Court). In such instances, the Senate continued to act independently of the courts, sometimes exonerating senators before their cases came to trial...Because of the severity of the punishment in expulsion cases, however, the Senate usually waited for the courts to act and only considered expelling those who were actually convicted, even though the body recognised that its members could be held to a higher standard than obedience to the law. In at least one instance...the Senate even waited for the appeal process to be completed before preparing the move against the individual. In fact, the Supreme Court's 1906 decision upholding the conviction in that case specifically stated that conviction 'did not operate, ipso facto, to vacate the seat of the convicted Senator nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment' (*Burton v United States*, 202 US 344). In other words, it remained the Senate's duty to carry out its own discipline of the erring member, quite apart from any sentence imposed by the courts. Two of the senators whose convictions were not overturned chose to resign before the body could act on expulsion.¹¹⁷

The last case of this kind was that of Harrison A Williams Jr (noted above) from 1982. Of that case Butler and Wolff comment:

¹¹⁶ DR Tarr and A O'Connor eds, *Congress A to Z*, 3rd edition, Fitzroy Dearborn Publishers 1999, p 119.

¹¹⁷ AM Butler and W Wolff, *United States Senate Election, Expulsion and Censure Cases, 1793-1990*, Government Printing Office 1995, p xxix.

The Senate was careful to take no action against Williams until the legal process had run its course, in order not to prejudice the case. Once he had been convicted and sentenced, however, the body was prepared to move against him. Committee member made clear during the debate that, even if Williams had not been convicted, the Senate would have every right to conduct its own review of his behavior to determine whether he had violated any Senate rules.¹¹⁸

5.5. United States – State legislatures

The expulsion power of the US Congress is an instance of where the makers of the US Constitution followed already established practice in the former colonies. As explained by Robert Luce, the history of exclusion and expulsion in the US started with its first legislature, the Virginia House of Burgesses that met in 1619. According to Luce, in 1658 it was enacted that

persons guilty of ‘odious sinnes of drunkennesse, blasphemous swearing and cursing, scandalous living in adultery and ffornication’, besides being fined were to be held incapable of being witnesses or of holding any public office.¹¹⁹

Luce traces the history of US State expulsion cases from that point to the early 20th century, noting along the way that ‘Congress has been more lenient than many State Legislatures in the matter of expulsion’.¹²⁰ Discussed in detail was the expulsion of five socialist members of the New York Assembly in 1920, an episode Luce describes as ‘unfortunate’. Their expulsion was on the ground that Socialist Party members were so disloyal and traitorous that their oaths to support the Constitution could only be treated as a cloak for treachery.¹²¹

As to the present arrangements, *Mason’s Manual of Legislative Procedure* writes that ‘Most state constitutions provide that each house, with the concurrence of two-thirds of all the members elected, may expel a member’.¹²²

5.6. New Zealand

The New Zealand House of Representatives has never exercised its expulsion power. Indeed, its very existence has been doubted. The House refrained from proceeding with one motion to expel a member before the *Parliamentary Privileges Act 1865* was enacted, on the ground that the House possessed no such power, and in 1877 the Speaker denied that the House had such a power.¹²³

¹¹⁸ AM Butler and W Wolff, n 117, p 437.

¹¹⁹ R Luce, n 115, p 277.

¹²⁰ R Luce, n 115, p 287.

¹²¹ R Luce, n 115, p 291.

¹²² *Mason’s Manual of Legislative Procedure*, 1989, pp 393-4.

¹²³ D McGee, *Parliamentary Practice in New Zealand*, 2nd edition, 1994, pp 509-10.

The situation has been reviewed on a number of occasions. In 1989 the Standing Orders Committee recommended that this doubtful power be abolished.¹²⁴ In 1994 the Parliamentary Privileges Bill proposed the same course of action (clause 12(3)). The Explanatory Note to the Bill commented:

In modern democratic conditions it is intolerable for any lingering doubt to remain as to whether a member of Parliament could be expelled as the pleasure of the House of Representatives. It is suggested that that issue be put beyond doubt by a specific statutory provision.

In its 1999 report on the Parliamentary Privileges Bill, the Standing Orders Committee recommended:

The abolition of the House's power to expel members (if it exists, which is not certain) was recommended in 1989. It is supported by the committee and should be included in the future legislation that the committee recommends.¹²⁵

5.7. Canada

Part of the difficulty with comparing expulsion in Australian and overseas jurisdictions is that often the constitutional disqualification regimes found here are not in place elsewhere. For this reason, some instances of expulsions from overseas Parliaments would more readily be dealt with by disqualification in any Australian jurisdiction.

Canada is a case in point. The powers and privileges of Canada's national and provincial Parliaments are on a legislative basis.¹²⁶ As such, their power to expel a Member is beyond doubt. As for disqualification, this is dealt with by statute in some cases but not in others. In Marleau's *House of Commons Procedure and Practice* it is explained that:

Once a person is elected to the House of Commons, there are no constitutional provisions and few statutory provisions for removal of that Member from office. The statutory provisions rendering a Member ineligible to sit or vote do not automatically cause the seat of that Member to become vacant. Indeed, the laying of a criminal charge against a Member has no effect on his or her eligibility to remain in office... Even if convicted of an indictable offence, a formal resolution of the House is still required to unseat a Member.¹²⁷

¹²⁴ New Zealand Law Commission, *The Law of Parliamentary Privilege in New Zealand: A Reference Paper*, Miscellaneous Paper 5, 1996, p 19.

¹²⁵ New Zealand House of Representatives, Standing Orders Committee, *Report on the Parliamentary Privileges Bill*, 1999, p 7. To date, no action has been taken on this recommendation.

¹²⁶ The relevant statutory law is reviewed in A Heard, 'The expulsion and disqualification of legislators: parliamentary privilege and the Charter of Rights' (1995) 18 *The Dalhousie Law Journal* 380 at 401-2.

¹²⁷ R Marleau and C Montpetit, *House of Commons Procedure and Practice*, 2000, pp 205-7.

It is said that, since Confederation, there have been four cases where Members of the House of Commons were expelled for having committed serious offences. Three cases involved criminal convictions: Louis Reil was expelled twice, in 1874 and 1875 for being a fugitive from justice; and Fred Rose was expelled after been found guilty of conspiracy under the *Official Secrets Act*. The fourth Canadian expulsion was in 1891 when Thomas McGreevy was expelled after been found guilty of contempt of the authority of the House. McGreevy had refused to answer questions put to him by the select committee established to inquire into allegations of corruption.

At the provincial level, there was an expulsion case in Nova Scotia in 1986 when Billy Joe MacLean was convicted of forging documents to claim \$22,000 from the House of Assembly.¹²⁸ The Nova Scotia Supreme Court upheld the House's power to expel a Member by resolution.¹²⁹ It also held that the establishment and enforcement of proper standards for Members of the House was not a breach of section 3 of the *Canadian Charter of Rights and Freedoms*.¹³⁰

The expulsion power of the Canadian Parliaments was reviewed by the Supreme Court of Canada in the 1996 case of Fred Harvey. He was expelled from the New Brunswick Legislative Assembly, after he had been convicted of an illegal practice under the *Election Act*. Further to this, Harvey was disqualified under section 119(c) of that Act from seeking re-election for a period of 5 years. In effect, it was the validity of this disqualification, not Harvey's expulsion that was decided by the Supreme Court. In their discussion of parliamentary privilege, Justices L'Heureux-Dube and McLachlin observed:

The authorities establish that expulsion from the legislature of members deemed unfit is a proper exercise of parliamentary privilege...Expulsion may be justified on two grounds: to enforce discipline within the House; and to remove those whose behaviour has made them unfit to remain as members...Both objectives are important. With respect to the latter, Heard points out that within the past decade, 'at least eighteen Canadian legislators were convicted of criminal offences, including sexual assault, assault (on a wife), and murder; while most resigned, a few hung doggedly on until they were expelled by their assembly or defeated at the polls'. He adds: 'No legislature can be venerated as an institution of governance if it is populated with such unsavoury characters. Indeed, some would add that the civic virtue of a society requires the removal from public office of the corrupt, criminal, and profoundly immoral'.

¹²⁸ A Heard, 'The expulsion and disqualification of legislators: parliamentary privilege and the Charter of Rights' (1995) 18 *The Dalhousie Law Journal* 380 at 381.

¹²⁹ R Marleau and C Montpetit, n 127, p 206, Fn 367; *MacLean v Nova Scotia* (1987) 35 DLR (4th) 306 (NSSC).

¹³⁰ Section 3 of the Charter provides: 'Every citizen has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein'.

Justices L'Heureux-Dube and McLachlin continued:

The right of expulsion on these two grounds -- discipline and unfit behaviour -- is a matter of parliamentary privilege and is not subject to judicial review...The absence of judicial review where a legitimate ground of expulsion is established may be interpreted as a recognition that a broad and unfettered right to expel members, free from judicial interference and the uncertainty, conflict, and delay that such interference might engender, is necessary to the proper functioning of democracy. Indeed, the need for dignity and efficiency in the House has long been accepted as requiring nothing less. The history of the struggle for parliamentary privilege supports this conclusion...The point is not that the legislature is always right. The point is rather that the legislature is in at least as good a position as the courts, and often in a better position, to decide what it requires to function effectively. In these circumstances, a dispute in the courts about the propriety of the legislative body's decision, with the delays and uncertainties that such disputes inevitably impose on the conduct of legislative business, is unjustified.

They concluded:

It is thus clear that had the New Brunswick legislature simply expelled Mr. Harvey, that decision would fall squarely within its parliamentary privilege and the courts would have no power to review it.¹³¹

¹³¹ *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 – <http://www.canlii.org/ca/cas/scc/1996/1996scc77.html>

6. CONCLUSION

With the possible exception of the New Zealand House of Representatives, for those jurisdictions reviewed in this paper expulsion is considered an undoubted inherent power of a legislative assembly. The 1964 edition of *Erskine May*, current at the time of the *Armstrong* case, commented that for the British House of Commons:

The purpose of expulsion is not so much disciplinary as remedial, no so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution.¹³²

In NSW the expulsion power is on a common law footing. It is to be implied by reasonable necessity and, as such, can only be exercised for a self-protective and defensive purpose. The expulsion of 'unworthy' members is an example of the power of a House of Parliament to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of Parliament. It is an ultimate sanction that is rarely used.

¹³²

Erskine May's Treatise on The Law, Privileges Proceedings and Usage of Parliament, 17th edition, Butterworth and Co 1964, p 105.

APPENDIX A – Sections 8 and 9 of the ICAC Act 1988 (NSW)

ICAC Act 1988 (NSW)

8 General nature of corrupt conduct

(1) Corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
- (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
- (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
- (b) bribery,
- (c) blackmail,
- (d) obtaining or offering secret commissions,
- (e) fraud,
- (f) theft,
- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,

- (k) election fraud,
 - (l) reating,
 - (m) tax evasion,
 - (n) revenue evasion,
 - (o) currency violations,
 - (p) illegal drug dealings,
 - (q) illegal gambling,
 - (r) obtaining financial benefit by vice engaged in by others,
 - (s) bankruptcy and company violations,
 - (t) harbouring criminals,
 - (u) forgery,
 - (v) treason or other offences against the Sovereign,
 - (w) homicide or violence,
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:
- (a) matters arising in the State or matters arising under the law of the State, or
 - (b) matters arising outside the State or outside Australia or matters arising under the law of

the Commonwealth or under any other law.

- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

9 Limitation on nature of corrupt conduct

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
- (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section:

applicable code of conduct means, in relation to:

- (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in

section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

- (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct could also constitute a breach of a law (apart from this Act) and the Commission identifies that law in the report.

APPENDIX B – Expulsion Cases in the US Congress
From *Congress A to Z*, Third Edition, 1999
Edited by D. R. Tarr & A. O'Connor

Cases of Expulsion in the House

Year	Member	Grounds	Disposition
1798	Matthew Lyon, Anti-Fed-Vt.	Assault on representative	Not expelled
1798	Roger Griswold, Fed-Conn.	Assault on representative	Not expelled
1799	Matthew Lyon, Anti-Fed-Vt.	Sedition	Not expelled
1838	William J. Graves, Whig-Ky.	Killing of representative in duel	Not expelled
1839	Alexander Duncan, Whig-Ohio	Offensive publication	Not expelled
1856	Preston S. Brooks, State Rights Dem.-S.C.	Assault on senator	Not expelled
1857	Orsamus B. Matteson, Whig-N.Y.	Corruption	Not expelled
1857	William A. Gilbert, Whig-N.Y.	Corruption	Not expelled
1857	William W. Welch, American-Conn.	Corruption	Not expelled
1857	Francis S. Edwards, American-N.Y.	Corruption	Not expelled
1858	Orsamus B. Matteson, Whig-N.Y.	Corruption	Not expelled
1861	John B. Clark, D-Mo.	Support of rebellion	Expelled
1861	Henry C. Burnett, D-Ky.	Support of rebellion	Expelled
1861	John W. Reid, D-Mo.	Support of rebellion	Expelled
1864	Alexander Long, D-Ohio	Treasonable utterance	Not expelled ^a
1864	Benjamin G. Harris, D-Md.	Treasonable utterance	Not expelled ^a
1866	Lovell H. Rousseau, R-Ky.	Assault on representative	Not expelled ^a
1870	Benjamin F. Whittemore, R-S.C.	Corruption	Not expelled ^a
1870	Roderick R. Butler, R-Tenn.	Corruption	Not expelled ^a
1873	Oakes Ames, R-Mass.	Corruption	Not expelled ^a
1873	James Brooks, D-N.Y.	Corruption	Not expelled ^a
1875	John Y. Brown, D-Ky.	Insult to representative	Not expelled ^a
1875	William S. King, R-Minn.	Corruption	Not expelled
1875	John G. Schumaker, D-N.Y.	Corruption	Not expelled
1884	William P. Kellogg, R-La.	Corruption	Not expelled
1921	Thomas L. Blanton, D-Texas	Abuse of leave to print	Not expelled ^a
1979	Charles C. Diggs Jr., D-Mich.	Misuse of clerk-hire funds	Not expelled ^a
1980	Michael J. "Ozzie" Myers, D-Pa.	Corruption	Expelled
1988	Mario Biaggi, D-N.Y.	Corruption	Not expelled ^b
1990	Barney Frank, D-Mass.	Discrediting House	Not expelled ^c

SOURCES: Hinds and Cannon, *Precedents of the House of Representatives of the United States*, 11 vols. (1935-1941); Joint Committee on Congressional Operations, *House of Representatives Exclusion, Censure, and Expulsion Cases from 1789 to 1973*, 93rd Cong., 1st sess., 1973, committee print; *Congressional Quarterly Almanac* 1980; *Congressional Quarterly Weekly Report*, selected issues.

NOTES:

- a. Censured after expulsion move failed or was withdrawn.
- b. Facing probable expulsion, Biaggi resigned from Congress on August 8, 1988.
- c. Reprimanded after expulsion and censure moves failed.

Cases of Expulsion in the Senate

Year	Member	Grounds	Disposition
1797	William Blount, Ind-Tenn.	Anti-Spanish conspiracy	Expelled
1808	John Smith, D-Ohio	Disloyalty	Not expelled
1858	Henry M. Rice, D-Minn.	Corruption	Not expelled
1861	James M. Mason, D-Va.	Support of rebellion	Expelled
1861	Robert M. T. Hunter, D-Va.	Support of rebellion	Expelled
1861	Thomas L. Clingman, D-N.C.	Support of rebellion	Expelled
1861	Thomas Bragg, D-N.C.	Support of rebellion	Expelled
1861	James Chestnut Jr., States Rights-S.C.	Support of rebellion	Expelled
1861	Alfred O. P. Nicholson, D-Tenn.	Support of rebellion	Expelled
1861	William K. Sebastian, D-Ark.	Support of rebellion	Expelled ^a
1861	Charles B. Mitchel, D-Ark.	Support of rebellion	Expelled
1861	John Hemphill, State Rights D-Texas	Support of rebellion	Expelled
1861	Louis T. Wigfall, D-Texas ^b	Support of rebellion	Not expelled
1861	Louis T. Wigfall, D-Texas	Support of rebellion	Expelled
1861	John C. Breckinridge, D-Ky.	Support of rebellion	Expelled
1861	Lazarus W. Powell, D-Ky.	Support of rebellion	Not expelled
1862	Trusten Polk, D-Mo.	Support of rebellion	Expelled
1862	Jesse D. Bright, D-Ind.	Support of rebellion	Expelled
1862	Waldo P. Johnson, D-Mo.	Support of rebellion	Expelled
1862	James F. Simmons, Whig-R.I.	Corruption	Not expelled
1873	James W. Patterson, R-N.H.	Corruption	Not expelled
1893	William N. Roach, D-N.D.	Embezzlement	Not expelled
1905	John H. Mitchell, R-Ore.	Corruption	Not expelled
1907	Reed Smoot, R-Utah	Mormonism	Not expelled
1919	Robert M. La Follette, R-Wis.	Disloyalty	Not expelled
1934	John H. Overton, D-La.	Corruption	Not expelled
1934	Huey P. Long, D-La.	Corruption	Not expelled
1942	William Langer, R-N.D.	Corruption	Not expelled
1982	Harrison A. Williams Jr., D-N.J.	Corruption	Not expelled ^c
1995	Bob Packwood, R-Ore.	Sexual harassment	Not expelled ^d

SOURCES: Senate Committee on Rules and Administration, Subcommittee on Privileges and Elections, *Senate Election, Expulsion, and Censure Cases from 1793 to 1972*, comp. Richard D. Hupman, 92nd Cong., 1st sess., 1972, S Doc 92-7; *Congress and the Nation 1981-1984*, vol. 6. (Washington, D.C.: Congressional Quarterly, 1985); *Congress and the Nation 1993-1996*, vol. 9 (Washington, D.C.: Congressional Quarterly, 1988).

NOTES:

- The Senate reversed its decision on Sebastian's expulsion March 3, 1877. Sebastian had died in 1865, but his children were paid an amount equal to his Senate salary between the time of his expulsion and the date of his death.
- The Senate took no action on an initial resolution expelling Wigfall because he represented a state that had seceded from the Union; three months later he was expelled for supporting the Confederacy.
- Facing probable expulsion, Williams resigned March 11, 1982.
- Facing probable expulsion, Packwood resigned Sept. 7, 1995.