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Reconstituting the Constitution

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salaries), so that MPs felt it acceptable to claim the maximum allowed under the scheme, whether it was actually needed or not.[10] This practice was assisted by the fact that claims for £250 or less required no receipt (and in the case of food, up to £400). The other was that a rather relaxed interpretation was taken of the link between the expenditure and the Member's parliamentary duty. This led to claims ranging from 55p for a cup of Horlicks,[11] and a "Genius 4 piece garlic peeling & cutting set" bought on a TV shopping channel[12] to the equally questionable but considerably more expensive moat cleaning,[13] and the previously mentioned duck palace.

14.2.2 The New Zealand Scandal

Smaller in scale, but similar in character, in 2010 the details of New Zealand ministerial credit card spending were released following an Official Information Act 1982 request. Released in two stages, these covered the spending of both National and Labour party ministers from 2003.

Analysis of the receipts showed that Ministers had not kept strictly to the terms of the agreement covering the use of the card, which stipulates that that cards should not be used for personal expenses except in an emergency.[14] While some items claimed for, such as golf clubs, CDs, massages and pornographic films, were repaid from Ministers' personal funds, other items, where the parliamentary nature of the expenditure, particularly expenditure on entertaining and alcohol, was in question, were not.[15]

14.2.3 Why Are Solutions Needed?

Before we turn to look at the options for regulating MPs, there is a prior question that needs answering. That is the question of why a system of regulation is merited. In my view, the justifications are threefold.

First, Members of Parliament occupy a position of trust in regard to the electorate. This comes from their status as representatives, as they are entrusted with the power inherent in the people under the doctrine of popular sovereignty. Should they

[10] Barratt (2009).
[11] Daily Telegraph (2009a).
[12] Ibid.
[13] Prince (2009).
[14] Ministerial Services (2008).
[15] Staff Reporters (2010).

abuse that trust, the legitimacy of Parliament could be undermined. As a consequence, those in public office are generally held to higher standards of behaviour than the ordinary person. Lastly, and again connected, where public money is involved, some sort of system must be in place to monitor, regulate, and if necessary, discipline those involved in its misuse.

It should be noted that in both jurisdictions, the MPs found to have abused the systems in place did not escape unscathed. In New Zealand, certain offending MPs saw themselves demoted in the internal party rankings. One Minister resigned from the Cabinet as result of the exposure of his credit card use, but was reinstated by the Prime Minister when the Auditor-General's inquiry found his breaking of the rules was not intentional.[16] The Prime Minister also requested a review be undertaken of the use of ministerial credit cards.[17]

In the United Kingdom, some MPs were simply informed by their party leader that they would not be standing again at the forthcoming parliamentary election. Others decided that they would not wait to be told, and announced their retirement from politics. Others still were de-selected by their local constituency association. In the Labour party, some faced a specially-constituted panel which assessed their suitability to stand again.[18] Others chose to brazen it out before the electorate, and took their punishment that way. Some MPs even found themselves facing criminal charges.[19] In an astounding development, the Speaker of the Commons, facing a motion of no confidence for his role in handling the affair, resigned as Speaker and from his seat.

However, notwithstanding the action taken by parties and voters in the wake of the misconduct, it is clear that a democratic nation cannot place too much reliance on non-legal and ad hoc forms of regulation and sanction of its representatives. A more methodical and principled way is needed. To these we now turn.

14.3 "Soft" Internal Regulation

Codes of Conduct are the preferred tool for those seeking to send a message to MPs about what is appropriate behaviour and what is not. (I use the term "Code" here to cover the three main types of rules concerning MPs: a Ministerial Code, a Members' Code, and a Register of Interests. Some Parliaments also address ethical standards, either within a Code or separately.)

[16] Office of the Auditor-General (2010a).

[17] Office of the Auditor-General (2010b).

[18] Daily Telegraph (2009b).

[19] Four MPs (three from the House of Commons and one from the Lords) have been charged with theft by false accounting. Efforts to block the trial using parliamentary privilege have so far failed, with the Supreme Court ruling that privilege could not be used to claim immunity from criminal prosecution: *R v Chaytor & Ors* [2010] UKSC 52; see also *R v Chaytor* [2010] EWCA Crim 1910.

Codes cover areas such as conflicts of interest (monetary or otherwise), relationships with lobbyists, use of parliamentary information, restrictions on post-parliamentary employment, and the expected general standards of behaviour in public life. The private activities of MPs are usually not the subject of regulation.

Codes may be principle-based, a series of detailed rules, or a combination. For example, the Code of Conduct for the House of Commons is premised on what are known as the Nolan principles of conduct: selflessness; integrity; objectivity; accountability; openness; honesty; and leadership.[20] That Code also contains the Members' Register of Interests which details those interests that must be declared on the grounds that they may create conflict with an MP's primary loyalty to her parliamentary duties.

While Codes usually do not in and of themselves have the power of sanction, they remain a powerful reminder of exactly what is expected of our representatives. A feature of most Codes is that they are non-legal, often drawn up by the Prime Minister's office (as in the Australian Commonwealth Parliament's Howard Code) or Cabinet Office (as in New Zealand), or created through a resolution of Parliament (the United Kingdom Codes of Conduct and the New South Wales Legislative Assembly's Premier's Code). Codes typically rely on the Prime Minister, a party leader, or in some cases, a parliamentary officer, for their enforcement in those cases where an MP does not take the step of resigning for breach. This leaves their effectiveness vulnerable to external considerations such as the offending MP's personal popularity, or a party's overall image concerns.

However, in some cases, Codes of Conduct can be backed up by other forms of regulation. In the United Kingdom, the Parliamentary Commissioner for Standards is a parliamentary officer who advises MPs on the Code as well as investigating possible breaches of the Code. The Commissioner has similar duties relating to the Members' Register of Interests. The Commissioner's powers are backed up by a power to report the findings of any investigation to the House of Commons Committee on Standards and Privileges (formed from a merger of the Privileges Committee and the Members' Interests Committee in 1996) which may take action under parliamentary privilege.

In some states of Australia, the Code has been put into statutory form[21] with a breach of the Code being declared to be a contempt of Parliament,[22] with the stipulation of financial penalties for that breach.[23]

[20] See the Appendix for the details of the Nolan Principles.

[21] Parliament (Register of Interests) Act 1978 (Vic) (code of conduct); Members of Parliament (Financial Interests) Act 1992 (WA) (pecuniary interests).

[22] Parliament (Register of Interests) Act 1978 (Vic), s 9; Members of Parliament (Financial Interests) Act 1992 (WA), s 4.

[23] Parliament (Register of Interests) Act 1978 (Vic).

14.3.1 A Code of Conduct for the New Zealand Parliament?

The New Zealand House of Representatives so far does not have a Code of Conduct for MPs of the type in place in the United Kingdom, Australia or Canada. That is not to say attempts have not been made, or that there are no indications to MPs as to how they should conduct themselves (and in particular, their financial affairs).

MPs who are members of the executive are subject to the guidance contained in the Cabinet Manual.[24] This covers matters such as conflicts of interest between their private lives and parliamentary duties as well as the personal behaviour of Ministers, noting that "[i]n all these roles [ie public and personal capacities] and at all times, Ministers are expected to act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards."[25]

Outside the executive, in 2007 members of four minor parties then in Parliament proposed a Code of Conduct for MPs referring to the expectation that MPs behave "ethically and with integrity", mostly focused on the behaviour of MPs in the debating chamber.[26] It was referred to the Standing Orders Committee, but in 2008 the Committee recommended that the Code not proceed, and that as most overseas codes focused on the disclosure of pecuniary interests, a new Code, in light of the current *Register of Pecuniary Interests of Members of Parliament* to which all MPs are subject, would be unnecessary.[27] The Committee nevertheless concluded:

> It can be difficult for members to recognise precisely what constitutes a conflict of interest. Their role is to represent the people, including particular interest groups, including interest groups to which they themselves belong. Members must recognise conflicts of interest, and make appropriate judgments to align their conduct with their public duty.[28]

Given this lack of a comprehensive Code in New Zealand, and their generally non-enforceable nature, we turn now to consider the traditional means at a Parliament's disposal for monitoring and regulating its members: parliamentary privilege.

14.4 "Hard" Internal Regulation

Parliamentary privilege is the oldest form of regulation of MPs' conduct. Privilege is the shortened term for what is traditionally known as the *lex et consuetudo parliamenti*: the law and customs of Parliament. For centuries the judiciary and

[24] Cabinet Office (2008), paras 2.52–2.96.

[25] Ibid, para 2.53.

[26] A copy of this code can be seen as an appendix to Wilson (2010), pp. 581–582.

[27] Standing Orders Committee (2008), p. 12.

[28] Ibid (2008), p. 13.

Parliament were locked in conflict as to whether this was a separate species of law with which the judiciary could not engage, or whether, as eventually decided, it was part of the general law of the land. Even in these times, privilege retains a unique character and has its own set of precedents, forms of adjudication, and tightly defended boundaries beyond which the courts stray at their peril.

The ability to discipline MPs arises from the privilege of being able to regulate its own composition. This in the past has taken many forms, including the ability to decide the outcome of controverted elections, but these days, with the disputed elections jurisdiction having been ceded to the courts in the form of the election petition, it is more usually used for internal disciplinary matters, and occasionally, to effect the removal of MPs from Parliament.

It has its beginnings in Tudor times, when in 1514 Henry VIII allowed the Speaker to permit MPs to leave before the end of the parliamentary session. By the time of Elizabeth I, the Commons was increasingly exercising control over its own membership. Matters came to a head under James I in the case of *Goodwin v Fortescue*[29] which is widely seen as the point where the Commons' exclusive jurisdiction over its members was acknowledged, and the courts' parallel jurisdiction came to an end.

Under the composition privilege, MPs can be admonished, suspended, imprisoned or face the ultimate sanction of expulsion. Expulsion is an especially useful tool for a Parliament, as it allows a Parliament to address previously unthought-of behaviour by its members which may not be covered by statutory disqualification laws (these cover a wide range of scenarios such as death, mental disorder, showing allegiance to a foreign state, taking public office, and criminal convictions).[30]

14.4.1 Expulsions

The New Zealand Parliament has hesitated over its power to expel[31] and is yet to expel a member, but the power is still claimed for and in use in the United Kingdom. Expulsions are made through resolution of the House, with the purpose of the power generally agreed to be remedial rather than punitive. This allows the

[29] (1604) St Tr 91.

[30] See for example, s 55 Electoral Act 1993; House of Commons Disqualification Act 1975 (United Kingdom).

[31] Joseph (2001), p. 422. Some New Zealand writers have claimed that the privilege of expulsion has not survived the enumeration of reasons for disqualification in s 55 of the Electoral Act 1993: Joseph (2001), p. 422; Geddis (2002). However, this claim overlooks the longstanding rule governing the relationship between statute law and privilege: that parliamentary privileges must be extinguished by express words (see *Duke of Newcastle v Morris* (1870) LR 4 HL 661, 671). That is not the case with s 55.

House to restore its dignity and status against those who fall short of expected standards of behaviour. This in turn helps to maintain the legitimacy of the legislature in the public eye.

In this context, what can history tell us about those found to be unworthy of membership of the House? Members of the House of Commons have been expelled for a variety of transgressions, including the embezzling of public monies, for contempt of Parliament, for acts of sedition and libel, and more exotically, for writing a book arguing that it was possible to have eternal life without dying.

In more recent times, the key concern seems to be that of dishonesty, and typically, dishonesty involving money. The twentieth century saw three expulsions, and one near-expulsion from the House of Commons.[32] The first, in 1922, saw the departure of Horatio Bottomley after he had converted money intended for government bonds to his own private property portfolio. Then in 1947 Garry Allighan was expelled after he wrote a newspaper article alleging that other MPs had leaked confidential information to the media when in fact he himself was the guilty party. He then lied to the House of Commons privileges committee in the ensuing investigation. Finally, Peter Baker was expelled in 1954 after he had been convicted of forgery offences.

The most recent case was that of John Stonehouse. In 1974 he faked his own death by drowning and was believed dead until he resurfaced in Australia, where he had only come to the attention of the police because of his resemblance to Lord Lucan. The reason behind this elaborate deception was his intention to start a new life with his mistress using money embezzled from various companies he had set up using his parliamentary connections. He was to face a motion of expulsion but it was withdrawn so as not to prejudice his trial for theft, forgery, and fraud. Stonehouse was convicted, and then denied the Commons its prize by bringing about his disqualification from the House by applying for the Chiltern Hundreds.[33]

14.4.2 Other Punishments

In the United Kingdom, those who have not faced expulsion have also been disciplined for misconduct involving money: the Cash for Questions scandal saw the MPs Graham Riddick and David Tredinnick suspended in 1995 for 10 and 20 days respectively; in 2008 Derek Conway was suspended for ten sitting days, apologised to the House of Commons and was made to repay £13,000 after it emerged that although he employed his son as parliamentary researcher at a monthly salary of £1,000 there was no record of any work actually having been done; and George Galloway was also suspended in 2008 for 18 days following a

[32] House of Commons (2003).

[33] The office of Steward and Bailiff of the Chiltern Hundreds is an ancient paid office of the Crown, appointment to which immediately disqualifies an MP from Parliament.

finding from the Committee on Standards and Privileges that an appeal he was involved with had been funded by the Iraqi government and that Galloway had attempted to conceal this fact.

Curiously, it seems that no MPs were suspended by Parliament following the expenses and allowances scandal, although there may well have been a reluctance for Parliament to take such action when there was wide public distrust of its members. Nevertheless, the actions of the United Kingdom Parliament have shown that privilege can be effectively wielded against errant MPs, even to the extent of ending their parliamentary careers.

In contrast, the New Zealand Parliament has been less active in its use of privilege against MPs. Although it has not used its expulsion privilege, it has used the others only a little more. In 2007, when Taito Phillip Field was charged (while still an MP) with corruption and bribery offences for which he was later jailed, the Speaker declined to refer the matter to the Privileges Committee[34]; in 2008, it censured, but took no other action against the MP Winston Peters whom the Privileges Committee had found to have "knowingly providing false or misleading information on a return of pecuniary interests".[35] In 1999 it also declined to take action against Alamein Kopu MP who defected from the Alliance party and ended up supporting the government from the other side of the House, even though her behaviour was widely seen as lacking in integrity as she had signed a pledge to resign should she leave her party.[36] This approach to addressing MPs' misconduct makes exploring alternative means of regulation a more pressing issue.

14.4.3 The Problem with Privilege

The issue for those seeking an effective regulator of MPs' conduct is of course the barrier of Art 9 of the Bill of Rights 1689. Article 9 provides that "proceedings in Parliament ought not to be impeached or questioned in any place out of Parliament" and applies to New Zealand by virtue of the Imperial Laws Application Act 1988. A famous series of cases culminated in the compromise expressed in 1839 in *Stockdale v Hansard*,[37] whereby the courts maintained their right to say whether

[34] A motion of no confidence was lodged against the Speaker for this decision, but it did not come before the House and lapsed; see Wilson (2010), pp. 571–572.

[35] Privileges Committee (2008).

[36] See Privileges Committee (1997). This lack of action led to the enactment of the Electoral (Integrity) Amendment Act 2001, an ill-fated and ultimately discarded attempt to control the practice of party defections. The conflict (as seen in the one occasion it was used: *Prebble v Awatere Huata* [2005] 1 NZLR 289) it engendered between Parliament and the Courts to control membership of the House and the clash between the respective rights of the member's and the party's rights of freedom of association and freedom of speech led to it not being re-enacted when it expired in 2005.

[37] (1839) A & E 1.

a particular privilege existed, but Parliament retained exclusive jurisdiction over the application and enforcement of the privilege.

While, as we have seen, the composition privilege can be wielded with considerable effect against misbehaving MPs (if Parliament chooses to use it in the first place), most MPs do not conduct themselves quite so outrageously as Mr Allighan or Mr Stonehouse. In lesser cases of misconduct, it may be said that the use of privilege to discipline MPs is inherently blighted by a suspicion of conflicts of interest – how can Parliament be trusted to discipline its own members? – and furthermore, tacit understandings of what might be acceptable within Parliament, which do not align with the expectations of the public, permit MPs to behave outside the constraints usually attached to those spending money which is not their own.

The lack of jurisdiction enjoyed by the courts because of Art 9 is problematic therefore when Parliament either does not act in the face of misconduct or is considered not to have acted severely enough against the alleged offender. There can be no recourse against Parliament's decision or non-decision. The reasoning behind the continued ousting of the courts lies in the maintenance of separation of powers: the need to keep the judiciary apart from political matters as well as the requirement that Parliament, as the legal sovereign power, be free to conduct its own affairs without being held back by another branch of government. These are compelling reasons. But, in an age where a lack of trust in Parliament continues to grow, other solutions became more attractive. I now turn to examine one such solution.

14.5 External Regulation

Following the United Kingdom's MPs' expenses scandal, such was the public disillusionment and lack of confidence in Parliament's ability to regulate itself, the government quickly moved to create an external regulator with respect to financial matters.[38] The new regime was set out in the Parliamentary Standards Bill, introduced in May 2009, following hurried top-level cross-party discussions over the nature and form the regulation should take.

14.5.1 The Parliamentary Standards Bill

The Bill created an entity known as the Independent Parliamentary Standards Authority (IPSA) and the position of the Commissioner for Parliamentary

[38] This was just part of an extensive reform of the expenses and allowances system following the breaking of the scandal.

Investigations (since renamed the Compliance Officer for the IPSA).[39] The IPSA was to have five members, one a qualified auditor, one a judge or former judge, and one a former member of the House of Commons. The IPSA's function was to regulate and administer MPs' salaries, their allowances, and their financial interests. It was also made responsible for devising the rules on financial interests.

The Compliance Officer's role was to investigate complaints over breaches of the rules relating to financial interests and allowances. The Compliance Officer would then report the results of the investigation back to the IPSA which would have the following powers:

- To direct the repayment of allowances incorrectly paid;
- To direct that a Member's entry in the register of financial interests be amended;
- To recommend that the Committee on Standards and Privileges exercise its disciplinary powers against a Member (some of which powers were enumerated in the Bill).

The Bill also created three new criminal offences applying to MPs. These were: knowingly providing false or misleading information in a claim for an allowance; of failing to comply with the rules on registering interests; and breaching the rules against paid advocacy. To facilitate the prosecution of these offences, the Bill provided that Art 9 would not apply when evidence was being brought in relation to the offences. This exemption also applied to the Compliance Officer and the IPSA when they were carrying out their functions.

The Bill also provided that the House of Commons Code of Conduct would continue to exist, and that it would incorporate the Nolan Principles.

As drafted, the Bill represented a significant change in the way the conduct of MPs was overseen and sanctioned. However, it was not well received in the House of Commons, or in the House of Lords. Opposition was not based on the shift from internal to external regulation. The real concern was the impact that the Bill would have on parliamentary privilege and in particular, the established relationship between Parliament and the courts over their respective domains. This concern drove a number of amendments to the Bill and also caused the government to withdraw one particularly worrying clause before it could be considered by Parliament.

14.5.2 The Parliamentary Standards Act

The Bill when enacted looked the same superficially but now provides for a rather different regime from the one initially envisaged.

[39] Constitutional Reform and Governance Act 2010, s 26.

An external regulator has been established; the IPSA and the Compliance Officer for the IPSA still exist, but their functions have been curtailed somewhat. The IPSA still pays MPs' salaries, their allowances, and was to draw up a financial interests code (although Parliament has since legislated this power away).[40] The Compliance Officer is still responsible for investigations into the paying of allowances or the registration of financial interests. However, following an amendment in the House of Lords, the IPSA's power to make recommendations to Parliament has been redirected to the Compliance Officer, and watered down so that the Compliance Officer now only reports to the Standards and Privileges Committee. It is the Committee which retains a final power of decision over the investigation.

At an early stage in the proceedings, Parliament scored its first hit against the government's attempt to shift the boundary between Parliament and the courts. On the same day as the first Committee of the House debate the government withdrew the clause requiring the incorporation of the Nolan Principles into the Commons' Code of Conduct, following legal advice from the Clerk of the House that there could be a risk of litigation over whether the Principles were properly incorporated and raising the scenario that a court might direct Parliament to pass a resolution amending the Code.

Other changes aimed at preserving parliamentary privilege and the relationship with the courts occur throughout the Act. The first notable change can be seen in the first section, inserted by the Lords. It states: "Nothing in this Act shall be construed by a court in the United Kingdom as affecting Article IX of the Bill of Rights 1689". This was a clear signal that Parliament was reasserting its exclusive jurisdiction over its own affairs and reinforced the earlier move in the Commons removing the carve-out from Art 9 in relation to prosecutions for the newly-created offences. To complete the evisceration of the offending clause, two of the three offences, failing to register an interest and paid advocacy, were then removed by the Lords. The Lords also removed the ability for a serving judge to serve as a member of IPSA – this was too close to the accepted boundary between Parliament and the courts.

A year on, the IPSA has been established, and is busy drawing up a new scheme for MPs expenses and allowances.

The fortunes of the Parliamentary Standards Bill provide an instructive case study for those seeking a way beyond the traditional use of privilege with all of its attendant constraints, even though it would seem that parliamentarians are keen to preserve the pre-eminent role of privilege in regulating their affairs. Nonetheless, regardless of its eventual effectiveness, and at the moment, it is too soon to judge, this form of external regulation does not have at its heart the concerns of those parliamentarians are supposed to be accountable to: the electorate. It is worth noting, too, that this model of regulation does not address matters outside the realm of financial misconduct; as we have seen, MPs may misbehave in all sorts of ways.

[40] Constitutional Reform and Governance Act 2010, s 32.

14.6 The Recall Election

14.6.1 Theory of the Recall

Recall elections are sometimes seen as form of direct democracy, and thus as incompatible with a system of representative democracy. However, this is a constraint created by a particular view of how a representative should behave; as its use in various democracies shows, it is not a legal restriction on the introduction of recall elections. Conversely, recall elections can be viewed as an additional corrective device within a system of representative democracy, to be employed where other remedies such as regular elections or disqualification provisions are not available. As Thomas Cronin has commented: "voters have generally preferred to reserve the recall for its original intended use (to weed out malfeasance and corruption) and to settle political questions at regular elections."[41]

The recall is a device premised on the delegate theory of representation. Under this theory, a close relationship exists between a Member of Parliament and her constituents. Accordingly, representatives are in Parliament to effect the wishes of the electorate. The recall sits within a model of representation that envisages a much closer relationship between the electorate and representatives than the competing trustee theory of representation, since under delegate theory what is represented is the people rather than their interests. Too much independence from the electorate is inconsistent with the delegate model. Consequently, a delegate who does not pay attention to the wishes of the electorate risks not being able to continue in the role. So, should representatives fail to meet the standards required of them or to speak properly on their behalf (without substituting too much of their own discretion), they can be "recalled" and replaced with another by their constituents.[42]

Recall elections extend the boundaries of the delegate theory of representation in two ways. First, in an electoral system involving the possibility of a recall, the judging of the representative and the consequent ties of accountability are always active, rather than just at the single moment of the election. Secondly, the representative's security of office is also weakened by this model as a seat could be lost at any stage. Both of these factors have the potential to affect the representative's behaviour during office. This does not always mean that the ever-present shadow of a recall election will act as a negative internal constraint on the Member's conduct; it might also mean that a Member seeks the approval of her constituents before acting, or communicates more frequently or in more depth with constituents about his activities.

[41] Cronin (1989), p. 143.

[42] I have focused only on the type of recall election where the recall can be initiated and decided on by the people. In some states, the recall is made by branch of government, usually the legislature.