THE LEGAL PERSONALITY OF THE WESTERN AUSTRALIAN PARLIAMENT

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Identifying and defining the legal personality of the Western Australian Parliament is not just an interesting pursuit of constitutional theory; it is also a question of considerable practical importance. Is, for example, the Parliament a "person" coming within the reach of the Western Australian Equal Opportunity Act 1984? Can officers of the Parliament aptly be described as "State employees" for the purposes of that Act? Can the Western Australian Industrial Relations Commission exert its jurisdiction over the Parliament as an "employer" in relation to Parliamentary staff under the Western Australian Industrial Relations Act 1979? And in instances such as these, who can competently speak in a representative capacity for the Parliament: the President and the Speaker, the clerks of each House, or perhaps a Minister of the Crown? In many such cases, the issues may fall to be decided simply as a matter of statutory construction in ways that conveniently avoid touching on the more fundamental question of whether the Parliament, or its houses, have corporate personality. More importantly, whilst these may appear to be somewhat mundane and everyday matters, they entail significant questions of the separation of governmental power: the relationship between the executive government on the one hand and the Parliament on the other, and the extent to which the executive government may make incursions into the effective operation of the Parliament.

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Answers to these questions must be sought in the basic constitutional documents themselves, the customary and common law of Parliament, the relevant statutes, and judicial decisions. Surprisingly, judicial decisions are of little assistance due to the paucity of cases in which these issues have been the subject of litigation.

THE CONSTITUTIONAL FRAMEWORK

The foundational provision of the Western Australian Constitution Act 1889 ("Constitution Act 1889") is section 2. This reads:

> 2. (1) There shall be, in place of the Legislative Council now subsisting, a Legislative Council and a Legislative Assembly: and it shall be lawful for Her Majesty,[1] by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good Government of the Colony[2] of Western Australia and its Dependencies: and such Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.
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> (2) The Parliament[3] of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly.

1. The use of this feudal notion of the monarch legislating lies at the root of many of the problems addressed in this article. Because of its opaque and mystic symbolism, the fiction gives rise to ambiguities that are arguably inconsistent with plain language expression. See also (WA) Interpretation Act 1984 s 5, definition of 'Her Majesty', and note *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.
2. "Colony" is no longer appropriate to describe the status of Western Australia, certainly not since the passing of the (Cth) Australia Act 1986, the (UK) Australia Act 1986 and the (WA) Australia Acts (Request) Act 1985 (cumulatively referred to as "the Australia Acts") which repealed the operation of the (UK) Colonial Laws Validity Act 1865 in its operation to Western Australia. "State" is the appropriate description (see covering clause 6 of the (UK) Commonwealth of Australia Constitution Act 1900 and s 106 of the Australian Constitution).
3. S 2 of the 1888 draft Bill of the Constitution Act commenced "[t]here shall be, in place of the Legislative Council now subsisting, a Legislative Council and a Legislative Assembly which together shall be the Parliament of Western Australia....": Lord Knutsford, Secretary of State commented in Despatch no 81 to Governor Sir F Broome 31 August 1888, appearing in *Correspondence Respecting the Proposed Introduction of Responsible Government in Western Australia* (London: Eyre & Spottiswood, 1889) 35, para 5:

> You will observe that the expression Parliament has been removed from the Bill whenever it was employed as meaning the two Chambers.... [I]t is not strictly accurate to describe the Legislative Council and Assembly of Western Australia, without the Queen, as constituting the Parliament of the Colony....

It was therefore deleted from the formula now found in s 2(1) of that Act. Its usage in the (now) s 2(2) is consistent with his Lordship's comment.

> (3) Every Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73 of this Act, be presented to the Governor for assent by or[4] in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen.

Originally, the Constitution Bill 1889, as annexed to the (United Kingdom) Western Australian Constitution Act 1890, only contained what is now sub-section (1). Sub-section (2), which is the principal definition of the Western Australian Parliament, was a later addition.[5] In a sense, the reference to "Parliament" in sub-section (2) may be regarded as redundant, given that the legislative power of the State is sufficiently conferred by sub-section (1) upon a legislature comprising the Queen and the two Houses of Parliament.

Venturing beyond this seminal provision, a search of the various constitutional enactments operative in Western Australia discloses a curious assortment of terms that separately describe the law-making institution or its constituent parts. References to "Parliament" are relatively few. In the Constitution Act itself, there is no further reference to "Parliament". The older term of "legislature" is used instead in sections 57 and 58 in the context of recognition of "Acts of the Legislature", whilst sections 59 and 60 deal with the levying *by the Legislature* of customs duties (a subject which, since 1901, has been beyond the State's competence by virtue of section 90 of the Australian Constitution). Section 72 of the Constitution Act requires all appropriations of revenue from the Consolidated Revenue Fund to be by "Acts of the Legislature" whilst section 73(1) confers full power on the Legislature to alter the provisions of the Constitution Act itself,[6] subject to the specified "manner and form" requirements.

The Western Australian Constitution Acts Amendment Act 1899 ("Amendment Act") is also somewhat reticent regarding mention of

4. S 9(1) of the (UK) and (Cth) Australia Acts effectively repealed State laws such as s 73 of the Constitution Act requiring reservation for assent by the Queen. Hence the words "by or" where they appear (twice) in this sub-section are redundant.
5. Act no 59 of 1978. Along with amendments to other provisions, including ss 50 and 73, the insertion of this sub-section was intended to entrench the position of Governor. Western Australian amendments would seem to be modelled in part upon the (Qld) Constitution Act Amendment Act 1977 s 4.
6. In *The State of Western Australia v Wilsmore* (1982) 149 CLR 79 the High Court gave a restricted reading to s 73(1), holding that in light of the proviso to that provision, s 73(1) does not apply to amendments of other legislation.

"Parliament". Section 13 reads:

> 13. The member of the Legislative Council holding office as the President thereof who shall vacate his seat by periodical retirement when the Council is not in session, shall continue in office and be deemed to be the President of the said Council until the next meeting of Parliament, unless he shall not be re-elected a member of the said Council; but nothing in this section shall enable a President hereby continued in office to preside at any meeting of the said Council.

Section 23, a provision to which reference will be made later,[7] is of somewhat similar effect as concerns the office of Speaker. This reads:

> 23. In case of any dissolution of Parliament the Speaker of the Legislative Assembly at the time of such dissolution shall continue in office and shall be deemed to be the Speaker of the said Assembly until the first meeting of the new Parliament, unless he shall not be re-elected a member of the said Assembly; but nothing in this section shall enable a Speaker hereby continued in office to preside at any meeting of the said Assembly.

The reference to a "dissolution of Parliament" in this provision is somewhat curious. It is clear that the Legislative Assembly can be dissolved from time to time[8] but that the Legislative Council is assured[9] of an irreducible term of four years beginning on 22 May in the relevant year. There is thus no necessary concurrence of the termination of both Houses which could constitute a "dissolution of Parliament". On this point, however, one should have regard to the discussion below of the New Zealand case of *Ualesi v Ministry of Transport*[10] (*"Ualesi"*).

Irregularity of terminology again arises in sections 31 to 38 of the Amendment Act, which are concerned with questions of qualification for and disqualification from membership of "the Legislature".[11]

Section 3 of the Western Australian Parliamentary Privileges Act

7. See text at 331.
8. (WA) Constitution Acts Amendment Act 1899 s 21(1).
9. Ibid s 8.
10. [1980] 1 NZLR 575. See text at 330-332.
11. Use of the expression "the Legislature" does not impose a constitutional restraint upon Parliament to the extent that the legislative and constitutive power of the State may only be exercised by the two houses of parliament acting with the Governor. As explained in *Clayton v Heffron* (1960) 105 CLR 214, 250-252, the constitutive powers of the State can be exercised by a reconstituted authority including the electorate. This would be so in the case of s 73(2) of the Constitution Act 1889. Note in addition to the words "Parliament" and "Legislature" ss 36(7) and 42(4) make reference to the "Clerk of the *Parliaments*" regarding custody of documents.

1891 effects a synthesis between the competing terms "Parliament" and "Legislature" by providing that "[t]he Legislature of Western Australia shall be and is hereby designated 'The Parliament of Western Australia'."[12] Having achieved this reconciliation, the Parliamentary Privileges Act continues to use the expression "House of the Parliament" in sections 4 and 8, a usage also consistently adopted in Chapter VIII of the Western Australian Criminal Code 1913 in relation to various offences constituting interference with those Houses.[13]

PARLIAMENT AND THE CROWN

Turning to a consideration of the principal provision that establishes the legislative authority of the "Parliament", it can be said that section 2 of the Constitution Act maintains the conventional mediaeval fiction that laws are made by the Queen with the advice of both Houses. This expresses the truth that Australia is a monarchy. As Hanks states: "Our legal and governmental systems are based on that proposition. The Queen or her representative is an integral part of each of the Australian parliaments...."[14] The reality is, however, that in Western Australia, the Queen's powers are exercised by her representative, the Governor.

It is a simple step, then, to assume that so far as the Parliament has a legal identity (that is, that it is a juristic person), this identity is to be equated with that of "the Crown". It is at this stage, however, that conceptual problems arise. The legal personality of the *executive* government is also taken to be represented by the Crown. Again, according to Hanks:

> This legal personality of the executive government is represented by the Crown, by the Queen: that is the law regards the government as a legal person and that person is the Queen. However, in this context the terms "the Crown" and "the Queen" have become depersonalised. The terms refer, not to the Queen in her personal capacity, but to the office of monarch or the institution

12. As terms describing the entity in which the plenary law-making power of the State is vested, "Parliament" and "Legislature" are equally appropriate to refer to the Queen "with the advice and consent" of the two Houses. And see *Namoi Shire Council v Attorney-General for New South Wales* [1980] 2 NSWLR 639, 644 ("*Namoi*").
13. See also ss 351 and 361 relating to defamation by and of members of either house of parliament. In provisions such as these, "Parliament" according to s 5 of the (WA) Interpretation Act 1984 simply means "the Parliament of the State".
14. P Hanks *Australian Constitutional Law: Materials and Commentary* 4th edn (Sydney: Butterworths, 1990) para 5.001.

> of the monarchy. When we talk of the Crown in the context of Australian government in the late twentieth century, we refer to a complex system of which the formal Head is the monarch.[15]

In *Bropho v State of Western Australia* the High Court, in the context of discussing the presumption concerning when the "Crown" is bound by a statute, distinguished between former times, when "the Crown" "encompassed little more than the Sovereign, his or her direct representatives and the basic organs of government"[16] and the present when instead of the Queen acting in reliance on the ancient prerogatives and regal capacities, the business of government is carried on through the activities of the myriad governmental commercial and industrial instrumentalities covered by the shield of the Crown.

It is in this context that various institutions and individuals discharge executive functions as agents or servants of the Crown. To attribute Crown personality to the Australian governments themselves, however, involves a conundrum. How can one person represent seven (or more) separate autonomous governments?[17] A possible resolution of this dilemma is to regard each government as a separate independent corporation representing, for legal purposes, the personality of the particular government. If this be accepted, it can then be argued that the control of each corporation is delegated to a particular agent or representative: in the case of Western Australia, the State Governor. According to Hanks, this delegation is effected by section 7 of the Commonwealth Australia Act 1986 which, so far as relevant, reads:

> 7. (1) Her Majesty's representative in each State shall be the Governor.

15. Ibid, para 5.002. See also *British Broadcasting Corporation v Johns (Inspector of Taxes)* [1965] Ch 32, 78-79 where Diplock LJ referred to the Crown "which today personifies the executive government of the country *and is also a party to all legislation....*" (emphasis added).
16. (1990) 93 ALR 207, 215.
17. P Hogg *Liability of the Crown* 2nd edn (Ontario: Carswell Co Ltd, 1989) 11-12 comments:

> Within Australia, the federal government is the Crown in right of Australia (or the Commonwealth), and each of the state governments is the Crown in right of the state. This usage is obviously suggestive of indivisibility, but the suggestion must be resisted.

Consistent with that suggestion, the (WA) Crown Suits Act 1947 s 3 defines the term "Crown" for the purposes of that Act, as meaning the Crown in right of the State.

> (2) [A]ll powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.[18]

The understanding of the legal personality of the State government as a legal entity was recently affirmed by the Full Court of the Supreme Court of Western Australia in *The State of Western Australia v Watson*.[19] It was said there:

> Because the State is recognised as a legal person it has attributes of corporate personality. It has been suggested that "the organisation of the State is essentially the same as that of a corporation": [P W Hogg *Liability of the Crown* 1st edn (Sydney: Law Book Co, 1971) 9]. It may be accepted that the State is analogous to a corporation in many respects. Like any analogy its application in any particular case must be viewed with caution.[20]

If, then, the executive government assumes a legal personality - that is, is equated with the Crown - how can it be that the same entity is capable of providing a legal personality to the body described as "Parliament"? Whilst the doctrine of the separation of powers has, in general, been rejected in the context of the Australian States,[21] to identify Parliament solely with the Executive would be to compound a constitutional incongruity. It would mean, in practical terms, the complete subjugation of Parliament to the Executive and would render Parliament functionally ineffective. To take a simple example referred to above,[22] if Parliamentary staff are in effect employed by the executive government, the latter has in its power the means to thwart Parliament. Of course, the relationship is much more complex than that. By virtue of section 46(1) of the Amendment Act, Bills appropriating moneys may only originate in the Legislative Assembly. This necessarily means that appropriation is subject to the executive government's control, consistent with the normally accepted notions of "responsible government".[23] An abstemious government, therefore, has it within its power to restrict the amount of moneys it is prepared to

18. Supra n 14, para 5.005.
19. [1990] WAR 248.
20. Ibid, 266.
21. *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Gilbertson v State of South Australia* [1978] AC 772.
22. See text at 323.
23. Despite suggestions to the contrary arising from Sir John Kerr's dismissal of the Whitlam Government in 1975, the orthodox view concerning state parliaments is that governments are determined according to whether they command the confidence of the lower houses.

allocate to Parliamentary operations. It may be that, if not included in a Bill "appropriating moneys for the ordinary annual services of the Government",[24] an appropriation on parliamentary objects could be amended by the Legislative Council notwithstanding section 46(3) of the Amendment Act. But in the end, any difference between the Government and the Legislative Council over this matter would probably be resolved on terms satisfactory to the Government.

One approach to resolving the difficulties between equating the personality of Parliament with that of the Executive, in terms of control of appropriation and employment of Parliamentary staff, is to regard Parliament - as constituted by the three elements of the Queen (represented by the Governor), the Legislative Council and the Legislative Assembly - as a greater entity than each of its several parts. It could further be argued that as such, Parliament is capable of assuming a continuing legal existence as a body irrespective of whether or not any of its distinct constitutive elements is functional. Parliament's legislative competence, in terms of the ability to make laws, may be affected if one of its constitutive parts is not functional at a particular time, but this may not necessarily detract from the fundamental existence of the institution.

This relationship between the Parliament as a body corporate and its constitutive parts has been explored in three New Zealand cases. In the most recent, *Ualesi,*[25] it was argued that a Minister of the Crown was invalidly appointed because his appointment had been made at a time when the General Assembly of New Zealand was dissolved and before the Minister had taken his place as a member of the House of Representatives. The General Assembly of New Zealand was defined as consisting of the House of Representatives and the Governor-General. The contention was that the Minister could not be appointed as he was not a Member of the House of Representatives at the time of the purported appointment, as required by law, given that the House did

24. Supra n 8, ss 46(2) and 46(6). This is similar to the provision in the Bill of Rights 1688 (1 W & M sess 2 c 2) which distinguishes between "levying money for the use of the *Crown*" and the grant by *Parliament*, discussed in *Cobb & Co. Ltd v Kropp* [1965] Qd R 285.

25. Supra n 10. For further discussion of the debate aroused by *Ualesi* see Note "On Dissolved Houses and De Facto Members: Ualesi Case" (1981) 9 UNZL Rev 379; P Joseph "The Startling Reality: Toward Unconstitutional Government" [1981] NZLJ 26; F Brookfield "The startling reality and Ualesi: a rejoinder" [1982] NZLJ 65.

not exist. Justice Quilliam held, however, that the dissolution of the General Assembly did not entail the proposition that the House of Representatives ceased to exist. Rather, what it did mean was that at those times when the General Assembly was dissolved, the House of Representatives ceased to be able to exert its *legislative powers*.

This decision might be regarded as turning on the special provisions of New Zealand law. In the Western Australian context, notwithstanding the references in the Amendment Act to a dissolution of Parliament,[26] the analogous situation is where the Legislative Assembly, as a constituent part of the Parliament, is dissolved. In such an event, if Justice Quilliam is correct, the Legislative Assembly would continue in existence although there would be a suspension of the law-making powers of the composite Parliament pending the reconstitution of that House. This begs the question, admittedly, whether a House can in fact exist other than as a collection or assembly of its members, a question addressed in *Re House of Commons and Canada Labour Relations Board*[27] ("*House of Commons* case").

The view that a House ceases to exist upon dissolution finds some support in an earlier New Zealand decision, *Police v Walker*.[28] Here, following the dissolution of the General Assembly, which the New Zealand Court of Appeal seems to have treated as including the dissolution of the House of Representatives, a Minister of the Crown responsible for the administration of the Parliament had purported to exercise control over the Parliamentary precincts by requiring the police to clear a Maori tent demonstration. He did this because, again according to New Zealand law, the Speaker of the House of Representatives had ceased to hold office upon dissolution of that House (unlike the position of Western Australia, where section 23 of the Amendment Act[29] provides for the Speaker to continue to exercise his or her powers pending the appointment of a new Speaker). The Court of Appeal accepted without debate that the House of Representatives had ceased to exist but regarded it as having effectively delegated its powers to the responsible Minister in the interim. In *Ualesi*[30] Justice Quilliam attempted to rationalise the decision in *Police v Walker* by treating

26. S 23. See text at 326.
27. (1986) 27 DLR (4th) 481; Fed Ct App. See text at 332-333.
28. [1977] 1 NZLR 355.
29. See text at 326.
30. Supra n 10.

remarks about the House ceasing to exist as not being essential parts of the earlier decision. Nevertheless, it is difficult to escape the conclusion that the court in the earlier case *had* held such a view. Whatever the proper resolution of this apparent conflict, to regard a House as ceasing to exist or being in suspension does not affect the broader proposition of the continuing existence of Parliament as a whole. Further, so long as one can identify one particular person - whether the Speaker or another officer of the House, or even a Government Minister for short-term purposes - as having received the powers of administration over the House, its affairs and its personnel, by express or implied delegation, there is no insurmountable practical problem if the House as an assembly of individuals does cease to exist. There could, however, be a substantial impairment of Parliament's integrity and autonomy if control, generally or in the short term, is vested in or entrusted to the Executive.

The view that Parliament may exist even when its Houses have been dissolved is also supported by the somewhat contentious New Zealand decision in *Simpson v Attorney-General*.[31] The majority judgment of the Court of Appeal in that case suggested that the Governor-General could still exercise his special law-making prerogatives by way of assenting to legislation even though a House had been dissolved. There was no requirement that the Vice-Regal assent should be given at a time when the Houses of Parliament were operational.

The view that a constitutive House of Parliament does cease to exist after dissolution is also supported by the judgment of Justice Hugessen of the Federal Court of Appeal in the Canadian *House of Commons* case.

> I am of the view that the House of Commons is not an "employer" within the meaning given to that term by s-s. 107(1) of the *Canada Labour Code*, which defines an employer as being a "person".

31. [1955] NZLR 271.

> By no process of reasoning or of imagination can I conceive of the House as being a person. It is an assembly of persons, albeit, no doubt, the most important one in the country. Nothing in the *Constitution Act, 1867*, nor in the law, custom and convention of the Constitution as I understand it, gives to the House corporate status or personality. Indeed everything points the other way. It is of the essence of a corporation that it shall be perpetual. But the House of Commons is by its nature an ephemeral thing, having by constitutional prescription a maximum life span of five years. When the House is dissolved it ceases to exist.[32]

His Honour recognised that there was a suggestion in the authorities that Parliament might be regarded as a corporation. He disputed whether that view was correct but concluded:

> Whatever be the status of Parliament, however, there is no authority that I know of to indicate that the House of Commons may be a person.[33]

At the end of the day, we are left with the difficulty of deciding whether - even if Parliament as a composite entity has a legal personality of its own, represented by the Governor as the Crown in its legislative capacity as distinct from its executive capacity - Parliament is capable as such of exercising powers such as employment of its staff and control of its affairs, property and precincts.

It can be argued that Parliament can have no greater powers than those conferred upon each House individually or collectively. The powers of each House are the subject of section 36 of the Constitution Act, which states:

> 36. It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively. Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.

One might comment in passing that the limitation in the proviso, not being itself entrenched by the requirement for a statutory majority, can be amended expressly or even impliedly by any later specific Act.[34] For present purposes, however, the question in respect of any particular

32. Supra n 27, 491-492.
33. Ibid, 493.
34. Supra n 6 Gibbs CJ, 84-85.

matter such as the employment of Parliamentary staff or control of the Parliamentary precincts will be determined, in the absence of any such legislation, by whether the House of Commons possessed such a power at 1890. In relation to matters such as control of internal Parliamentary proceedings or of Parliamentary precincts,[35] both Houses of the State Parliament undoubtedly enjoy the equivalent powers possessed by the House of Commons.[36]

With respect to employment, however, the problem is more complex. The position in the United Kingdom was that the Clerks of the Commons were not employed by the House of Commons as such. They were appointed by the Crown and they and their subordinate officers were not affected by dissolution of Parliament.[37] The problem of preserving the historic distinction between Parliament and the executive government in such instances has been resolved in the United Kingdom context by conventions of strict impartiality.[38] If this be a guide, one could conclude that since the Clerks of each House in Western Australia are appointed by the Governor in Council on the recommendation of the appropriate presiding officer, it is the Governor in Council who is the "employer" of the clerks. This is notwithstanding that, once appointed, they are removeable by a vote of the particular House of which they are Clerk.[39] In strict legal analysis, the Clerks would then be officers of the executive government, putting them in

35. *Rees v McCay* (1975) 7 ACTR 4, 7.
36. *R v Sir R F Graham-Campbell, Ex parte Herbert* [1935] 1 KB 594; *Bradlaugh v Gosset* (1884) 12 QBD 271. An alternative way to approach this matter is to distinguish between a *power* of a house, and one of its *functions*: see Forster J in *Attorney-General for the Commonwealth v MacFarlane* (1971) 18 FLR 150, 156-157. The engagement of staff might be regarded as something incidental to its legislative function, but the better view would still be that discharge of that function still entails the exercise of a *power* of the house.
37. M L Gwyer *Anson's The Law and Custom of the Constitution* 5th edn (Oxford: Claredon Press, 1922) 160; C J Boulton (ed) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 21st edn (London: Butterworths, 1989) 188-189. J Redlich *The Procedure of the House of Commons: A Study of its History and Present Form* Vol II (trans A E Steinthal) (London: Archibald Constable & Co Ltd, 1908) 173 describes the Clerk of the House as "an officer of the Crown".
38. P Marsden *The Officers of the Commons 1363-1978* (London: HMSO, 1979) 15, quoted in A R Browning (ed) *House of Representatives Practice* 2nd edn (Canberra: AGPS, 1989) 243.
39. I am indebted to L Marquet for this information.

potential conflict with their Parliamentary responsibilities. An apparently opposite view is that of Justice Pratte in the *House of Commons* case.[40] Addressing the Canadian situation, he stated:

> The House of Commons was created by s.17 of the *Constitution Act*, 1867, as one of the three constituent elements of Parliament:
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> 17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.
>
> Under s.4 of the *Senate and House of Commons Act*, RSC 1970, c S-8, it possesses certain powers and privileges:
>
> 4. The Senate and the House of Commons respectively, and the members thereof respectively, hold, enjoy and exercise,
>
> (a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to that Act; and
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> (b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.
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> Among those powers, there is the power to have employees. It is because of the existence of that power that the *House of Commons Act*, RSC 1970, c H-9, as amended, provides for the creation of a Board of Internal Economy of the House of Commons to act on all matters of financial and administrative policy affecting the House, "its offices and its staff" and also provides for the suspension and removal, on the ground of misconduct and unfitness, of "any clerk, officer, messenger or other person attendant on the House of Commons."
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> It is interesting to observe that while the Speaker of the House is elected by the House pursuant to s.44 of the *Constitution Act, 1867*, the other most important officers of the House are appointed by the Crown by letters patent. That is the case of the Clerk, the Assistant Clerk and the Sergeant-at-Arms. As to the other employees of the House, which were formerly engaged by the Committees of the House, they are now engaged and supervised by the Clerk and Sergeant-at-Arms, subject, of course, to the directions of the Board of Internal Economy and the Speaker.
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> A provision, which remained in our statute books from 1870 until 1953, reveals the importance that Parliament itself attached to those powers of the House

40. Supra n 27. See also J Griffith and M Ryle *Parliament: Functions Practice and Procedure* (London: Sweet & Maxwell, 1989) 152-153. Employment of staff is now regulated by the (UK) House of Commons (Administration) Act 1978 which establishes a House of Commons Commission.

> over its employees. In 1870, there was enacted a statute providing for the superannuation of persons employed in the civil service. Section 9 of that Act made it applicable to permanent officers and servants of the Senate and the House of Commons; it read in part as follows:
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> 9. The foregoing enactments shall apply to ... and to the permanent officers and servants of the Senate and House of Commons; who, for the purposes of this Act shall be held to be in the Civil Service of Canada, *saving always all legal rights and privileges of either House, as respects the appointment or removal of is officers and servants, or any of them* ...
>
> The employees of the House, therefore, are not ordinary public servants. For instance, it is clear that neither the *Public Service Employment Act*, RSC 1970, c P-32, nor the *Public Service Staff Relations Act*, RSC 1970, c P-35, apply to them. When a statute relating to public servants applies to them it expressly says so.[41]

What emerges from this analysis is that the Clerks and the Parliamentary staff are in an ambiguous situation. Their status is somewhat unique. Constitutional propriety would perhaps be better served if the appointment of the Clerks was by the Governor alone on the recommendation of the presiding officer of the relevant House, though this would entail a departure from the notion of responsible government.[42] Whilst for purposes of general House control and discipline, the Houses can be regarded as having delegated their responsibilities to their presiding officers, the situation of employment is a somewhat curious anomaly.

In many instances, the application of particular pieces of legislation regulating employment to Parliament and its staff would fall to be determined by the terms of the particular legislation rather than by general consitutional concepts and principles. Thus, where statutes such as the Western Australian Equal Opportunity Act rely on general expressions such as "person", there will be substantial doubt as to whether this embraces Parliament itself, and even more doubt about

41. Supra n 27, 483-484. (emphasis in original and footnotes omitted).
42. One argument not pursued here is whether the attribute of corporate personality enures to Parliament by virtue of its historic origin as a court of record. The decision of McLelland J in *Namoi* supra n 12 would deny that status to a colonial parliament and thus preclude such an argument.

whether this includes a House of Parliament.[43] Courts will probably hesitate to adopt a construction that would enhance the Executive's interference with Parliamentary independence.[44] Something more explicit would normally be required. If it should emerge from the terms of the legislation that a term such as "employer" is capable of including the Crown, one can then ask whether this is the Crown in right of the State Government or the Crown manifested as the Governor in Parliament. Given the lack of authority recognising the latter possibility, however conceptually attractive it might be, the former and more conventional answer will probably be accepted in the absence of a clear textual indication.

SPECIFIC STATUTORY INDICATORS

Often, however, these will be statutory sign-posts to resolve specific conundrums. One important instance is found in section 7(1) of the Western Australian Industrial Relations Act where "employer" is defined as including

> (b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees;

"Public authority" means "the Governor in Executive Council, any Minister of the Crown in right of the State, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law...."

Section 23(1) vests jurisdiction in industrial matters in the Industrial Relations Commission *except* for certain matters relating to discipline of persons who are

> (i) an officer or employee in either House of Parliament
>
> (I) under the separate control of the President or Speaker or under their joint control;

43. For example, ss 8(1), 9(1) and 10(1) qualify the expression "person" by adding "(in this sub-section referred to as the 'discriminator')" thereby making inappropriate inclusion of the Parliament itself. Note, however, s 6 of that Act provides that it binds the Crown, hence persons acting on behalf of the Crown would be caught, apparently including the Clerks. The expression "person" in a proper context is apt to include the Crown. See *Boarland (Inspector of Taxes) v Madras Electric Supply Corporation* [1953] 2 All ER 467, 472.

44. Supra n 27 Pratte J, 491.

(II) employed by a Committee appointed pursuant to the Joint Standing Rules and Orders of the Legislative Council and the Legislative Assembly; or

(III) employed by the Crown....

The inference could be drawn that those exceptions aside, the Industrial Relations Commission could exercise jurisdiction over parliamentary staff.

Further, for the purposes of the jurisdiction of the Public Service Arbitrator under Part IIA, Division 2 of the Industrial Relations Act, it is significant that section 80C(1) excludes from the definition of a "Government Officer" any person who is an officer or an employee in either House of Parliament

(i) under the separate control of the President or Speaker or under their joint control;

(ii) employed by a Committee appointed pursuant to the Joint Standing Rules and Orders of a Legislative Council and a Legislative Assembly; or

(iii) employed by the Crown....

It follows that the definition of "employer" in section 80C has no reference to the employment of those officers enumerated above.

Whether the more general definition of "employer" in section 7 operates to include either the Clerks of the Houses is another matter. One has to approach the concept of "employer" to some degree as parasitic upon the meaning of "employee" in the same section. That definition, as expanded at common law, requires a consideration of the relationship between the persons said to be the employer and employee, largely in terms of whether the former has control over the activities of the latter and whether the "employee" can be said to be part of the organisation or apparatus of the "employer". Given the generality of these expressions it seems to be clear that a relationship of employment exists, for the purposes of the Industrial Relations Act between the parliamentary staff and the "Crown" arguably manifested as the Governor in Council, as suggested above, rather than a notional corporation personified by the trinitarian agencies of "Parliament" (both Houses and the Queen) or by a corporation sole comprised by "the Governor in Parliament".

REPRESENTATION OF HOUSES

In any case, a separate issue will arise as to who may be an appropriate person to represent Parliamentary interests. In an industrial relations context, depending on the specific terms of the legislation, it may well be that representation of Parliamentary staff by a body like the Civil Service Association is inappropriate, given that Parliamentary staff are not ordinary public servants. Whether that representation should be effected by the relevant Clerks or the presiding officers is not an easy question to determine. It may well be that as between them there is no mutual exclusivity of representative function; in other words, it may well be that either the Clerks or the presiding officers may competently discharge the task of *representation*, the matter falling to be resolved among them by established usages and conventional practices. In such cases, of course, one House alone cannot satisfactorily affect the operation of statute law by its own resolution,[45] but it must be recognised that it always lies within the sovereign power of Parliaments to determine these matters by legislation and hence protect themselves from any erosion of Parliamentary autonomy and independence.

45. *Stockdale v Hansard* (1839) 9 AD & E 1; 112 ER 1112.