Members of Parliament: law and ethics

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Chapter 8

Abuse of public trust — corruption offences

Introduction

A member [of Parliament] is the watch-dog of the public; and Cerberus must not be seduced from vigilance by a sop.

R v Boston per Higgins J.1

This chapter examines the criminal liability of members of parliament, both common law and statutory, in relation to their official functions. As with all other standards of members, their criminal liability is based on their fundamental obligation to act in the public interest. However, an infringement of that obligation should only attract a criminal penalty if it involves a serious abuse of the public trust — it must lie at the extreme end of the spectrum of conduct which falls below that expected of members by the community. Where along that spectrum lies the dividing line between criminal and non-criminal conduct is not clearly defined.2 A significant reason for that is the very nature of the political process as one of compromise and bargaining. Not surprisingly, a further complication is the uncertainty over how far art 9 freedom of speech immunises members from criminal liability.

There are at least three areas of the criminal law which pertain to the criminal liability of members in their official capacity: bribery, extortion and official misconduct. (Other offences also apply to members as either public officials or as a members of the public but they fall outside the scope of this book.)3 These offences are often referred to as offences of ‘official corruption’ because they involve an abuse of the public trust in the performance of their functions both inside and outside the

1 (1923) 33 CLR 386 at 410.
2 This was recognised in the Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (December 1995), Ch 3, at 277 and following.
3 See for example s 92 Criminal Code (NT) — bargaining for offices in the public service.
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House. However, the term 'corruption' has no clear meaning at common law. To prosecute 'corrupt conduct', it must constitute either a common law or statutory offence. Although statutes such as the Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act) refer to corruption or 'corrupt conduct', they specifically define the elements of the offence. In that way, 'corruption' is simply a label to describe the criminal liability of public officials. To provide certainty, statutory provisions which proscribe acts done 'corruptly' should therefore be avoided.

Each of the offences of bribery, extortion and official misconduct in relation to members is considered in this chapter. An attempt is made to provide guidance to members as to when conduct is criminal. In doing so, assistance is gained from the position in the UK, Canada and the US. Of particular importance are the offences of bribery and extortion. While the latter is often mistakenly thought to require coercion, the relationship between the two offences is much closer. For bribery, a benefit must be offered to or accepted by a member in order to influence the member in the exercise of his or her duties as a member. For extortion, the member as a public officer must take or accept a benefit knowing that he or she has no right to take that benefit and does so 'under colour of office'. The focus of each of these offences differs — with bribery, it is on the influence sought, whereas with extortion, it is on the taking of an undue benefit.

Bribery

Historical outline

The payment of bribes to public officials was a widespread phenomenon in England for centuries. The first attempt at controlling official corruption was the enactment of the First Statute of Westminster in 1275 which, in various chapters, dealt with instances of extortion, such as the unlawful taking or acceptance of benefits by various public officials. This Statute was in response to the revelations of extortion by sheriffs, bailiffs and other officials contained in the report known as The Hundred Rolls which was commissioned by Edward I in 1274.

Professor Finn has shown that this early focus on the unlawful receipt of benefits on account of one's official position (that is, extortion) gradually shifted to the acceptance

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4 Sections 8 and 9 as defined by the NSW Court of Appeal in Greiner v ICAC (1992) 28 NSWLR 125.
5 The jurisdiction of integrity regimes, such as ICAC, defined by reference to 'corruption', is criticised as corruption 'monstering': Findlay, 'Corruption Control and Monstering' (1991)
12 Current Issues in Criminal Justice 36.
6 Statute of Westminster I, 3 Edw (1275).
7 Chapters 26, 27, 30 & 31.
9 The name of the report came from the fact the royal commissioners made inquiries from each of the political divisions called the 'hundreds'.

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of benefits for exercising official power for particular purposes (that is, bribery).10 According to Coke,11 bribery offences originally applied to judges and extortion offences to public officers. However, by the publication of Coke’s *Institutes of the Laws of England* in the 17th century, the offence of bribery applied to all public officers.

Members of Parliament were not excluded from the corrupt practices affecting officialdom. Even after the Glorious Revolution of 1688, William III offered members numerous official positions in order to gain some control of Parliament.12 Accordingly, Parliament adopted a number of measures to protect itself and its members from Crown influence. One of these was the resolution of the House of Commons on 2 May 1695 which declared its disapproval of bribery of members of Parliament:

*That the offer of any money, or other advantage, to any member of Parliament, for the promoting of any matter whatsoever, depending or to be transacted in Parliament, is a high crime and misdemeanour, and tends to the subversion of the English constitution.*13

Even before this resolution, Parliament regarded the *acceptance* of bribes by members as a grave offence warranting, in many cases, expulsion from the House. In 1694, the Speaker of the House of Commons, Sir John Trevor, was expelled from the House for accepting 1000 guineas from the City of London in return for assisting the passage of the *Orphans Act*.14

There are two notable aspects of this 1695 resolution. First, it is declaring bribery of members as a high crime according to the *lex et consuetudo Parliamenti* and not as a common law offence. Secondly, the offer or acceptance of a bribe must be concerned with the member’s role in parliamentary proceedings rather than outside the House. This restriction is not clear from the explanation of the resolution given by *Erskine May* which has been adopted by Parliaments throughout the Commonwealth as the basis of a criminal offence:

>The acceptance by any Member of either House of a bribe to influence him in his conduct as such Member, or of any fee, compensation or reward in connection with the promotion of, or opposition to any bill, resolution, matter or thing submitted*

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11 *Institutes of the Laws of England*, 3 Co Inst 147. What is regarded as the first bribery statute, 8 Rich 2, ch 3 (1384), applied only to judges of the King’s Bench and Common Pleas and Barons of the Exchequer. This statute remained in force until 1881.


14 *CJ* (1693-97) 274.
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or intended to be submitted to the House or any committee thereof is a breach of privilege.¹⁵

A consequence of the 1695 resolution appears to be that there is no common law offence of bribery in relation to the parliamentary activities of members of the United Kingdom Parliament. The House of Commons thereby assumed exclusive jurisdiction over bribery of members in relation to their official activities whether within or outside the scope of art 9 freedom of speech. This was also the conclusion of the Royal Commission on Standards of Conduct in Public Life (the Salmon Report)¹⁶ which recommended¹⁷ that bribery of members within their parliamentary capacity be made a criminal offence. The Report warned, however, that members were liable for bribery in relation to conduct occurring outside their parliamentary duties:

> We should make it clear that corrupt transactions involving a Member of Parliament in respect of matters that had nothing to do with his parliamentary activities would be caught by the ordinary criminal law [emphasis added].¹⁸

However, in 1992 a Member of the House of Commons was tried for misuse of public office for accepting benefits in return for using his influence on behalf of a company and was acquitted.¹⁹ The conclusion of the Salmon Report has also been questioned by two United Kingdom inquiries: the Nolan Committee²⁰ and the 1999 Report of the Joint Committee on Parliamentary Privilege.²¹ Indeed, the latter report recommended legislation to render members liable for bribery even when it occurs within the scope of art 9, provided any prosecution has the consent of the Attorney-General.²²

The Salmon Report’s conclusions were based on the view that a member does not hold a public office. The classic test of a ‘public officer’ is that espoused by the English Court of Criminal Appeal in *R v Whitaker*:

> A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the

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¹⁷ At para 311.

¹⁸ At para 308.


²¹ At para 136.

²² Recommendation 13 and paras 166-73. There is an extensive discussion of all the options at paras 143-165.
duties he discharges, he is a public officer.\textsuperscript{23}

In both Australia\textsuperscript{24} and Canada\textsuperscript{25} a member of parliament has been held to be a public officer.\textsuperscript{26} Moreover, it may well be that for the purposes of the common law offence of bribery, the critical requirement is not the holding of a public office, but the violation of a public trust.

\textbf{Common law offence}

A classic definition of the general offence of bribery at common law is given by \textit{Russell on Crime}:

Bribery is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.\textsuperscript{27}

While specific statutory provisions dealing with bribery of members of parliament have been enacted at the Commonwealth level,\textsuperscript{28} in South Australia\textsuperscript{29} and in the code jurisdictions\textsuperscript{30} of Queensland, Tasmania, Western Australia and the Northern Territory, the common law offence of bribery continues to exist at the Commonwealth level and in NSW, Victoria and the ACT. The two principal Australian cases on the common law offence of bribery of members of parliament are \textit{R v White}\textsuperscript{31} and \textit{R v Boston}.\textsuperscript{32}

\textbf{R v White}

In \textit{R v White}, an early decision of the NSW Supreme Court in 1875, the Court upheld the conviction of White for offering a bribe to a member of the NSW Legislative Assembly in the lobby of the House. The bribe was offered to obtain the member's vote in the House for compensation on resumption of a property. While noting the lack of judicial precedent, the Court (Martin CJ, Hargraves and Faucett JJ) declared that the offer or acceptance of a bribe by a member of parliament

\begin{footnotes}
\item[23] [1914] 3 KB 1283 at 1296.
\item[24] See \textit{R v Boston} (1923) 33 CLR 386.
\item[25] See \textit{R v Bunting} (1865) 7 OR 524.
\item[27] J W Cecil Turner, \textit{Russell on Crime} (12th ed) Sweet & Maxwell Limited London 1986 vol 1, p 381, citing 3 Co Inst 149; 1 Hawk c 67 s 2; 4 Bl Com 139; 3 Stephen, Hist CrL 250.
\item[28] Section 73A Crimes Act 1914 (Cth).
\item[29] Section 249 Criminal Law Consolidation Act 1935 (SA).
\item[30] Criminal Codes: ss 59 & 66 (Qld); ss 71 & 72 (Tas); s 60 (WA); ss 59 and 60 (NT).
\item[31] (1875) 13 SCR (NSW) 322.
\item[32] (1923) 33 CLR 386.
\end{footnotes}
constituted an offence at common law. The Court’s reasoning relied more on the injury to the public occasioned by bribery of members than whether they held a public office. Only Faucett J expressly held that they did so. Both Hargraves and Faucett JJ recognised that members hold positions of public trust and confidence and hence are amenable to the common law of bribery when they abuse this public trust. They implicitly rejected a narrow scope for the common law offence of bribery based upon some restricted interpretation of ‘public office’. They regarded all those who hold ‘offices of public trust and confidence’ as liable to account for bribery.

While avoiding any reference to public office, Martin CJ implicitly accepted the reasoning of the other two judges by emphasising the injury to the public which bribery of members inflicts. After reviewing the case law on bribery from early in the 17th century, the Chief Justice simply extended the offence, in the absence of direct precedent, from the situation where it applies to bribery of electors voting in parliamentary elections to the bribery of those elected to vote in parliament:

The injury to the public is more direct, and is certainly greater in tampering with the person actually elected, than with the persons who elect him ... [A] legislator who suffers his vote to be influenced by a bribe does that which is calculated to sap the utility of representative institutions at their foundation.

Interestingly, almost no reference was made in any of the judgments to the effect of parliamentary privilege where a member is bribed to vote in a particular way in parliament. Martin CJ appears to reject an argument that bribery of members is more appropriately dealt with by parliament than by the courts, by referring to the rejection of the same argument in relation to the bribery of electors in *Rex v Pitt* and *Rex v Mead* in 1762. Nor was such an argument supported by the absence of any direct judicial precedent, for, in his view, this may well be due to the particular difficulty of establishing that the offer or receipt of a benefit to or by a member is a bribe. In any event, as the offence was one of attempted bribery occurring in the lobby of Parliament, it was arguably beyond the scope of parliamentary privilege.

While *R v White* establishes that it is a common law offence to offer a benefit in order to influence the vote of a member in parliament, as well as to accept such a

33 (1875) 13 SCR (NSW) 322.
34 At 338.
35 Per Hargrave J at 334 and per Faucett J at 339.
36 Per Hargrave J at 334.
37 At 327-330.
38 At 330.
39 At 330.
40 (1762) 3 Burr 1335; 97 ER 861.
41 (1875) 13 SCR (NSW) 322 at 331.
42 This is so if the decision in *United States v Brewster* (1972) 408 US 501 (discussed below) is followed in Australia.
benefit, little guidance is given in any of the judgments as to other circumstances in which a member may be implicated in a bribery offence. For instance, is it a bribe for a member to accept a benefit on account of exercising his or her influence on behalf of a constituent? This was answered affirmatively by the High Court in *R v Boston*.

### *R v Boston*

In *R v Boston*, a majority of the High Court found a criminal conspiracy in an agreement to pay a member of the NSW Legislative Assembly large sums of money in return for using his position to secure the acquisition of certain property by the NSW Government and to put pressure on the Minister for Lands.

Given that a criminal conspiracy requires an agreement between two or more persons to commit an unlawful act, the issue in *R v Boston* was whether the acceptance of money by a member to exert pressure on the Executive constituted an unlawful act. The defendant argued that it did not because the agreement contemplated no act on the part of the member which was to be performed in Parliament, hence what was to occur fell outside the member's official duties as a legislator. In rejecting this approach, the majority judges varied in their reasoning.

Knox CJ regarded such an agreement as tending to the *public mischief* and hence capable of constituting a criminal conspiracy. The House of Lords has since declared there is no common law offence of conspiracy to effect a public mischief. 45

The other majority justices, Isaacs and Rich JJ (in a joint judgment) and Higgins J, while acknowledging that the member's official or legal duties were confined to those of a parliamentary nature, nevertheless regarded any act of a member for reward in terms of exerting pressure on a minister outside parliament as a violation of public trust. Such behaviour seemed to be regarded by their Honours as a criminal offence although only Higgins J expressed this view in the context of a member's official duties — and while leaving open the position, his Honour indicated that if, by the agreement, the member were to act entirely outside the House, this would also constitute an indictable conspiracy.

Isaacs and Rich JJ considered the member 'guilty of a breach of high public trust' for entering into such an agreement. Their Honours expressly followed *R v White* in holding that a member is a public officer. However, Knox CJ avoided any discussion of this issue, while Higgins J regarded it as inmaterial: 'He is a Member of Parliament holding a fiduciary relation towards the public, and that is enough.' 52

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43 (1923) 33 CLR 386.
45 *R v Withers* [1975] AC 842.
46 (1923) 33 CLR 386 at 402-403.
47 At 409.
48 At 407.
49 At 410.
50 At 405.
51 (1875) 13 SCR (NSW) 322.
52 (1923) 33 CLR 386 at 412.
Gavan Duffy and Starke JJ in their joint dissent adopted a strikingly different position. First, in their view, a member did not hold public office and, therefore, was not subject to the common law as such. They gave no justification for this view because of the second ground for their dissent, namely, that the count was too widely drawn. Their Honours considered the count was capable of being satisfied by a criminal or innocent agreement. In other words, they accepted that it may not be unlawful for a member in certain cases to act for reward in exerting influence on the executive:

It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.

What may be an innocent agreement is indicated in the preceding passage:

The terms of the charge would be satisfied if it were shown that he was to be employed to forward a transaction which he believed to be, and which in fact was, entirely beneficial to the purchasers and desirable in the interests of the community, and which had never been and could never be the subject of parliamentary enactment or discussion.

In recognising the difficulty in drawing the line between conduct which is criminal and that which is unethical, the dissenting judgment demonstrates a more practical appreciation of the realities of political life than the majority judgments. But in denying members are liable at common law as public officers, their Honours ignored the obligations of members to act in the public interest. However, at least three of the six judges did recognise that members of parliament are liable at common law for the criminal offence of bribery if they abuse the public trust vested in them as the representatives of the people. The elements of that offence are considered below, along with the similar elements of the code offences.

**Code offences: Queensland and Western Australia**

The code offences in relation to the bribery of members of parliament in Queensland *Criminal Code, ss 59 and 60* and Western Australia *Criminal Code, ss 60 and 61* are

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53 At 413.
54 At 415.
55 At 414.
56 Isaacs, Higgins and Rich JJ. Further support can be found in *Crittenden v Anderson* (1950) an unreported decision of Fullagar J sitting as a Court of Disputed Returns, noted in (1977) 51 ALJ 171; *Pratten v The Labour Daily Ltd* [1926] VLR 115 at 125; *R v Bembridge* (1783) 3 Doug 327 at 332. Also in *R v Bunting* (1885) 7 OR 524 the majority did not consider whether members are public officers but O'Connor J in dissent held them not to be public officers but legislators whose duties are not executive or administrative but deliberative.
identical except that the latter defines 'benefit' to mean 'pecuniary or otherwise'.

The Queensland provisions are as follows.

**Member of Parliament receiving Bribes**

59. (1) Any person who, being a member of the Legislative Assembly, asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself, or any other person upon any understanding that the person's vote, opinion, judgment, or action, in the Legislative Assembly, or in any committee thereof, shall be influenced thereby, or shall be given in any particular manner or in favour of any particular side of any question or matter, is guilty of a crime, and is liable to imprisonment for 7 years, and is disqualified from sitting or voting as a member of the Legislative Assembly for 7 years.

(2) The offender cannot be arrested without warrant.

**Bribery of Member of Parliament**

60. (1) Any person who —

(a) in order to influence a member of the Legislative Assembly in the member’s vote, opinion, judgment, or action, upon any question or matter arising in the Legislative Assembly or in any committee thereof or in order to induce the member to absent himself or herself from the Assembly or from any such committee, gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, such member, or to, upon, or for, any other person; or

(b) attempts, directly or indirectly, by fraud, or by threats or intimidation of any kind, to influence a member of the Legislative Assembly in the member’s vote, opinion, judgment, or action, upon any such question or matter, or to induce the member to so absent himself or herself:

is guilty of a crime, and is liable to imprisonment for 7 years.57

The code offences in Queensland and Western Australia are quite narrow in scope compared to those in the other code jurisdictions and under the Crimes Act 1914 (Cth). The activity, the subject of the bribe, is restricted to within the member’s House; that is, the bribe must be intended to influence the member in his or her ‘vote, opinion, judgment, or action in the House ... or in any Committee ... or in any Joint Committee’. Although a bribe offered or accepted in respect of a member

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57 There need not be a specific question before the House; the benefit may be offered ‘if and when one arises’ R v Connolly No 2 [1922] St R Qld 278 at 288 per Sund J.
acting outside the House may well be an offence at common law, it is not a bribery offence under these provisions of the Queensland and Western Australian codes. However, both codes also prescribe corruption offences for ‘public officers’ whose definition is sufficiently broad to include members of Parliament as persons ‘discharging a duty ... of a public nature’. The narrow scope of the member specific bribery provisions may have been intended to be complemented by these general offences which are considered further below. In addition, corrupt activities of members outside Parliament may constitute the offence of extortion under s 88 of the Queensland Criminal Code or a corruption offence under s 83 of the Western Australian Criminal Code (these also will be dealt with later). In any event, the member specific bribery provisions clearly require redrafting to bring them in line with the other code jurisdictions.

The Queensland Criminal Code Review Committee in its draft code in 1991 proposed a new bribery offence in cl 137 which applied to ministers and public officers as well as members. The elements of the offence were contained in the definition of ‘bribe’ to which the clause simply referred. As regards members, the proposal contained two substantive changes: first, the proposed offence was no longer limited to member's activities within the House but covered ‘the performance or discharge of the functions’ of a member; and second, the proposed offence omitted reference to any ‘understanding’ to ‘influence’ a member, requiring instead that the receipt of the property or benefit be done ‘corruptly in respect of any act done or to be done, or any omission made or to be made ...’ in relation to the performance of the member’s functions.

It is surprising that the Report of the Western Australia Parliamentary Standards Committee simply concluded, without any discussion, that ss 60 and 61 of the Criminal Code (WA) and s 7 of the Official Corruption Commission Act 1988 ‘cover reasonably adequately the subject of potential bribery of Members of Parliament’. This contrasts with the concern expressed in the Report of the Royal Commission into Commercial Activities of Government and other Matters (the WA Inc Report) over the inadequacy of ss 82 and 83 of the Criminal Code (WA) in being confined to acts occurring within ‘the performance or discharge of the functions of his office or employment’. The Report noted that these offences would therefore not cover influence peddling and forms of extortion.

**Code offences: Tasmania and the Northern Territory**

The bribery offences prescribed by the Criminal Codes of Tasmania and the Northern Territory are substantially the same. Sections 71 and 72 of the Tasmanian

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58 Section 87 Criminal Code (Qld); s 82 Criminal Code (WA). See also s 77 Criminal Code (NT).
61 Vol 1 1989.
62 At section 8.3.
63 Part II, 1992 at 4.5.2.
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_Criminal Code_ provide:

71. Any person who, being a Member of either House of Parliament, solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, upon any understanding that the exercise by him of his duty or authority as such Member shall be in any manner influenced or affected, is guilty of a crime.

Charge: Receiving [or soliciting] a bribe as a Member of Parliament.

72. Any person who, in order to influence a Member of either House of Parliament in his exercise of his duty or authority as such Member, or in order to induce him to absent himself from the House or from any Parliamentary committee, gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for such Member, or any other person, is guilty of a crime.

Charge: Bribing [or offering to bribe] a Member of Parliament.[64]

Sections 59 and 60 of the Northern Territory _Criminal Code_ provide:

59. Bribery of Legislative Assembly member

Any person who, in order to influence a member of the Legislative Assembly in the exercise of his duty or authority as a member, or in order to induce him to absent himself from the Legislative Assembly or a committee of the Legislative Assembly, gives, confers, or procures, or promises or offers to give, confer, or procure, property or a benefit of any kind to, upon, or for the member or another, is guilty of a crime and is liable to imprisonment for 7 years.

60. Legislative Assembly member receiving bribe

Any person who, being a member of the Legislative Assembly, solicits, receives or obtains, or agrees to receive or obtain, property or a benefit of any kind for himself or another, upon the understanding that the exercise by the member of his duty or authority as a member shall be in any way influenced or affected, is guilty of a crime and is liable to imprisonment for 7 years.

It is readily apparent how much wider these offences are compared with those in Queensland and Western Australia. The intended effect of the bribe must relate to 'the exercise by the member of his duty or authority as a member' (s 60 _Criminal Code_ (NT)). The nature of the required 'understanding' is, however, problematic, and is discussed below in relation to the elements of the offence.

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64 See _Report of the Royal Commission into an attempt to bribe a Member of the House of Assembly & other matters_ (Tasmania, October 1991) which concerned the prosecution of Edmund Rouse.
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**Crimes Act 1914 (Cth)**

Section 73A of the *Crimes Act 1914* (Cth) prescribes two offences:

(1) A member of either House of Parliament who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain, any property or benefit of any kind for himself or any other person, on an understanding that the exercise by him of his duty or authority as such a member will, in any manner, be influenced or affected, is guilty of an offence.

(2) A person who, in order to influence or affect a member of either House of the Parliament in the exercise of his duty or authority as such a member or to induce him to absent himself from the House of which he is a member, any committee of that House or from any committee of both Houses of the Parliament, gives or confers, or promises or offers to give or confer, any property or benefit of any kind to or on the member or any other person is guilty of an offence.

The ACT provides an offence in practically identical terms in s 15 of the *Crimes (Offences Against the Government) Act 1989* (ACT).

These provisions, which are substantially the same as the Tasmanian and Northern Territory code offences, were inserted in 1982 on the recommendation of the Bowen Committee. The Committee recommended provisions based on the Tasmanian Code rather than on the narrower provisions of Queensland and Western Australia, to ensure that they covered members' activities both inside and outside the House, in particular, representations by members to ministers and public servants. Their recommendation was based on the uncertainty existing at common law as to whether bribery of members of parliament constituted a common law offence and the inapplicability of the general bribery offence in s 73 of the *Crimes Act* which applied only to 'Commonwealth officers'.

**South Australia**

In South Australia, five specific offences relating to public officers are made applicable to members of parliament who are included in the wide definition of 'public officer'. Notably, their rights under parliamentary privilege are expressly preserved.


68 Section 237(c).

69 Section 240.
The specific bribery offence is in s 249(2) of the *Criminal Law Consolidation Act 1935* (SA):

A public officer ... who improperly seeks, accepts or agrees to accept a benefit from another person (whether for himself or herself or for a third person) as a reward or inducement for —

(a) an act done or to be done, or an omission made or to be made, in his or her official capacity; or

(b) the exercise of power or influence that the public officer or former public officer has or had, or purports or purported to have, by virtue of his or her office, is guilty of an offence.

The element of ‘acting improperly’ is defined in s 238:

(1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.

(2) A person will not be taken to have acted improperly for the purposes of this Part unless the person’s act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.

(3) Without limiting the effect of subsection(2), a person will not be taken to have acted improperly for the purpose of this Part if—

(a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner;

(b) there was lawful authority or a reasonable excuse for the act, or

(c) the act was of a trivial character and caused no significant detriment to the public interest.

(4) In this section —

‘act’ includes omission or refusal or failure to act;

‘public officer’ includes a former public officer.

This offence extends to two situations: (1) where the contemplated official act is the exercise of influence; and (2) where the public officer purports to exercise a power which he or she does not have. More importantly for members is the definition of ‘acting improperly’ which requires them to have ‘knowingly or recklessly [acted] contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public
officers of the relevant kind'. This test allows for the special role of members to engage in what are regarded by the community as legitimate political 'deals' without technically infringing the bribery laws. Further, any public disclosure made by the member of such a deal (from time to time deals are made public between political parties or their parliamentary leaders) must be taken into account in determining whether the member acted improperly. These provisions would clearly accommodate, for example, a deal such as the 'Accord' reached in Tasmania between the Tasmanian Minority Government and the Greens in 1989.

General bribery offences

The Criminal Codes of Queensland, Tasmania, Western Australia and the Northern Territory also provide for bribery offences in relation to those who hold public office which could include members of parliament.\(^70\) It may be that the specific bribery offences for members of parliament indicate that those general offences were not intended to extend to members.

The Queensland\(^71\) and Northern Territory\(^72\) Code provisions require the benefit to be given on account of the discharge of a duty by the public officer who is charged with the performance of that duty. The Tasmanian Code provision\(^73\) requires the benefit to be given on account of the discharge of the duties of the office. How far these provisions extend to the activities of members outside parliament is unclear. Support for the wide view can be gleaned from the approach adopted by the High Court in *Herscu v The Queen*\(^74\) in holding that the 'duties' of a minister were not confined to specific legal duties but referred to the functions of the office, which included exerting influence as a result of one's position. While a member has a function in representing the interests of his or her constituents, whether it can be said that this function extends to making representations to the executive on behalf of persons who are not constituents remains problematic. A further difficulty with these Code provisions is their use of the term 'corruptly'.

More comprehensive is the Western Australian Code provision, enacted in 1988, which refers to the functions of office:

62. Any public officer who obtains, or who seeks or agrees to receive a bribe, and any person who gives, or who offers or promises to give, a bribe to a public officer, is guilty of a crime and is liable to imprisonment for 7 years.

Section 1(i) defines 'bribe':

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\(^70\) The definition in the WA *Criminal Code* expressly includes a member of parliament although public officer is defined as anyone 'exercising a power under a written law': s 1.

\(^71\) Section 87 *Criminal Code* (Qld). See *R v McCann* [1998] 2 Qd R 56 on 'holder of any public office'. Unclear whether this includes members of parliament.

\(^72\) Section 77 *Criminal Code* (NT).

\(^73\) Section 83 *Criminal Code* (Tas).

\(^74\) (1991) 173 CLR 276.
The term 'bribe' means any property or benefit, whether pecuniary or otherwise, sought, offered, agreed upon, given or obtained for the person being or to be bribed or any other person, in respect of any act done or to be done, or any omission made or to be made, or any favour or disfavour shown or to be shown, in relation to the performance or discharge of the functions of any office or employment, or the affairs or business of a principal.

The difficulty remains with this provision in relation to the scope of the 'functions' of members of parliament.

**Analysis of the elements of a bribery offence**

The key elements of a bribery offence are essentially the same at common law and under the Australian statutory provisions:

1. A benefit is offered, accepted, or solicited;
2. To or by a member of parliament;
3. In order to influence, or upon an understanding to influence the member;
4. In the member's behaviour in office or in the exercise of his or her duty or authority as a member.

It is evident from the elements of both the common law and statutory bribery offences, apart from the South Australian offence, that they only concern the bribery of future official action. Benefits offered or received in respect of past official action are not caught by these offences.

The most significant difference between the common law and the statutory provisions concern the second element listed above: at common law the benefit must be given to the member, but by statute it can be offered to or accepted by a third person. Each of these key elements will be examined in turn.

**1. 'A benefit is offered, accepted or solicited'**

The nature of the benefit offered, accepted or solicited, both at common law and under the Australian statutory provisions, may be of a pecuniary or non-pecuniary kind. Russell's definition of bribery at common law refers to 'any undue reward'.

The use of 'reward' indicates a very broad test which will include money, goods, services, forgiveness of a debt and even sexual favours. The requirement that the reward be 'undue' precludes the commission of an offence if the reward is so small — a treat — that it is unlikely to influence an official.

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75 J W Cecil Turner, above note 27, p 341.
76 See H M Advocate v Dick (1901) 3 F (Ct of Sess) 59 at 64.
78 See Woodward v Malby [1959] VR 794, where a book of matches was held too trivial. See also Willes J in the Bodmin Case (1869) 1 O'M & H 124 at 125; S v Deal Enterprises 1978 (3) S A 302.
Section 73A of the *Crimes Act 1914* (Cth) refers to 'any property or benefit of any kind', while 'property' is defined in s 3 to include 'money and everything, animate or inanimate, capable of being the subject of ownership'. Hence, non-tangible rewards must be covered by the reference to 'benefit of any kind'. The other Australian statutory provisions adopt the same wording, although the Western Australian provision expressly adds 'whether pecuniary or otherwise'. These statutory provisions seem to reflect the common law position.

An important issue in relation to members of parliament is the extent to which campaign donations, political favours and other political advantages may be viewed as 'benefits' or 'undue rewards'. A distinction needs to be drawn here between rewards or benefits which devolve personally on a member and those which enhance the member's political position, whether this be in relation to the member's prospects of re-election or of ministerial appointment, or advancement to positions of influence, such as on certain parliamentary committees, or promotion of the member's policies. In other words, certain benefits of a political nature may be unobjectionable, at least in so far as the criminal law is concerned, because the very nature of a representative democracy entails political bargaining and compromise. 79

A member who promises to support another member's motion in parliament or a particular policy outside Parliament in return for that member's political support in a similar respect cannot be viewed as providing or receiving a reward or benefit in order to corrupt official action. In such a case, the element of 'reward' is absent. One might argue that the conferral of mutual political support still involves a derogation of duty in adopting another's formulation of policy without necessarily considering whether it is in the public interest. However, it is unlikely that a member would support another's stand if it was clearly, in the view of the member, not in the public interest. If this did occur, such a derogation of duty is one more appropriately dealt with by the electorate or the member's party than by the criminal law.

However, in 1991 a political agreement in Tasmania thrust this issue to prominence when the 'Accord' entered into between the minority Field Labor Government and the Green Independents in Tasmania became the subject of criminal investigation. By this Accord, the Green Independents agreed to support the minority Government by voting in favour of supply and against any no confidence motions. In return, they received administrative benefits to the value of $353,000 for support services in 1990-91 which exceeded the allowance of $329,000. This arrangement was referred by the Director of Public Prosecutions in Tasmania who was asked to advise on whether it breached ss 71 and 72 of the *Criminal Code* (Tas). The Director's report 80 concluded that the special allowances provided to the Green Independents should not be viewed as 'benefits' within the statutory provisions:

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The funding for support services received by the Green Independents, whilst no doubt of benefit to them, is received by them (and their staff) pursuant to the exercise of their duties and functions as Members. These are not personal payments unconnected with the exercise of Parliamentary duties.81

Even if there were a technical breach of the Criminal Code, the Director concluded that no prosecution was warranted in the public interest, given the acknowledgement and acceptance of the Accord by the Governor, the Parliament and the community.82

This Tasmanian experience bears out the view expressed earlier that certain benefits of a political nature received by members should be recognised by the law as legitimate. Accordingly, the Australian statutory provisions need to be read down to exclude these legitimate benefits. On the other hand, the common law definition of bribery seems to be more flexible by incorporating the requirement that the undue reward ‘incline that person to act contrary to known rules of honesty and integrity’.

Political benefits

A closer look needs to be given to the range of ‘political’ benefits which may be offered to members in Australia to determine if any provide the basis for prosecution for bribery. In particular, campaign contributions, agreements not to run for office, logrolling and retainers are discussed.

• Campaign contributions

The ethical status of campaign contributions depends on the circumstances in which they were given. Contributions made to assist in the costs of an election campaign of a candidate whose policies the donor supports raise no ethical concerns provided the donor is not subsequently given preferential treatment. For this reason it would be preferable that the donors remain anonymous. This would also insulate against conflicts of interest arising. On the other hand, the receipt of campaign contributions may give rise to a range of ethical dilemmas, from a conflict of interest to bribery, depending on the intent of the donor and member. The element of intent is considered further below.

• An agreement not to run for office

An agreement not to run for office provides a significant benefit to those contesting a seat and any favour they give in return may be questioned as bribery. For instance, during a preselection process, another party member may offer not to run against the incumbent member provided the member appoints that person to the member’s personal staff. Is the benefit of the other person’s agreement not to run against the incumbent member sufficient for a bribery charge? This benefit is certainly one of a direct political advantage and was held to be a ‘thing of personal advantage’ within the New York bribery statute in People v Hochberg.83

81 At 2.
82 At 2.
83 (1978) 62 AD 2d 239; 404 NYS 2d 161.
If the decision not to run against an opponent was made to obtain a personal benefit (for example, appointment to a statutory body) in the event a particular opponent is successful, and this is understood by that opponent, the conferral of that benefit would clearly be improper. It constitutes a significant breach of public trust and may warrant prosecution, although difficulties of proof will no doubt arise. If, on the other hand, the member adopts a particular policy advocated by the withdrawn opponent in return for that person's agreement not to run against the member, this would be viewed as a legitimate political bargain.

In Tasmania, a variation on the *Hochberg* case arose in 1991 when the Head of the Premier's Office, Mr Evans, was charged with bargaining for public office. He offered the position of Ombudsman to the former Labor leader, Neil Batt, after he lost his seat in the 1989 election. The appointment was conditional on Batt signing two undertakings, one renouncing all political affiliations and the other agreeing to be ruled out of any recount in his former seat of Denison. (With multi-member constituencies in Tasmania, had one of the elected Labor members in Denison resigned shortly after the election — which was a possibility — the vacancy would be filled by a recount of the former member's preferences.) The departure of Batt from the political arena was seen as a distinct political advantage for his former party and the Field Labor Government. This saga of political intrigue is heightened by the fact that the allegation of bribery on the part of the Head of the Premier's Office was brought by Batt himself. The charge was dismissed in December 1991 by a Tasmanian magistrate for, it would seem, lack of a prima facie case. The magistrate found Batt lacked credibility as a witness but is reported also as relying upon the point that it had not been proven that Evans knew what he was doing was wrong.

For this case to involve bribery of or by a public officer, given that Evans was the only public officer involved (as Batt at the time was a former member), the charge would need to be that Evans solicited a bribe from Batt. The difficulty, though, is to identify the benefit received by Evans. The political advantage was enjoyed by the Labor Government and party. Was Evans, then, an accessory only?

The principle to be applied in each case is whether there has been an abuse of public trust warranting prosecution. Do the common law and statutory offences of bribery accommodate this approach? Unless the statutory offences are read down in the manner adopted by the Tasmanian Director of Prosecutions in relation to the 1991 Accord, they do not on their face accommodate political bargains. In contrast, the common law offence of bribery possesses that inbuilt flexibility by virtue of the requirement that the effect of the undue reward is to cause the official 'to act contrary to the known rules of honesty and integrity'. This requirement seems eminently capable of accommodating legitimate political compromises and bargains.

- **Logrolling**

Logrolling involves vote trading; that is, 'I will vote for X if you will vote for Y'. More generally, it involves the offer to exercise one's official power in a particular way if another public official does likewise. A famous US example of logrolling was...
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People ex rel Dickinson v Van de Carr\(^84\) in 1903 where a New York City alderman wrote to the street cleaning commissioner in the following terms:

“If you will reinstate Antonio Corino, who I think was too severely punished by being dismissed from your department, I will vote and otherwise help you to obtain the money needed for a new plant in Brooklyn.\(^85\)

The Court regarded such a proposal as capable of constituting the soliciting of a bribe. Lowenstein\(^86\) concedes: ‘If the letter in Van de Carr supported a bribery prosecution, there must be thousands of bribes committed daily in Washington, in State capitolis, and in city halls across the United States.’

There have certainly been instances of vote trading within Australian parliaments, especially in the Senate, in the formation of minority governments and in party room factional deals. The predominance of party discipline in Australia distinguishes the Australian political system from that in the United States. Hence, the nature and scope of vote trading and lobbying in Australia is less intense and less obvious. Significant lobbying is directed towards the policy formulators in the political parties who are usually the senior members of the parliamentary parties.

Whether a particular case of vote trading or logrolling constitutes bribery depends again on whether it entails an abuse of public trust. Lowenstein suggests that in the US logrolling is wrongful where it is motivated by a ‘corrupt intent’.\(^87\) Receipt of any specific personal benefit by a member as a result of logrolling would be evidence of this corrupt intent. But if all that is received is one of the legitimate political benefits noted earlier, then this is unlikely to involve a breach of public trust.

A clear case of logrolling occurred in Papua New Guinea in November 1993 when the Ombudsman Commission found three PNG Members of Parliament had demanded and been paid $145,000 each by Prime Minister Namaliu in return for continuing to support the Government.

- Retainers

The practice of retainers being paid to members of parliament seems to be not as common within the Australian political system compared with the UK and the US.

In the UK, the payment of a retainer to a member to act as a consultant to an organisation or individual is regarded as acceptable provided the member makes all necessary disclosures of this interest and does not initiate or advocate any matter in parliament which will confer an exclusive benefit on that organisation or individual.\(^88\) At times, acceptance of a retainer may straddle these boundaries of acceptable and unacceptable behaviour.

\(^84\) (1903) 87 AD 386; 84 NYS 461.
\(^85\) At 462.
\(^86\) D H Lowenstein, above note 78 at 814.
\(^87\) D H Lowenstein, above note 78 at 816.
Zellick\textsuperscript{89} points out that even the receipt of a retainer may technically breach UK corruption legislation. The same point can be made in relation to the Australian statutory offences of bribery. According to Zellick, whether a retainer constitutes a bribe will depend on the nature of the transaction and the intention of the parties involved. He suggests the following test:

It will be a bribe where it is intended that the Member act covertly in return for the consideration, but it will be permissible if the intention is for the Member to comport himself openly, making declarations where appropriate, or if it can truly be said that he will not use his parliamentary position for the benefit of the person making the payment — such as where it is a purely advisory arrangement — although that is easier said than done.\textsuperscript{90}

The attitude of the common law of bribery in Australia to the receipt of retainers or other benefits by members in relation to activities occurring outside parliament is not clear, given the diverse judgments in \textit{R v Boston}.\textsuperscript{91} Reference has already been made to the position taken by the majority Justices\textsuperscript{92} that the receipt of benefits by a member on account of acting as a member in seeking to influence the executive in a particular matter constituted a breach of public trust. In contrast, in their dissenting joint judgment Gavan Duffy and Starke JJ were not prepared to regard the receipt of such a benefit \textit{in every case} as conduct of a criminal nature. They said:

\begin{quote}
It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.\textsuperscript{93}
\end{quote}

This quote highlights the other three elements of the offence of bribery considered next.

\textbf{(2) 'to or by a Member of Parliament'}

At least under the Australian statutory provisions, the benefit may be conferred either on the member or on some other person. The position at common law is not so clear. This was noted by ICAC in its \textit{Report on Investigation into North Coast Land Development} where it queried whether money paid to a political party constituted a bribe at common law when it was paid to influence a member of that party (who held public office) in the performance of his or her official duties.\textsuperscript{94}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} G Zellick, above note 26 at 45.
\item \textsuperscript{90} G Zellick, above note 26 at 46 — see \textit{R v Bunting} (1885) 7 OR 524 per O'Connor J at 566.
\item \textsuperscript{91} (1923) 33 CLR 386.
\item \textsuperscript{92} Knox CJ, Isaacs, Higgins and Rich JJ.
\item \textsuperscript{93} At 415.
\item \textsuperscript{94} ICAC, July 1991, at 617.
\end{itemize}
\end{footnotesize}
(3) 'in order to influence' or 'upon an understanding to influence or affect the Member'

The statutory bribery offences in relation to members in Australia require the benefit to be offered or accepted on an understanding that the member's exercise of his or her position will be influenced or affected in some way. The common law offence of bribery seems to require the same element in prescribing that the benefit be offered or received in order to influence the member. Accordingly, benefits offered to or received by members simply on account of past favours are not covered by the Australian statutory provisions nor by the common law. The benefit must be given in order to influence the member in the future. Close examination is given here to the 'understanding' or 'intent to influence', the specificity of intention, the extent to which the member must be affected, and particular problems with campaign contributions.

(a) 'Understanding' and 'intent to influence'

The need for an 'understanding' or an 'intent to influence' imports the requirement of mens rea on the part of the giver of the benefit. If the giver of the benefit has no intent to influence the member, then no offence of bribery occurs. So if, for instance, a grateful constituent confers a gift upon the local member without any intention to influence the member, and this is known to the member, this is not bribery. But whether the member has committed another offence, such as extortion or official misconduct, or otherwise acted improperly, may need to be considered. If, on the other hand, the member accepts the gift knowing of the constituent's intent to influence but refuses to be so influenced, then there is authority to support a bribery charge against the member in such a case. The position may be different if the giver or receiver acts with the intent of trapping the other party and reporting the matter to the authorities. The better view appears to be that a trapper will not be guilty of bribery so long as it is the other party who instigates the corrupt transaction.

(b) Specificity of intention

It is clear that the reference to an 'understanding' in the statutory bribery offences does not require an agreement as such, but as with the common law offence, simply an intent on the part of the briber to influence the member.

The question which arises here is: how specific, in terms of the conduct of the member, must this intent be to influence the member? Lowenstein identifies three situations where one may intend to influence official conduct in ways which range from the specific to the general:

95 See Williams v R (1979) 23 ALR 369 at 373 per Blackburn J.
96 Lanham, Weinberg, Brown and Ryan, above note 59, p 207.
A person who provides a thing of value to a public official plausibly might hope to influence the official's decisions in any of three ways: 1) by conditioning the gift on the official's agreement to do or not to do something in a particular manner; 2) by causing the official to believe that his chances of receiving similar benefits in the future will be enhanced by acting favourably toward the donor; and 3) by stimulating gratitude or some kindred emotion that influences the official to act favourably toward the donor. 99

In the US, there are authorities 100 which regard all three situations as capable of amounting to bribery. Other authorities state the need for 'some more and less specific quid pro quo'. 101 These three situations highlight superbly the spectrum of misconduct which ranges from unethical conduct to criminal misconduct. The first situation is clearly one of bribery; the second belongs to the grey area surrounding that dividing line; and the third is probably not criminal. Of course, difficulties of proof arise in all three situations.

(c) 'Influence or affect' the member

The intention or understanding must be to influence or affect the exercise of the member's functions. At issue here is whether or not the intended effect on the conduct of the member must be to cause the member to act in breach of duty. In other words, does bribery arise even when the member is encouraged to act in the proper manner?

As regards public officials generally, the position at common law is not clear. In Williams v R 102 Blackburn J in obiter was of the view that the common law offence of bribery required an 'intention to procure a breach of duty on the part of the officials bribed'. 103 Yet as Lanham 104 points out, the High Court in R v Boston accepted that conspiracy to bribe a member of parliament to act in the public interest still constituted an offence. Two South African cases, R v Gurney 105 and R v Patel, 106 required no intention that the official act in breach of duty.

As regards statutory offences, Blackburn J in Williams v R interpreted s 73 of the Crimes Act 1914 (Cth) as effecting a change in the common law position by extending to a case where a benefit is offered to encourage public officers, in that case, two police officers, to properly perform their duties. 107 Section 73 also applied even when payment was made for an act already done. 108
The preferable view seems to be that a member is 'influenced or affected' simply on receipt of a benefit if it is intended: (a) to persuade the member to change his or her stance on a matter, such as whether to vote in a particular way in parliament; or (b) to encourage the member to vote in the way the member intended to before receiving the benefit; or (c) to encourage the member to decide an issue in a particular way. The statutory offence considered in *Williams v R* extended to benefits given for acts done in the past. In such a case, it is impossible to require the benefit to influence or affect the action taken.

If there were a requirement to establish a particular breach of duty on the part of a member, it could be argued that this occurs whenever a member accepts a benefit on any understanding because this conflicts with the member's duty to act in the public interest. As Higgins J put it, 'to act in violation of his duty to use his office for the public, not for his private, interest, is a criminal offence'.

(d) Political donations

Clearly, political donations present some difficulty in this context. The circumstances in which the offer or acceptance of political donations may constitute bribery depends on the existence and nature of an intention or understanding to influence or affect the member.

Determining the intention of the donor when making a political donation can obviously be difficult. This was recognised in 1875 by Martin CJ in *R v White* as one factor explaining the absence of any conviction for an attempt to bribe a member of Parliament:

> it may not be an uncommon thing for a member of the Legislature to have his conduct influenced by benefits given or promised, but the difficulty of proving that to be a bribe which the parties interested profess to regard as a just attention to the wishes and arguments of proved and steady supporters, may well account for the fact that there has been no conviction for an attempt to bribe a member of Parliament.

Once the intentions of the donor and donee are ascertained, a distinction can be drawn between two situations which illustrate the delicate line which separates bribery from political financial support.

The first is where a donation is given directly or indirectly to assist the election of a candidate because that person, or the political party of which that person is a member, has a policy on an issue which the donor is keen to see implemented. This is clearly not improper conduct. There may well be an understanding here in terms of their co-incidence of views, but it is not a case where the member is 'influenced or affected' in the formulation of that policy.

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109 *R v Rosten* (1923) 33 CLR 386 at 409.
110 (1875) 13 SCR (NSW) 322.
111 At 331.
To be distinguished from this situation is where a member accepts a benefit to vote in parliament although they would have voted in the same way if the benefit had not been provided. The receipt of the benefit is a clear breach of duty because of the member's duty to act solely in the public interest.

The second situation is where a political donation is given in return for an undertaking that the member will adopt or even maintain a particular policy. This is unacceptable conduct. In this situation, the member 'obliges' him or herself to the interests of the donor, whereas in the previous case the member assumes no obligation to the donor, leaving unaffected the prerogative to decide from time to time what is in the public interest.

Another situation which occurs, particularly in the US, is the practice of special lobby groups making political campaign contributions with the explicit purpose of guaranteeing access to legislators when required in the future. It is suggested by Lowenstein that such contributions are bribes despite the apparently widely held view in the US community that they are not.\textsuperscript{112} Such a practice is at least on the borderline of bribery and is certainly a breach of duty to act in the public interest in so far as it is intended to secure preferential treatment on the basis of gratitude rather than merit.

Finally, acceptance of a political donation from a donor who is a witness before a parliamentary committee would be clearly improper on the part of any member of that committee. While it may be difficult to establish bribery, the receipt of the benefit under colour of office might constitute extortion (see further below).\textsuperscript{113}

(4) ‘in the member's behaviour in office'\textsuperscript{114} or ‘in the exercise of his duty or authority as a member'\textsuperscript{115}

This element is concerned with the member's official conduct which must be influenced or affected, or intended to be influenced or affected, by the benefit. At common law, this is generally cited as 'behaviour in that office'. As noted earlier, the original basis for regarding bribery as an offence committed only by those who held public office was the need to confine the offence to those situations where the public trust is violated. Accordingly, only if the conduct which is influenced or intended to be influenced falls within the scope of their office or trust will a bribery prosecution be open.

The terminology adopted by the statutory formulations is slightly different from that at common law:

(1) the Commonwealth, Northern Territory and Tasmanian provisions require

\textsuperscript{112} D H Lowenstein, above note 78 at 826-828.
\textsuperscript{113} See the WA Report of the Royal Commission into Commercial Activities of Government and Other Matters, 1992, Part II at 4.5.3.
\textsuperscript{114} For a discussion of this common law element, see J W Cecil Turner, above note 27, p 381.
\textsuperscript{115} Section 59 Criminal Code (NT).
the member to be influenced 'in the exercise by him of his duty or authority as such a member';

(2) the Queensland and Western Australian provisions currently prescribe a narrower scope — to influence a member 'in the member's vote, opinion, judgment, or action upon any question or matter arising in the Legislative Assembly ... or in any committee thereof ... or in order to induce the member to absent himself or herself from the Legislative Assembly or from any such committee'.

The formulation in (2), while too narrow in scope, involves little uncertainty in deciding whether the conduct of the member which is the object of the bribe is within the scope of the member's office or trust. The formulation in (1) seems to reflect the application of the common law offence to 'office'.

For the purposes of these criminal offences, the critical question is: what are the duties or functions of a member of parliament? In defining those duties, one is not confined to those specifically imposed on the member by statute or standing orders. A wider perception of 'duties' of a public officer was endorsed by the High Court in *Herscu v The Queen* where the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ adopted the definition of McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*:

The duties of a public office include those lying directly within the scope of the office, 'those essential to the accomplishment of the main purpose for which the office was created and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes'. *Nesbitt Fruit Products Inc v Wallace* (1936) 17 F Supp 141 at 143.

In *Herscu v The Queen*, the issue was whether conduct of a minister seeking to persuade a local authority to reconsider a planning decision on behalf of a developer occurred 'in the discharge of the duties of his office' within s 87(2) of the *Criminal Code* (Qld). Interpreting 'duties of his office' to mean 'the functions of his office', the High Court upheld the minister's conduct as falling within the scope of the section. The Court emphasised that the section was not so restricted as to apply only to functions the minister was by law obliged to perform. Hence, exerting influence as a result of one's position fell within the

117 At 281.
118 *G J Coles and Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 524.
120 In the course of its judgment, the Court overruled *R v David* [1931] QWN 2 which held that a charge could not be brought against a policeman pursuant to s 87 for accepting a travelling rug in return for removing a jar of petrol found on the accused's premises after a fire. Macrossan SPJ held that the act of removing evidence was not done within the proper discharge of the policeman's duties and hence, fell outside the scope of s 87. The joint judgment in *Herscu* declared at 283 that '[t]he section is concerned with the violation or attempted violation of official duty rather than with the actual performance of official duty'.

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functions and therefore the duties of one’s public office as a minister. This point was clearly made by Brennan J:

When the office is such that the holder wields influence or is in a position to wield influence in matters of a particular kind, the wielding of influence in a matter of that kind is a discharge of the duties of the office. Such a wielding of influence is something done in an official capacity. 121

No reference was made in Herscu v The Queen yet the wide interpretation given to the duties of a public officer seems equally applicable to the duties of a member of parliament. A significant issue in R v Boston was whether a member acts as such when seeking to influence or persuade the executive in relation to a particular matter within its control. The defendants submitted that such conduct fell outside the legal duties of a member of parliament which are confined to the member’s role in parliament. The majority Justices in R v Boston accepted that the central core of the public duties of a member are those of a parliamentary nature, namely, those duties described in the Queensland123 and Western Australian124 statutory offences as the member’s ‘vote, opinion, judgment or action upon any question or matter arising in the House ... or in any Committee’. But their Honours in that case were prepared to extend the scope of the member’s public duties beyond this core to encompass the role of a member in seeking to influence the executive. Their rationale was neatly put by Higgins J:

the words ‘to use his position as such member’ primarily refer to action in the House; and they can only refer to action outside so far as action outside is based on potential action inside.125

The potential action inside is the duty of the member to scrutinise in parliament the activities of the executive. To accept a benefit in return for advancing the donor’s particular interest with the executive fetters the member’s ability to freely review executive conduct. Knox CJ recognised the derogation in duty which arises in such a case:

It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people. 126

Isaacs and Rich JJ, while recognising that as a public officer the member of

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122 (1923) 33 CLR 386.
123 Sections 59 and 60 Criminal Code (QM).
124 Sections 60 and 61 Criminal Code (WA).
125 (1923) 33 CLR 386 at 469.
126 At 393.
parliament's legal duties are confined to parliamentary activities, and therefore do not extend to 'visiting Departments and advising Ministers or interviewing subordinate officers', nonetheless recognised that when a member is paid to deal with the executive on behalf of someone, the member has 'violated his legal duty to the State', that is, 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'.

Further support for this approach can be gathered from the High Court in Wilkinson v Osborne and Home v Barber, both of which held agreements invalid for inducing the member in each case to violate his duty to act as a watchdog of the executive. In the light of the Herescu decision, the duties of a member of parliament are not to be restricted to those performed in the parliament but include the representation of the interests of their constituents and review of the activities of the executive.

**Extortion**

**Historical outline**

The offence of extortion was the principal weapon against corruption in England from the 13th to at least the 18th century. In particular, Ch 26 of the First Statute of Westminster (1275), prohibited the King's officers from taking any benefit on account of their office:

... no Sheriff, or other officer of the King, shall take any reward to do his office, but

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127 At 402.
128 At 408.
129 At 400.
130 (1915) 21 CLR 89.
131 (1920) 27 CLR 494.
132 This would appear to be the approach adopted by the Gibbs' Committee in recommending the amendment of ss 73 and 73A of the Crimes Act 1914 (Cth) to cover a situation where the public official or a member acts in exercise of their duty, functions or authority as such an officer or member, or as having held themselves out as having such duty, functions or authority proposed. Crimes Amendment Act (No 2) 1996 cll 54 and 58. Other authorities support this approach: A-G of Ceylon v de Livera [1963] AC 103, although in that case there was a certain state practice of consultation with the local member. See G Zellick, above note 26 at 44 and R v Benmou [1964] 1 Q B 263. Yet a narrow approach has been adopted in the US, for example State v Bowling 5 Ariz App 476,472 P 2d 928 (1967) where elected officials agreed, in return for pecuniary benefits, to intercede on behalf of people and use their influence with other officials or agencies to achieve a particular outcome. In such cases, the use of influence was held not to be part of their official duties. D H Lowenstein, above note 77 at 818, argues that since the influence derives from the official position 'their exercise of that influence for an individualised benefit is an abuse of the public trust no less harmful to democratic values than a direct bribe of the decision-maker'.

133 Statute of Westminster I, 3 Edw chs 26, 27, 30 & 31 (1275).
shall be paid of what he takes of the King: and he that does, shall yield twice as much, and shall be punished at the King’s pleasure.

Coke asserted that this chapter merely declared the ancient common law but added to the already existing penalties of fine and imprisonment the liability to account for twice the reward received.\textsuperscript{134} The general nature of this offence, ‘take any reward to do his office’, indicates that the essential element of the original offence of extortion was the taking of a benefit on account of one’s public office. No force or threat of force was required. An historically important prosecution for non-coercive extortion occurred near the end of the 18th century when Warren Hastings, the Governor of Bengal, was impeached by the House of Commons for taking gifts in violation of his Covenant with the East India Company with no coercion being alleged. Nor was it required by legislation later enacted\textsuperscript{135} in 1784 and 1793 which deemed the receipt of any ‘gift or present’ by an employee of the Crown or of the East India Company in the East Indies as extortion and a misdemeanour.\textsuperscript{136}

Since the 18th century, the offence of bribery has overtaken extortion as the principal weapon against corruption, reserving the latter primarily for cases of coercion. However, since the gravamen of the offence of extortion is merely the receipt of a benefit to which the public officer is not entitled, it remains an appropriate offence where an abuse of public trust occurs, especially when there is difficulty in establishing the specific requirements of the offence of bribery.

**Common law offence**

The common law offence of extortion is defined in *Halsbury’s* (3rd edition):

A public officer is guilty of extortion who, from an improper motive and under colour of office, takes from any person any money or valuable thing which is not due from such person at the time when it is taken.\textsuperscript{137}

This offence was abrogated in the UK\textsuperscript{138} in 1968 on the recommendation (without explanation) of the English Criminal Law Revision Committee.\textsuperscript{139} The offence has also been abrogated in Victoria.\textsuperscript{140} It remains available at the Commonwealth level and in NSW and the ACT, while it has been given a statutory basis in South Australia.\textsuperscript{141}

\begin{footnotesize}
\begin{itemize}
\item 135 24 Geo 3, ch 25, s 45 (1784); 33 Geo 3, ch 52, s 62 (1793).
\item 136 J Lindgren, above note 8.
\item 138 Section 32 (1)(a) *Theft Act 1968* (UK).
\item 139 Eighth Report on Theft and Related Offences.
\item 140 See s 3 *Crimes (Theft) Act 1973* (Vic).
\item 141 Section 252 *Criminal Law Consolidation Act 1935* (SA).
\end{itemize}
\end{footnotesize}
The elements of the offence of extortion at common law appear to be:

1. a public officer;
2. takes or accepts any benefit from a person;
3. which is not due from such person;
4. knowing he or she has no right to take or accept the benefit (the improper motive); and
5. does so 'under colour of office'.

Notably, no violence or oppression is required. The pressure is supplied by virtue of the public office, hence the reference at common law to 'under colour of office'. A number of differences exist between the common law offences of bribery and extortion.

1. Bribery only concerns the conferral of a benefit to influence future official action. Extortion, in addition to influencing future action, also covers benefits conferred on account of past action.
2. Bribery requires the official to have accepted the benefit on the basis of some 'understanding' to act or to not act in some particular way. No such quid pro quo is required for extortion, where it is sufficient to establish that the public officer simply accepted a benefit knowing it is given with some expectation of a future undefined benefit, or that the benefit was induced by the officer. In the latter situation, there is no need to prove any intention on the part of the provider of the benefit.
3. Bribery requires the official to be influenced in his or her capacity as a member of parliament. Extortion 'under colour of office' extends to a case where a member gives the appearance that he or she is acting within but is in fact acting outside the capacity of a member.

In spite of these differences, there is considerable overlap between bribery and extortion. Both seem to adopt fairly wide definitions of the types of benefits which are conferred and, at least at common law, both seem to confine the receipt of these benefits to the official. Also, each offence accommodates customary benefits which in the case of extortion exclude benefits 'voluntarily given to him, and which it is customary to give for the more diligent or expeditious performance of his duty'.

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142 A further requirement of the common law offence of extortion has been expressed by the Gibbs Committee: 'compulsion in a legal sense'. Such a requirement of compulsion limits the offence to only coercive extortion. In the absence of previous authority supporting this view, it is submitted with respect that no element of compulsion is required.

143 Note that the Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (December 1995) recommended that no separate offence of common law extortion should be included in the Model Criminal Code: ch 3 at 265.

144 Under the US Hobbs Act no personal benefit may be required: see US v Margiotta (1982) 688 F 2d 108 (2nd Circuit); US v Troha (1975) 525 F 2d 1096 (2nd Circuit) where the benefit went to the political party.

Code offences

The code offences of extortion are of limited scope compared with their common law counterpart. The identical offences in Queensland\(^\text{146}\) and the Northern Territory\(^\text{147}\) only apply to persons who are employed in the Public Service. However, the relevant offences in Tasmania and Western Australia apply to all public officers including, therefore, members. In Tasmania, the offence is:

s 84 (1) Any public officer who, under colour of office and otherwise than in good faith, demands, takes, or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, is guilty of a crime.

The offence in Western Australia also extends to public officers but is in quite different terms:

83 Any public officer who, without lawful authority or a reasonable excuse — ..

(c) acts corruptly in the performance or discharge of the functions of his office or employment, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and liable to imprisonment for 3 years.

These code provisions have less scope than the common law offence of extortion by virtue of their requirement that the benefit be received for 'the performance of his duty as such officer' and not under 'colour of office'. This latter common law element refers to the functions of the office rather than any narrow interpretation of 'duty', so that the act need not be one the member was required to perform. What this statutory element fails to cover is a situation where a member acts outside the functions of his or her office by misrepresenting the scope of those functions, such as where a member misrepresents that he or she is a member of a particular parliamentary committee and in return for a benefit agrees to take certain action which is favourable to someone. If the member is not a member of the committee then any action taken is not likely to be viewed as 'in the performance of the duty' of the member. The common law offence of extortion avoids any need to show a connection with the performance of official duties or functions, requiring only that the benefit is received under colour of office.

Distinctive also to the Western Australian offence is the requirement that the officer act 'corruptly'. This seems to mean that the officer receive or solicits the benefit knowing that he or she has no entitlement to it, or not caring whether there is such an entitlement.\(^\text{148}\)

\(^{146}\) Section 88 Criminal Code (Qld).

\(^{147}\) Section 78 Criminal Code (NT).

In 1992, as part of the statutory reforms dealing with offences by public officers which include members of Parliament,\(^{149}\) s 252 ('Demanding or requiring benefit on basis of public office') of the \textit{Criminal Law Consolidation Act 1935} (SA) was enacted:

(1) \textbf{A person who —}

\begin{enumerate}[(a)]
  \item demands or requires from another person a benefit (whether for himself or herself or for a third person); and
  \item in making the demand or requirement —
    \begin{enumerate}[(i)]
      \item suggests or implies that it should be complied with because the person holds a public office (whether or not the person in fact holds that office); and
      \item knows that there is no legal entitlement to the benefit, is guilty of an offence.
    \end{enumerate}
\end{enumerate}

Subsection (2) excludes from the offence industrial demands for pay, conditions of appointment and employment. This offence requires some act of inducement but seems to require no quid pro quo.

\textbf{Inducement}

There are two elements which may be required for the statutory offence of extortion. The first is that the official or, in this case, the member must induce the benefit received in some way. The second is that some degree of quid pro quo is required. Neither of these elements is required for the common law offence of extortion. Inducement is, however, an optional element in the code offences in Tasmania and Western Australia which refer to a public officer who 'demands, takes or accepts' a reward.\(^{150}\) The corresponding South Australian provision does require inducement in the form of a demand or requirement.\(^{151}\) Also, the Gibbs Committee recommended at the Commonwealth level the substitution of the common law offence of extortion under colour of office with a statutory offence which required inducement:

A statutory offence should be created of a person \textit{demanding, exacting or requiring} the provision of a benefit to himself or herself or any other person from another person and in making the demand, exaction or requirement the person suggests or implies that it should be complied with because the person holds (i) a Commonwealth office; or (ii) employment by the Commonwealth, a Territory (excluding the Northern Territory and the ACT), a public authority under the

\(^{149}\) Section 237 \textit{Criminal Law Consolidation Act 1935} (SA).

\(^{150}\) Section 84 \textit{Criminal Code} (Tas); s 83 \textit{Criminal Code} (WA).

\(^{151}\) Section 252 \textit{Criminal Law Consolidation Act 1935} (SA).
Commonwealth or an authority of a Territory (whether or not the person holds that office or employment) and the person knows that there is no legal entitlement to the benefit [emphasis added].\(^{152}\)

In the US, a majority of the Supreme Court in \textit{Evans v United States}\(^{153}\) held that, consistent with the common law position, no inducement is required where a public official receives a benefit under colour of office under the Hobbs Act: '... the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under colour of official right.'\(^{154}\) Given that the person who transfers property to the public official must do so as a result of being 'induced ... under colour of official right', the mere acceptance of the payment by the official is sufficient if the official knows it was given to influence him or her.

This approach follows the earlier view of the Court of Appeals for the Fourth Circuit in \textit{United States v Paschal}\(^{155}\) which regarded the retention of a benefit or gift by a public official on account of the mere performance of the official's duties, as in itself, a misuse of office.\(^{156}\) For the purposes of a Hobbs Act prosecution, the Court stated:

\begin{quote}
It is enough that the benefactor transfers something of significant value to the public official with the expectation that the public official will extend to him some benefit or refrain from some harmful action, and the public official accepts the thing of significant value knowing that it is being transferred to him because of his office.\(^{157}\)
\end{quote}

Hence no specific act of inducement is required, since the nature of the public office constitutes sufficient inducement.\(^{158}\) Also, the Court rejected any need to establish, where no specific act of inducement occurs, that the public official conferred some advantage to the payer to which the payer was not entitled. In this case, evidence of the passive receipt of two vacations and a Cadillac automobile by

\(^{152}\) Fourth Interim Report: Review of Commonwealth Criminal Law November 1990, para 34.1(a) at 243.


\(^{154}\) 18 USCA s 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce ... by robbery or extortion or attempts or conspires so to do ... shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section — ...

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

\(^{155}\) (1985) 772 F 2d 68.

\(^{156}\) At 74.

\(^{157}\) At 71-72.

\(^{158}\) J Lindgren, above note 8, at 836-7.
two North Carolina State engineers as gifts from various highway contractors was held sufficient to enable a jury to find extortion 'under colour of official right'. The purpose of these gifts was apparently to establish and maintain friendly relations with the State engineers to ensure fair treatment from them.

It is likely that the position taken in United States v Paschal\(^{159}\) reflects the common law position in Australia.

**Quid pro quo**

Although the common law and statutory offences of extortion in Australia do not expressly require any form of quid pro quo, it may be that this element can be used, as it has been in the US under the Hobbs Act, to distinguish between lawful campaign contributions and those which are illegal as payments received under 'colour of office'.

This issue was tackled by the US Supreme Court in United States v McCormick\(^ {160}\) where McCormick, a member of the West Virginia House of Delegates, sponsored legislation to extend the temporary permit program for foreign doctors which enabled them to practice until they pass their State exams. Subsequently, McCormick was asked to support further legislation which proposed to confer permanent licences on those who had practised for a certain number of years under that program. At this time, McCormick was seeking re-election and on one occasion, he mentioned to Vandergrift, the chief lobbyist for the foreign doctors, that his campaign was expensive and he had heard nothing from the foreign doctors. Vandergrift replied that he would talk to the doctors and 'see what he could do'. In due course, Vandergrift gave McCormick substantial payments in cash which were not declared by McCormick either as campaign contributions or in his income tax return. In respect of these payments, McCormick was initially found guilty of extortion 'under colour of official right'.

The jury was instructed that for the offence to be established, McCormick must have induced the cash payments but that no quid pro quo was necessary. On appeal, only the issue of the quid pro quo was challenged. The Supreme Court set aside the conviction because the jury instructions failed to distinguish between legitimate campaign contributions and illegal payments under the Hobbs Act. The majority of the Court held that a quid pro quo was necessary for receipt of a payment, ostensibly made as a campaign contribution, to constitute an offence of extortion under the Hobbs Act. The Court recognised the peculiar role of legislators who serve their constituents, at times assisting them personally and seeking political donations at the same time:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the every day business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of

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\(^{159}\) (1985) 772 F 2d 68.

their views and what they intend to do and have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent 'under color of official right'. To hold otherwise would open to prosecution not only conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.161

The Court accepted, however, that campaign contributions may be received in circumstances which constitute extortion 'under color of official right' if a sufficient quid pro quo exists, that is, where:

the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking [emphasis added].162

In requiring an explicit promise or undertaking, the offence is not established if the donor merely has an expectation of benefit.163 The majority was not prepared to comment on whether a quid pro quo was necessary in other cases not involving the payment of campaign contributions.164

In their dissenting opinion, Stevens, Blackman and O'Connor JJ adopted a restrictive view of the Hobbs Act by requiring at least an implicit 'mutual understanding'. In their view:

Subtle extortion is just as wrongful — and probably much more common — than the kind of express understanding that the Court’s opinion seems to require ... [It] is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office [emphasis added].165

Significantly, they seem to be prescribing this requirement of a mutual understanding for all payments and benefits, not just for campaign contributions.

161 At 273.
162 At 273.
163 At 273; concurring Justice Scalia at 277 refers to 'anticipation of favourable future action' as not in breach of Hobbs Act, but 'an explicit promise of favourable future action' would be.
164 At 279 footnote 10.
165 At 283-284.
They described the boundary line between a legitimate campaign contribution and one which is obtained by extortion in the following way:

(1) if the donor expects to benefit from the candidate's election because the candidate's policy is to support particular legislation or a particular cause and this support exists regardless of whether the contribution is made, then the receipt of the contribution is not improper; but

(2) if the donor makes a campaign contribution because there is a mutual understanding between the donor and the candidate that the candidate will only support particular legislation or a particular cause if a contribution is made, then there is evidence to support a finding of extortion 'under colour of official right'.

Their dissenting opinion found no defect in the trial court's jury instruction that in order to convict McCormick the payment needed to be made 'with the expectation that such payment would influence Mr McCormick's official conduct, and with the knowledge on the part of Mr McCormick that they were paid to him with that expectation by virtue of the office he held'.

These judgments provide quite useful guidance on where the line is to be drawn between conduct which is legitimate political practice and that which is criminal as an abuse of the public trust.

The Supreme Court affirmed McCormick in the following year in Evans v United States: 'We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'

**Official misconduct**

**Common law**

The classic statement of the common law offence of official misconduct, sometimes referred to as the offence of misbehaviour in public office, was given by Lord Mansfield in R v Bembridge:

Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

**Notes and references**

166 At 287.
167 At 284.
169 (1783) 3 Douglii 327 at 332; 99 ER 679 at 681.
On the basis of these two principles, Professor Finn identified four specific common law offences which constitute the offence of official misconduct: fraud in office; wilful neglect of duty (nonfeasance); wilful misuse of official power (misfeasance); and wilful abuse of position (malfeasance). As public officers, Australian members of parliament are potentially within the scope of these offences, although only fraud in office and possibly wilful abuse of position are likely to arise. The latter species of the offence occurs where a member abuses his or her position by exerting influence for an improper reason, such as to derive some pecuniary benefit.

The common law offence of fraud in office encompasses misappropriation of public resources, such as false travel claims. To establish this offence, proof is required of a dishonest motive and that the misappropriation occurs under colour of public office.

The latter element arises, inter alia, where the public officer 'positively utilised his official position or the opportunities it placed before him though he had no official authority at all to act as he did — as where a police officer uses police facilities to which his position gives him access, for his own private purposes'. Members of parliament who abuse their position by making false claims or use their parliamentary resources for personal purposes are liable to prosecution in the non-Code jurisdictions for this offence of official misconduct.

Statute

Apart from Western Australia, the Code States possess a motley collection of offences which fail to adequately cover the four common law offences referred to above and have little or no application to members of parliament.

The Queensland and Northern Territory Code provisions which concern official misconduct other than bribery and extortion, do not apply to members of parliament, being confined to persons 'employed in the Public Service'. In contrast, the relevant offences in the Tasmanian Code apply to 'public officers', but are of very limited application to members: oppression (physical), conflict of interest in contracts and neglect of duty. On the other hand, Western Australia provides a general offence concerned with official misconduct which

172 At 313-315.
173 At 314.
175 Sections 89, 90, 91, 92, 94, and 200 *Criminal Code* (Qld).
176 Sections 79, 80, 81, 83, 84, and 122 *Criminal Code* (NT).
177 Section 84(2) *Criminal Code* (Tas).
178 Section 85.
179 Section 115.
extends to 'any public officer':

83. Any public officer who, without lawful authority or a reasonable excuse —

(a) acts upon any knowledge or information obtained by reason of his office or employment;
(b) acts in any manner, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or
(c) acts corruptly in the performance or discharge of the functions of his office or employment, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 3 years.

In 1992 South Australia enacted, as part of the package of measures dealing with official corruption, two offences which significantly cover the common law field of official misconduct: s 251 (abuse of public office) and s 253 (offences relating to appointment to public office).

There are, however, general criminal offences which apply to members to cover the misappropriation of public resources such as the making of false travel claims. In Queensland s 408C of the Criminal Code (Qld) provides for the offence of fraud whenever a person dishonestly applies to his or her own use, or to the use of any person, property belonging to another.

Meaning of 'corruptly'

Where an element of an offence requires an act to be done 'corruptly', what this means will depend entirely upon the context in which it occurs. Although it is often defined to mean 'dishonestly', a more useful interpretation in the context of a bribery offence is given by McPherson J in Bjelke-Petersen v Burns and Australian Broadcasting Commission:

Nevertheless, the word 'corruption' can be used to mean, not misappropriation in the strict sense, but an 'abuse of power'. It is sometimes so used in equity to connote the use of power to obtain 'some private advantage or for any purpose foreign to the power': see Mills v Mills (1938) 60 CLR 150, 185.

Similarly in R v Austin, Harvey and Lane, McPherson SPJ found the unauthorised use of official credit facilities by three State ministers for private purposes meant they had `corruptly used a public office' within the terms of the Public Officers'
Superannuation Benefits Recovery Act 1988 (Qld). Also, in *R v Llewellyn-Jones*, the defendant was charged on six counts of misbehaviour in a public office. Lord Parker CJ regarded as inherent in the nature of each count that what was alleged to occur was dishonest or fraudulent because each count alleged an intention to gain a personal advantage.

The Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (December 1995) equated ‘corruptly’ with the common law element of the offence of bribery that it be ‘contrary to the known rules of honesty and integrity’. A somewhat different perspective is given by Lowenstein, who interprets ‘corruptly’ as wrongful, in the sense of being against the public interest. He also argues that it serves the purpose of imposing a special stigma upon those who abuse the public trust. Although testing corrupt behaviour on the basis of whether it is contrary to the public interest may throw open the issue to wide ranging views, he does suggest that the process by which a decision is made, as distinct from the decision itself, may be more objectively judged as against the public interest if it 'impairs the citizen’s right to participate in politics'.

The special stigma attaching to the label 'corrupt' is well illustrated by the Metherell affair in NSW in 1992 which caused the resignation of the Premier, Mr Nick Greiner. He resigned as a consequence of the Independent Commission Against Corruption (ICAC) finding that he had engaged in 'corrupt conduct' within the broad meaning of that phrase in ss 8 and 9 of the *Independent Commission Against Corruption Act 1988* (NSW). By section 9, a finding of corrupt conduct could be made if the conduct fell within one of the specific categories of conduct in s 8 (such as acting with partiality, breach of public trust or misuse of information) and such conduct constituted or could constitute a criminal or disciplinary offence, or provided reasonable grounds for dismissal. However, this finding was later declared a nullity by the NSW Court of Appeal which expressed its concern over the statutory definition of 'corrupt conduct'.

ICAC's *Second Report on Investigation into the Metherell Resignation and Appointment* queried the view that the labelling of conduct as 'corrupt' should be restricted to those situations where the official derives some personal benefit:

Does the community benefit more by retaining old notions of corruption, or does it benefit by the expansion of these notions to explicitly cover partiality and

183 [[1968] 1 QB 429.](151x183)
184 Ch 3, at 277.
185 D H Lowenstein, above note 78 at 802.
186 D H Lowenstein, above note 78 at 806.
187 D H Lowenstein, above note 78 at 805.
188 *Greiner v ICAC* (1992) 28 NSWLR 125.
189 Per Gleeson CJ at 129; per Mahoney JA at 50; per Priestley JA at 180.
dishonesty that nonetheless involves no benefit to the public official? ... It must be remembered that the partial, dishonest or wrongful exercise of public office can be equally dangerous and harmful to the community, irrespective of whether the public official concerned gets a kickback. 191

The difficulty with this view is that a 'kickback' is objectively ascertainable as 'corrupt', whereas other 'dangerous and harmful' effects are not. Given the uncertainty which exists as to the meaning of 'corruption', 'corrupt intent' and 'corruptly', it seems desirable to remove those expressions from the statutory language. This was done by the Gibbs Committee192 whose recommendations and proposed amendments to the Crimes Act 1914 (Cth) described the 'corruption' offences in terms of their specific elements without reference to a 'corrupt intent'. 193

The scope and effect of the privilege of freedom of speech

The impact of the privilege of freedom of speech on corruption prosecutions of members of Parliament has received scant judicial attention in Australia and the UK, while in Canada and particularly in the US the issue has often been raised. Curiously, in the two significant Australian decisions in this area, R v White194 and R v Boston,195 apart from an ambiguous reference to the relationship between parliamentary privilege and the common law made by Hargrave J in the former case,196 no mention is made of any possible argument that art 9 of the Bill of Rights 1689 might preclude the court's jurisdiction.

The issue is essentially the extent to which the freedom of speech which members enjoy during the debates and proceedings of Parliament precludes their prosecution for corruption offences. Obviously, in so far as this freedom has that effect, members remain liable to their House for any criminal conduct, as the 1695 resolution197 of the House of Commons clearly indicates.

It is necessary to consider separately the effect of parliamentary privilege where a prosecution is brought under the common law and one brought under statute, since in the latter situation the privilege may have been abrogated.

Common law

It is clear that if any element of a corruption offence occurs during the 'debates or proceedings in parliament', no criminal prosecution may be brought at common

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191 As above, p 14.
193 See Pt IV, 'Bribery and Corruption'.
194 (1875) 13 SCR (NSW) 322.
195 (1923) 33 CLR 386.
196 (1875) 13 SCR (NSW) 322 at 335.
197 CJ (1693-97) 331.
For instance, if one member bribes another member during a parliamentary debate to vote on a motion (the subject of the debate) in a particular way, art 9 precludes the bringing of a criminal prosecution against either member.

Where, however, all the elements of a corruption offence occur outside the ‘debates or proceedings in parliament’, different views have been expressed as to whether art 9 still applies. For example, if a member is offered a bribe outside parliament to vote in a particular way and the member agrees at that time to accept the bribe, the offence of bribery is complete — whether the member actually votes or not is irrelevant to proving the offence of bribery. Yet because the bribe is offered and accepted for voting in parliament, an act clearly within the protection of parliamentary privilege, are there grounds for saying that the member’s bribery is a matter falling within the exclusive jurisdiction of parliament? And can the person who offered the bribe be charged with a criminal offence without infringing the privileges of parliament? There is English authority that parliamentary privilege even precludes prosecution of a member in these circumstances. Such a view is reminiscent of the wide view of the freedom adopted in the *Church of Scientology of California v Johnson-Smith* and followed by the Judicial Committee of the Privy Council in *Prebble v Television New Zealand Ltd* and by s 16 of the *Parliamentary Privileges Act 1987* (Cth) which precludes any reliance on what occurs within the scope of parliamentary proceedings.

In *Ex parte Wason* the applicant brought a charge of conspiracy against Earl Russell, Lord Chelmsford and the Lord Chief Baron that they agreed to deceive the House of Lords by denying in the House the truthfulness of an allegation made by the applicant against the Lord Chief Baron. The Court of Queens Bench rejected the charge as disclosing no offence: as their statements made in the House of Lords were protected by parliamentary privilege, parliamentary privilege protected them from any conspiracy charge. Central to the reasoning of the Court was the much quoted principle espoused by Lush J which supports a wide scope for freedom of speech:

I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.

This principle was cited in Chapter 6 as supporting the view that art 9 precluded any reliance being placed on Hansard to support, even evidentially, other legal

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198 This would normally be as words spoken or as a written statement that is, offering, soliciting or accepting a bribe. Whether physical acts are also protected such as assault on a member is unclear, for example, J I Fajgenbaum and P J Hanks, *Australian Constitutional Law, Cases, Materials and Text* Butterworths Melbourne 1972, p 191 refers to the privilege only extending to ‘things said or written’.


201 (1869) LR 4 QB 573.

202 At 577.
proceedings. Lush J applied that principle in this case to prevent a corruption prosecution which in his view amounted to an indirect inquiry into the motives of the members' activities within the debates or proceedings of parliament. Whether art 9 ought to have this scope in relation to corruption offences depends on the extent to which this is necessary to protect the independence of parliament and of its members. While the immunity accorded members under a wide view of the freedom seems harder to justify in relation to corruption offences, the risk is that without it, members are more vulnerable to allegations of corruption in the exercise of their parliamentary duties.

In stark contrast to the (albeit limited) judicial debate in England and Canada and the wider judicial debate in the US, almost no reference has been made in Australian case law to the effect of parliamentary privilege on corruption prosecutions of members. In particular, practically no reference was made to this issue in *R v White* and *R v Boston*, which recognised that bribery of members constituted a common law offence.

In *R v White*, only Hargrave J referred briefly to parliamentary privilege, holding in rather ambiguous terms that it did not exclude common law jurisdiction in that case where a member had been offered a bribe in the lobby of the House to vote in favour of a compensation matter then before the House. The remainder of the Court rejected the argument that the matter should be left to the jurisdiction of parliament. Their justification for this view was essentially the existence of the offence at common law. Despite the fact all elements of the offence of bribery were committed outside the scope of the freedom and none referred to potential action within its scope, no issue of parliamentary privilege arose.

The position was different in *R v Boston* where the charge was one of criminal conspiracy in which the accused agreed to pay a member of parliament to exert his influence on the executive government to acquire a particular property. Since all of the elements of this charge occurred outside the scope of the freedom and none referred to potential action within its scope, no issue of parliamentary privilege arose.

In view of the limited consideration given to parliamentary privilege in the prosecution of members for corruption offences in Australia, assistance can be gathered from relevant decisions in the US and Canada.

**US position**

The principle quoted earlier from Lush J in *Ex parte Wason* was expressly adopted by the US Supreme Court in *United States v Johnson* to describe the effect of the Speech or Debate Clause in art 1 s 6 of the United States Constitution: '... for any

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203 (1875) 13 SCR (NSW) 322 at 335.
204 Per Martin CJ at 330; per Hargrave J at 334.
Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.' 207

In that case, Johnson was charged with conspiracy to defraud the United States in violation of 18 USC s 371. It was alleged that while a member of the House of Representatives, he had agreed with three others to exert influence on the Department of Justice to dismiss indictments pending against a savings and loan institution and to make a speech in the House favourable to those institutions. Johnson performed both tasks and received payment in the form of a ‘campaign contribution’ and ‘legal fees’. On appeal from his conviction, the Supreme Court affirmed the Court of Appeal’s order of a new trial on the basis that evidence led as to the speech made in the House, who wrote it, and the meaning and intention behind the words used violated the protection of the Speech or Debate Clause.

The Supreme Court rejected the Government’s contention that there was no violation of the Clause ‘because the gravamen of the count was the alleged conspiracy, not the speech, and because the defendant, not the prosecution, introduced the speech’. The Court regarded any reference to the speech in the House or to any agreement to make such a speech as completely inadmissible by virtue of parliamentary privilege. To base a bribery charge on an agreement to act in the House in a particular way within the protection of the privilege was to question the motivation of the legislator. Such an inquiry into the motives of legislators was, according to the Court, precisely what the Speech or Debate Clause precluded. However, the Court accepted that the conspiracy charge could be brought in relation to the other activities of the legislator in so far as they fell outside the protection of the Speech or Debate Clause. In this case, the attempts to influence the Justice Department were not regarded as congressional acts and hence could be the basis of criminal proceedings provided no reference was made to the speech in the House. 208

Therefore, the principle to be derived from United States v Johnson is that a prosecution may be brought provided the elements of the offence occur outside the scope of parliamentary privilege and no reference is made or reliance placed upon any act or conduct which occurs within the scope of the privilege. So if a member or legislator is bribed to influence an executive decision in a particular way, a charge can be brought; but if it is a bribe to vote in the House, then no charge can be brought because this would require reference to an act within privilege.

207 Although this article does not expressly refer to the ‘proceedings’ of Congress in the way art 9 includes the proceedings of Parliament, it has been interpreted to do so and to include committee meetings: Kilbourn v Thompson: (1880) 103 US 168 at 204; US v Brewster (1972) 408 US 501 at 519 per Burger CJ.

208 There is one aspect of the conspiracy charge in United States v Johnson which was not expressly adverted to by the Court but which may have been significant in their reasoning. The charge brought under 18 USC s 371, of conspiracy to defraud the US, required that two or more persons conspire to defraud the US and that one or more of such persons do any act to effect the object of the conspiracy — in other words, the elements of the offence were not necessarily completed before the speech was made in the House.
In decisions subsequent to *United States v Johnson*, the Supreme Court has restricted the scope of the Speech or Debate Clause to allow corruption prosecutions to proceed. The position now appears to be that a prosecution can be brought where all elements of the offence occur outside the protection of art 6 even if they refer to contemplated action within that privilege.

In *United States v Brewster*, a majority of the Supreme Court accepted that a bribery charge under 18 USC s 201 could be brought against a senator for accepting money in order to influence him in the performance of his official duties as a member of the Senate Committee on Post Office and Civil Service. The majority opinion given by Burger CJ adopted a narrow view of the Speech or Debate Clause confining it to 'legislative acts' and the motivation for their *actual* performance. Many activities of members outside the House were political rather than legislative acts, and so not within the scope of parliamentary privilege. A distinction needed to be drawn between conduct which is clearly *part of* the legislative process and conduct which is merely *related to* the legislative process and so not protected. into the latter category fell the senator's conduct in accepting money on the understanding that he would act favourably to the briber in future Senate committee meetings. Because the offence was complete upon acceptance of the money, Burger CJ found:

> ... inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's reasons for paying the money is sufficient to carry the case to the jury.

In holding that this did not amount to an inquiry into the motivation of the senator, the majority opinion failed to distinguish *United States v Johnson* where the promise to make a speech in the House was held incapable of being the basis of a prosecution because this would call into question the motivation of the member. They do, however, endeavour to justify their narrow view of the scope of the privilege in protecting only conduct which is clearly part of the legislative process on four grounds:

(i) to avoid the possibility of the privilege being abused;

(ii) otherwise all conduct of members would be protected;

(iii) if Congress were to have in effect exclusive jurisdiction over all its members' activities, this would deprive members of the usual constitutional protections accorded a criminal trial; and

(iv) Congress is not well equipped to adequately regulate and punish its members.

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210 At 517-518.
211 At 517-518.
212 At 519.
213 At 526.
214 At 522.
The minority opinions in United States v Brewster followed United States v Johnson as indistinguishable. Brennan J (with whom Douglas J agreed) regarded the prosecution as precluded by virtue of its inherent probe into the motivation of legislative acts on the part of the senator.\textsuperscript{215} White J relied on the authority of Ex parte Wason as on 'all fours' with the facts of this case.\textsuperscript{216}

Both Brennan\textsuperscript{217} and White J\textsuperscript{218} supported a wider scope for the privilege than the majority opinion, in order to protect the independence of the legislative branch. White J emphasised the threat posed by the executive if it were empowered to initiate prosecutions against members of Congress, especially in relation to campaign contributions:

... the opportunities for an Executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behaviour by threats or suggestions of criminal prosecution — precisely the evil that the Speech or Debate Clause was designed to prevent.\textsuperscript{219}

The majority opinion countered this argument by asserting that the danger of executive abuse in the initiation of prosecutions was no greater than the danger of abuse if the Congress alone were to bring such prosecutions. Any danger of executive abuse could be defused by Congress exempting its members from the scope of federal bribery laws.\textsuperscript{220}

United States v Brewster was followed by a majority of the Supreme Court in United States v Helstoski\textsuperscript{221} which also involved a prosecution under 18 USC s 201. A member of the House of Representatives was alleged to have accepted money from resident aliens in return for promoting private member's Bills to effect changes to the immigration law enabling them to remain in the US. The majority opinion of Burger CJ affirmed the position taken in United States v Brewster that although the Speech or Debate Clause prevented any reference at all to the legislative acts, evidence could be admitted of a promise to perform a legislative act in the future.\textsuperscript{222} The Chief Justice referred to the actual wording of the Speech or Debate Clause:

\begin{quote}
215 At 530.
216 At 544. His Honour also noted the requirement under 18 USC s 201(g) for the prosecution to establish an 'official act' which in this case would be the legislative act.
217 At 539.
218 At 544.
219 At 544.
220 At 523.
221 (1979) 442 US 477; 99 S Ct 2432.
222 At 479.
\end{quote}
... it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate'. Likewise, a promise to introduce a bill is not a legislative act.223

In a partial dissent, Stevens and Stewart JJ adopted a more liberal view of the evidence; their Honours would permit evidence which merely refers to legislative acts but does not go to proving the legislative act itself.224 Brennan J225 dissented on the same grounds as in Brewster.

Unlike art 9 freedom of speech in Australia, the Speech or Debate Clause is entrenched in the US Constitution. In United States v Heistoski,226 the majority opinion of Burger CJ looked at this issue from the perspective whether 18 USC s 201 was a congressional waiver of the Speech or Debate Clause. While concluding the legislation did not effect a waiver, the Chief Justice hinted that Congress lacked any power to waive such a privilege.227

The current position in the US appears to be that members of Congress are liable to criminal prosecution in respect of conduct which occurs outside the debates of Congress provided no reference is made to conduct which actually occurs within those debates. The fact any outside conduct may refer to future conduct within those debates does not matter: such contemplated conduct may be introduced into evidence. Evidence of actual conduct within the debates is, however, precluded.

Canadian position

The position at least in the Province of Ontario is established by R v Bunting228 which upheld an indictment for conspiracy to bribe members of the Ontario Legislative Assembly to vote against the Government in the Assembly in order to force its resignation. A majority of the Court of Queen's Bench (Wilson CJ and Armour J, O'Connor J dissenting) upheld the indictment on the basis that there was a common law offence of bribery of members of Parliament. Wilson CJ, who delivered the principal judgment, distinguished Ex parte Wason229 on the technical basis that the alleged conspiracy in that case was to do an illegal act, namely, to lie to the House of Lords, whereas in this case the conspiracy was to do an innocent act by illegal means, all the elements of which occurred outside the Legislative Assembly.230

223 At 496.
224 At 494.
225 At 500.
226 At 500.
227 At 493.
228 (1885) 7 Ont L R 544.
229 (1869) L R 4 Q S 573.
230 (1885) 7 Ont L R 544 at 555.
On the other hand, O'Connor J delivered a detailed dissenting judgment which explored the relationship between parliament and the courts, the criminal law and parliamentary privilege. His Honour relied upon \textit{Ex parte Wason} as establishing that there was no common law offence of bribery of members of parliament in relation to acts within the scope of parliamentary privilege.\textsuperscript{231} Moreover, his Honour regarded the conspiracy charge in this case as indistinguishable from that in \textit{Ex parte Wason}.\textsuperscript{232} Although in both cases, the offence was complete on reaching agreement outside parliament, the prosecution of the offence 'would, however, pertain or have reference to a matter which might take place in the House in the course of its proceedings, and in that way only could it be said that the proceedings in the House might be brought in question, and so the mere possibility of interference was held sufficient to debar the Courts from jurisdiction'.\textsuperscript{233}

In the course of his judgment, O'Connor J rejected the view that a member of parliament is a public officer, preferring the designation of 'legislator':

\begin{quote}
... a member of Parliament is not a public officer. He is a legislator — a representative immediately of a certain body of people limited to a certain portion of territory within the realm, and indirectly of the realm. His duties are neither executive, nor administrative, but deliberative. His mission is to discuss, deliberate, and legislate. To do this properly his intercourse with his constituents and the public, in the most extensive sense of the term, must be free and unrestrained. He is therefore necessarily the sole judge of what he may hear and entertain, and how he may be persuaded, subject only to such limits and regulations as are imposed by the law and the usage of Parliament for the preservation of the honour of the member, and the dignity of Parliament; and herein the Courts are not permitted to interfere.\textsuperscript{234}
\end{quote}

O'Connor J also recognised that the nature of a member's legislative duties in terms of the use of influence and the striking of political bargains makes it difficult to draw the line between legitimate and illegitimate political behaviour by way of the standards of the criminal law:

\begin{tabular}{l}
231 At 570. \\
232 At 569. \\
233 At 576. It has been suggested by G Zellick, above note 26 at 49, that O'Connor J differed from the majority in \textit{R v Bunting} by viewing the conspiracy charge in that case as one to effect an illegal act, namely, to interfere with the course of justice, and hence, was of the same type of conspiracy as in \textit{Ex parte Wason}. But the reasoning of O'Connor J demonstrates a commitment to a broad application of the principle of Lush J in \textit{Ex parte Wason} that parliamentary privilege is designed to prevent the motives of members being enquired into by the Courts. His Honour's decision and reasoning were not based upon any technical analysis of the particular nature of the conspiracy in that case. Rather, they were based upon the need to adequately protect members from judicial interference in view of their particular responsibilities. \\
234 At 568-9.
\end{tabular}
The difficulty is, doubtless, in drawing a line between what is necessary or permissible, and what ought to be criminal — the difficulty of drawing any line which may under no circumstances interfere with that free intercourse between members and the public which ought to and must exist. A further consideration with reference to such a line is the extreme difficulty, if not the impossibility, of preserving intact the privilege necessary to members of speaking and voting according to the dictates of their several judgments without any restraint except that of public opinion, and without feeling themselves accountable to any authority except that of their several constituents. Hence Parliament has kept the matter in its own hands, and instances are not wanting wherein it has meted out severe punishment for bribery and other offences against the law and privileges of Parliament.235

Summary of overseas position

In the absence of Australian authority on this issue, the UK, Canadian and US authorities are particularly helpful in isolating the various considerations involved in deciding on the likely impact of art 9 freedom of speech on corruption prosecutions of members. From those authorities, three propositions can be derived of which only the third is contentious.

1. Freedom of speech precludes a prosecution where any element of the offence occurs within the 'debates and proceedings' of parliament.

2. Where all elements of the offence occur outside the 'debates and proceedings' of parliament, freedom of speech still precludes any reference to what the member has done within that privilege for the purpose of assisting in the proof of the elements of that offence.236

3. The contentious issue is whether, in the second proposition, freedom of speech also precludes reference being made to an element of the offence which contemplates that an act might be done within that privilege by the member in the future. In this case, no reference is made to what actually occurs within parliament. Here, there are opposing judicial opinions, each of which relies on persuasive grounds.

The wide view of freedom of speech precludes reference to an act which might be committed within the scope of the privilege because of the need to protect the independence of parliament and of its members, in particular, by not allowing the motives or intentions of members to be questioned. A further justification relied on by O'Connor J in R v Bunting237 was the difficulty the law has in prescribing appropriate standards for members given their unique role as legislators. Judicial support for this wide view exists in the UK but it has only minority support in Canada and the US.

235 At 566-567.
236 Church of Scientology of California v Johnson-Smith [1971] 3 WLR 434 at 437-9. Reference is permitted to what is said or done in the parliament only to establish the fact that what was said, was said in parliament on a particular day by a particular person (439); see also Dingle v Associated Newspapers Ltd [1960] 2 QB 406.
237 (1885) 7 Q B 544 at 566-567.
The narrow view of the freedom does not preclude reference to such an act because neither the parliamentary process nor the motives of members are directly called into question. Further reasons are cited in the US authorities: to avoid abuse of the privilege; to accord them the safeguards of a criminal trial; the legislature is not well equipped to investigate corruption; and the language of the privilege refers to protecting conduct which has already occurred within the scope of the privilege. This is the position taken by the US Supreme Court and in Ontario.

The critical issue is the extent to which the independence and integrity of members of parliament may be adversely affected by a criminal prosecution which refers to but does not rely on conduct of a member falling within art 9 immunity. There is certainly a danger that the actions of a member may be indirectly questioned by a prosecution, but this hardly justifies the inability to prosecute those engaged in such corrupt activities. The High Court decisions in *R v White* and *R v Boston* seem to support that assessment. However, the adoption of a narrow view here as to the scope of the freedom contrasts with the wide view which has prevailed in defamation and other civil proceedings to prevent any reliance being placed on statements made under art 9 (see Chapter 6). Are these different perspectives reconcilable? An obvious basis is the seriousness of corruption prosecutions compared with other legal proceedings. The latter warrant fewer safeguards against the indirect questioning of the motives of members than the former. Yet as Chapter 6 indicates, even the basis of this wide view of the freedom in non-criminal proceedings is open to question.

**Statutory offences**

The enactment of statutory corruption offences for members of Parliament raises two issues in relation to parliamentary privilege. The first concerns the extent to which these offences may have overridden art 9 freedom of speech. The second is whether they have abrogated the power of each House to discipline its members for corrupt activities.

As to the first of these issues, as noted earlier, the position in the US is unclear, although indications have been given that the protection of the Speech or Debate Clause as a constitutionally entrenched provision cannot be abrogated by Congressional legislation which delegates the punishment of corrupt conduct to the courts. But in both the UK and generally in Australia, parliamentary privilege is

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238 In *Arena v Nader* (1997) 42 NSWLR 427 at 436 the NSW Court of Appeal and, it would appear, also the High Court (1997) 71 ALJR 1604 at 1605 rejected the argument that any alteration to the privileges of the Legislative Council required a referendum pursuant to s 7A of the *Constitution Act 1902* (NSW) as an alteration of its powers. Both judgments confined that manner and form provision to an alteration of the legislative powers of the House as distinct from its privileges. Presumably, this is also the position under s 10 of the *Constitution Act 1934* (SA) in relation to the South Australian Legislative Council. There appears to be no manner and form requirement applicable to statutory variations to the privileges of the other State Parliaments.
not constitutionally entrenched, and therefore it remains vulnerable to the
overriding sovereignty of parliament. So, if parliament enacts a general bribery
offence which applies, inter alia, to its members, does this abrogate the protection
of art 9 to enable a member to be prosecuted for accepting a bribe during the course
of parliamentary proceedings?

Despite judicial comments at times that parliamentary privilege is only abrogated
by express statutory provisions,

it is suggested in Chapter 5 that parliament can express its intention here either expressly or impliedly. However, a court will require
a very clear indication from the statute to derive an implied intention from
parliament to abrogate its members’ most valued privilege.

In other words, provided parliament enacts in clear terms its intention to override parliamentary
privilege and so delegate to the courts jurisdiction in relation to matters otherwise
within the exclusive jurisdiction of each House, then this intention can be and must
be given effect to by the courts. The statutory offences for bribery of members of
parliament in the Australian States and the Northern Territory and the ACT are
eamples of this clear statutory delegation of jurisdiction. This was also the view of
the Bowen Committee which, given the uncertainty of a bribery offence in relation
to members of parliament at common law, recommended the insertion of what is
now s 73A into the Crimes Act 1914 (Cth) to provide expressly for such an offence in
relation to members of the Commonwealth Parliament. The Committee was clearly
of the opinion that such a statutory offence overrode any protection afforded by
parliamentary privilege:

For Parliament to introduce bribery legislation for Members and Senators is entirely
consistent with its privileges. In doing so, Parliament is simply recognising that it
is better to delegate such matters to the courts, as it has done with disputed
returns.

On the other hand, in South Australia express provision is made in the Criminal
Law Consolidation Act 1935 (SA) that nothing in those sections dealing with public
officers derogates from parliamentary privilege.

The second issue is whether each House retains its power to punish its members
for corrupt activities despite the enactment of specific offences. The Western
Australian Parliamentary Standards Committee in 1989 accepted the view of the
Clerk of the Legislative Council, Mr Laurie Marquet, that concurrent jurisdiction
existed in that State in relation to s s 55 to 61 of the Criminal Code (WA) and
recommended that no criminal prosecutions be commenced unless the relevant

239 Bradlaugh v Gossett (1884) 12 QBD 271.
Law Journal 345 at 348; I. Marquet, ‘Commonwealth and State — A Privileged Compact?’
(1986) 1 Legislative Studies 20 at 21.
242 Section 240.
243 See note 54 in vol.1 para 3.6.1 at 22.
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member's House has passed an appropriate resolution. There is no reason for this not to be the position under the statutory provisions. An analogy arises with the concurrent jurisdiction in relation to the qualifications of members discussed in Chapter 4.

Conclusions and recommendations

If one begins with the premise that members of Parliament are fiduciaries of the public trust, the distinction between unethical conduct and criminal misconduct on the part of members may be drawn at that point where the misconduct constitutes a serious abuse of trust warranting a criminal sanction. What constitutes a 'serious' abuse of trust cannot be comprehensively defined but the essence of such conduct would seem to be:

- the receipt of a significant personal or political benefit by the member
- on account of his or her position as a member of Parliament,
- being a benefit for the member personally or for some other person or entity,
- at the direction of or with the agreement of the member, without the express or tacit consent of the community.

This formulation contains certain key elements.

- A 'benefit' covers both a positive benefit and a detriment, whether from positive conduct or omission on the part of the member.
- A 'significant' benefit precludes trivial or technical lapses incurring a criminal sanction. A mere conflict of interest is also insufficient to warrant a criminal charge.
- The nature of the benefit is initially very broad, encompassing every form of benefit — pecuniary, non-pecuniary, proprietary, personality, and most importantly, political benefits. But the final element of a lack of community consent recognises the legitimacy of certain benefits which flow from the political process and exempts them from the formulation of criminal misconduct.
- The most significant omission from the above formulation is the absence of any requirement that the receipt of the benefit be on account of any past or future conduct of the member whether this falls within or outside the 'duties' or 'functions' of the position. Certainly, proof of a quid pro quo, while not essential for a criminal prosecution of a serious abuse of trust, establishes a stronger case of such abuse, but it is not essential, for the abuse of trust occurs simply by virtue of the receipt or enjoyment of some significant benefit not sanctioned by the community as a whole. Benefits in the nature of campaign contributions 'without strings attached' are acceptable, while those accepted with knowledge of any expectation of favourable treatment in the future are clearly unacceptable by community standards.
- Although no quid pro quo is required, the benefit still needs to be given on account of the member's position. Current political practice must assist in identifying what that position entails but it clearly extends beyond the legislative process to include the representational role on behalf of constituents in their dealings with the executive and other governmental agencies.
A comparison of this formulation with the current state of the law, especially statutory law, reveals how serious abuse of public trust is inadequately subject to the criminal law. Not only is the coverage inadequate but where it does apply it is draconian, since little accommodation is provided for legitimate benefits arising from the political process. The preferable approach is to have one offence of abuse of office in relation to members of parliament which incorporates the formulation given above.

All statutory provisions dealing with members of parliament in this context should expressly state whether parliamentary privilege is retained or not. Where it is retained, as in s 240 of the Criminal Law Consolidation Act 1935 (SA), the criminal provision simply complements the role of the member's House. If the conduct falls within the debates or proceedings of the House, it is adjudged solely by the House. If the conduct falls outside those debates or proceedings it comes within the jurisdiction of the courts.

If parliamentary privilege is retained, one option is to adopt the approach of the US Supreme Court by confining the protection to conduct which actually occurs within the debates or proceedings of the parliament. Where conduct occurs outside that zone, it becomes more difficult to justify any wider scope to such privilege in order to prevent the motives of members being questioned in the courts. If a bribe is offered to and accepted by a member outside the House to speak in the House in support of a particular measure, is the independence of members put in jeopardy if in a bribery prosecution evidence is given of what the member actually said within the House? The motives of the member are certainly questioned, but is that not justified where such a serious abuse of trust is alleged?

The more radical option is to dispense with parliamentary privilege in relation to conduct of a criminal nature occurring within the scope of art 9. This is the course recommended by the 1999 Report of the UK Joint Committee on Parliamentary Privilege, with the proviso that any prosecution requires the consent of the Attorney-General. While it is an attractive proposition for holding members to account for their criminal conduct, the occasions will be rare when such conduct occurs solely within the protection of art 9. Accordingly, the benefits from this approach do not appear to be outweighed by the very significant erosion of privilege it causes and the risk of politically motivated and unjustified prosecutions against members. That risk may be lessened in the UK by the need to have the Attorney-General's approval, but given the political nature of that office in Australia, such a measure is unlikely to have that effect here.

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244 See rec 13 and Ch 3.